

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

---

**APPENDIX TO THE BRIEF  
OF APPELLANT CITY OF CENTERVILLE**

---

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

*Counsel for Appellant,  
 City of Centerville*

Scott A. Liberman (0058432)  
**ALTICK & CORWIN CO., LPA**  
 1700 One Dayton Centre  
 One South Main Street  
 Dayton, OH 45402  
 (937) 223-1201  
 Fax: (937) 223-5200  
 E-mail: liberman@altickcorwin.com

*Co-Counsel for Appellant,  
 City of Centerville*

Matthew C. Blickensderfer (0073019)  
*Counsel of Record*  
 Frost Brown Todd LLC  
 3300 Great American Tower  
 301 E. Fourth Street  
 Cincinnati, OH 45202  
 (513) 651-6162  
 Fax: (513) 651-6981  
 E-mail: mblickensderfer@fbtlaw.com

*Counsel for Appellee,  
 Sugarcreek Township*

Scott D. Phillips (0043654)  
**FROST BROWN TODD LLC**  
 9277 Centre Point Drive, Suite 300  
 West Chester, OH 45069  
 (513) 870-8200  
 Fax: (513) 870-0999  
 E-mail: sphillips@fbtlaw.com  
*Counsel for Appellee,  
 Sugarcreek Township*

<p><b>FILED</b></p> <p>DEC 20 2011</p> <p>CLERK OF COURT          SUPREME COURT OF OHIO</p>
---

Robert A. Meyer, Jr. (0022948)  
*Counsel of Record*  
Mark A. Snider (0078163)  
L. Bradfield Hughes (0070997)  
Porter Wright Morris & Arthur LLP  
41 S. High Street  
Columbus, OH 43215  
(614) 227-2096  
Fax: (614) 227-2100  
E-mail: rmeyer@porterwright.com

*Counsel for Amici Curiae Ohio Home  
Builders Association and Building Industry  
Association of Central Ohio*

Leslie S. Landen (0017064)  
Sara E. Mills (0073295)  
One Donham Plaza  
Middletown, OH 45042  
(513) 425-7830  
Fax: (513) 425-7780  
E-mail: lesl@cityofmiddletown.org  
E-mail: saram@cityofmiddletown.org

*Counsel for Amicus Curiae,  
City of Middletown*

Eugene L. Hollins (0040355)  
Dale D. Cook (0020707)  
Wiles, Boyle, Burkholder & Bringarnder  
Co., L.P.A.  
300 Spruce Street, Floor One  
Columbus, OH 43215  
(614) 221-5216  
Fax: (614) 221-5692  
E-mail: ghollins@wileslaw.com  
E-mail: dcook@wileslaw.com

*Counsel for Amici Ohio Municipal; League,  
Cities of Troy, Kent, New Albany, Zanesville,  
Westerville, Hilliard, Miamisburg and Dayton*

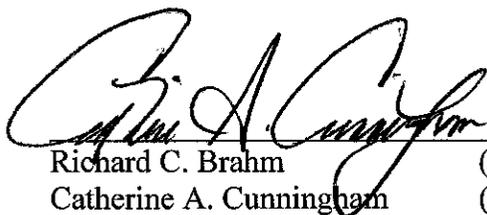
Matthew J. DeTemple (0023294)  
6500 Taylor Road  
Blacklick, OH 43004  
(614) 863-0045  
Fax: (614) 863-9751  
E-mail: detemple@ohiotownships.org

*Counsel for Amici Curiae, Ohio  
Township Association and Coalition of  
Large Ohio Urban Townships*

Darren M. Shulman, Esq. (0074717)  
Delaware City Attorney  
1 S. Sandusky Street  
Delaware, OH 43015  
(740) 203-1014  
Fax: (740) 203-1021

*Counsel for Amicus Curiae,  
City of Delaware, Ohio*

Respectfully submitted,



Richard C. Brahm (0009481)

Catherine A. Cunningham (0015730)

*Counsel of Record*

**BRAHM & CUNNINGHAM, LLC**

145 E. Rich Street

Columbus, OH 43215

(614) 228-2030

Fax: (614) 228-1472

E-mail: rbrahm@brahmcunningham.com

E-mail: ccunningham@brahmcunningham.com

*Counsel for Defendant-Appellant,*

*City of Centerville*

Scott A. Liberman (0058432)

ALTICK & CORWIN CO., LPA

1700 One Dayton Centre

One South Main Street

Dayton, OH 45402

(937) 223-1201

Fax: (937) 223-5200

E-mail: liberman@altickcorwin.com

*Co-Counsel for Defendant-Appellant,*

*City of Centerville*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon the following parties via regular first-class U.S. Mail, postage prepaid, on this 20<sup>th</sup> day of December, 2011:

Matthew C. Blickensderfer, Esq.

Frost Brown Todd LLC

3300 Great American Tower

301 E. Fourth Street

Cincinnati, OH 45202

Matthew J. DeTemple, Esq.

Ohio Township Association

6500 Taylor Road

Blacklick, OH 43004

Scott D. Phillips, Esq.

Frost Brown Todd LLC

9277 Centre Pointe Drive, Suite 300

West Chester, OH 45069

Darren M. Shulman, Esq.

Delaware City Attorney

1 S. Sandusky Street

Delaware, OH 43015

Robert A. Meyer, Jr., Esq.

Mark A. Snider, Esq.

L. Bradfield Hughes, Esq.

Porter Wright Morris & Arthur LLP

41 S. High Street

Columbus, OH 43215

Eugene L. Hollins, Esq.

Dale D. Cook, Esq.

Wiles, Boyle, Burkholder & Bringardner

Co., LPA

300 Spruce Street, Floor One

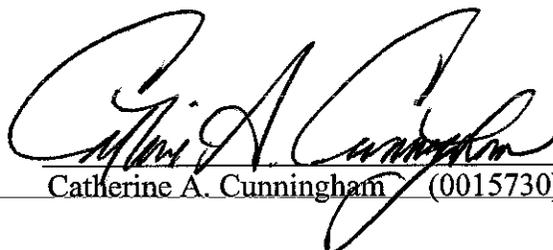
Columbus, OH 43215

Leslie S. Landen, Esq.

Sara E. Mills, Esq.

One Donham Plaza

Middletown, OH 45042



Catherine A. Cunningham (0015730)

**TABLE OF CONTENTS**

	<u>Page</u>
Notice of Appeal to the Ohio Supreme Court (May 31, 2011) .....	001
Final Entry of the Greene County Court of Appeals (April 15, 2011) .....	017
Opinion of the Greene County Court of Appeals (April 15, 2011) .....	019
Judgment Entry of the Greene County Court of Common Pleas (July 9, 2010) .....	031
Final Entry of the Greene County Court of Appeals (September 11, 2009).....	060
Opinion of the Greene County Court of Appeals (September 11, 2009) .....	062
Judgment Entry of the Greene County Court of Common Pleas (March 18, 2009) .....	112
Stipulations filed in the Greene County Court of Common Pleas (January 15, 2010) .....	197
 <b><u>STATUTES</u></b>	
R.C. 709.023 .....	201
R.C. 5709.40 .....	204

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  
Case No. 2010-CA-0052

---

NOTICE OF APPEAL  
OF APPELLANT, CITY OF CENTERVILLE

---

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

*Counsel for Appellant, City of Centerville*

Scott A. Liberman (0058432)  
ALTICK & CORWIN CO., LPA  
1700 One Dayton Centre  
One South Main Street  
Dayton, OH 45402  
(937) 223-1201  
Fax: (937) 223-5200  
E-mail: liberman@altickcorwin.com

*Co-Counsel for Appellant,  
City of Centerville*

Scott D. Phillips (0043654)  
FROST BROWN TODD LLC  
9277 Centre Point Drive, Suite 300  
West Chester, OH 45069  
(513) 870-8200  
Fax: (513) 870-0999  
E-mail: sphillips@fbtlaw.com  
  
*Counsel for Appellee, Sugarcreek Township*

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

FILED  
MAY 31 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

Appellant City of Centerville hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Greene County Court of Appeals, Second Appellate District, entered in Court of Appeals Case No. 2010-CA-0052 on April 15, 2011.

This case is one of public or great general interest.

Respectfully submitted,

  
Richard C. Brahm (0009481)  
Catherine A. Cunningham (0015730)

*Counsel of Record*

**BRAHM & CUNNINGHAM, LLC**

145 E. Rich Street

Columbus, OH 43215

(614) 228-2030

Fax: (614) 228-1472

E-mail: rbrahm@brahmcunningham.com

E-mail: ccunningham@brahmcunningham.com

*Counsel for Defendant-Appellant,  
City of Centerville*

Scott A. Liberman (0058432)

ALTICK & CORWIN CO., LPA

1700 One Dayton Centre

One South Main Street

Dayton, OH 45402

(937) 223-1201

Fax: (937) 223-5200

E-mail: liberman@altickcorwin.com

*Co-Counsel for Defendant-Appellant,  
City of Centerville*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon the following parties via regular first-class U.S. Mail, postage prepaid, on this 31<sup>st</sup> day of May, 2011:

Scott D. Phillips, Esq.  
Frost Brown Todd LLC  
9277 Centre Pointe Drive, Suite 300  
West Chester, OH 45069

Matthew J. DeTemple, Esq.  
6500 Taylor Road  
Blacklick, OH 43004

  
Catherine A. Cunningham (0015730)

FILED

2011 APR 15 AM 10:53

CLERK

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

SUGARCREEK TOWNSHIP  
 Plaintiff-Appellee : C.A. CASE NO. 2010-CA-52

vs. : T.C. CASE NO. 2006CV0784

CITY OF CENTERVILLE  
 Defendant-Appellant : (Civil Appeal from  
 Common Pleas Court)

O P I N I O N

Rendered on the 15<sup>th</sup> day of April, 2011.

Richard C. Brahm, Atty. Reg. No. 0009481, Catherine A. Cunningham, Atty. Reg. No. 0015730, 145 East Rich Street, Columbus, OH 43215-5240

Attorneys for Plaintiff-Appellee Sugarcreek Township

Scott D. Phillips, Atty. Reg. No. 0043654, Joseph W. Walker, Atty. Reg. No. 0079369, 9277 Centre Point Drive, Suite 300, West Chester, OH 45069

Attorneys for Defendant-Appellant City of Centerville

Matthew J. DeTemple, Atty. Reg. No. 0023294, 6500 Taylor Road, Suite A, Blacklick, OH 43004

Attorney for Amici Curiae the Ohio Township Association and Coalition of Large Ohio Urban Townships

GRADY, P.J.:

This appeal concerns a dispute between Plaintiff, Sugarcreek Township, and Defendant, City of Centerville, regarding land located in Sugarcreek Township that was annexed by Centerville in 2006 pursuant to R.C. 709.023. This is the second time this dispute is before us. We issued a prior decision on September

11-04-2377

Computer

THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT

Copy to C.O.A.  
Date 4-18-11  
\$ 1.00 Postage

11, 2009, which reversed the judgment of the trial court and remanded the cause for further proceedings. *Sugarcreek Township v. City of Centerville*, 184 Ohio App.3d 480, 2009-Ohio-4794 ("Sugarcreek I").

In 2006, Centerville entered into a preannexation agreement with the owner of two parcels of real property located in Sugarcreek Township. The annexation was an expedited type-2 annexation pursuant to R.C. 709.023, in which the annexed land nevertheless also remains part of the township from which it was annexed. The terms of the preannexation agreement required Centerville to enact an ordinance adopting a tax increment financing plan ("TIF plan") that would apply to the annexed land. On April 20, 2006, prior to the filing of the annexation petitions with the Greene County Board of Commissioners, Sugarcreek adopted its own TIF plan that encompassed some of the annexed lands.

A TIF plan "is a method of financing that is used to pay for public improvements. A public entity will sell bonds for public improvements and recoup the money from the increase in value of property that is enhanced by the public improvements. The property owners make service payments to a fund in lieu of property taxes, and the public entity pays the bond obligations with the money in this fund, rather than with the public entity's general revenue fund." *Sugarcreek I*, at ¶24. R.C. 5709.40 authorizes a municipality to adopt an ordinance creating a TIF plan.

In late June and early July 2006, Greene County granted Centerville's annexation petitions. In September of 2006, Sugarcreek commenced an action for declaratory judgment in the common pleas court. In paragraph 58 of its Second Amended Complaint, Sugarcreek sought "a declaration that Centerville may not implement a TIF on the Annexed Land, both because Sugarcreek is entitled to all real property tax receipts from the Annexed Land and because Centerville may not adopt a TIF on land that is already covered by Sugarcreek's TIF." Sugarcreek also sought a declaration that Centerville's annexation of the two parcels of real property located in Sugarcreek Township was invalid because proper procedures were not followed in annexing the land.

The parties filed motions for summary judgment in the declaratory judgment action. The trial court found that Sugarcreek is entitled to all real property taxes collected from the two parcels of land annexed by Centerville. Therefore, Centerville could not adopt a TIF plan covering the annexed land. The court reasoned "that Centerville's commitment in the Pre-Annexation Agreement, that would result in Centerville's TIF for the annexed land, would divert real property taxes from Sugarcreek in violation of R.C. § 709.023(H)." (Dkt. 235, p. 7.) The trial court granted Sugarcreek a declaratory judgment "that the City of Centerville may not implement a TIF on the annexed land . . . that would in any way divert real property taxes for the annexed territory from Sugarcreek Township." (Dkt. 235, p. 12.) The trial court also found that the annexations of the two

parcels of land were properly petitioned, granted, accepted, and completed in accordance with the requirements of applicable law.

Centerville filed a notice of appeal from the trial court's judgment, arguing that Sugarcreek Township neither had standing to challenge the annexation nor had presented a real case or controversy. Centerville also argued that the trial court erred in finding that a municipality may not enact a TIF plan covering property that has been annexed under the expedited annexation procedure in R.C. 709.023.

Based on our review of the record before us, we found that the trial court did not err in holding that Sugarcreek had standing to bring a declaratory-judgment action and that the controversy was ripe for adjudication. Further, we concluded that:

"the trial court erred in part in holding that Sugarcreek is entitled to all property tax revenues from the annexed property. The trial court correctly concluded that Centerville cannot interfere with Sugarcreek's collection of real property tax revenue levied on the unimproved and improved value of the real estate that remains in the township. However, the court failed to recognize that Centerville is also entitled to its own share of the minimum levies on the property under R.C. 5709.31 and 5709.315 and can therefore enact TIF legislation to the extent that it does not interfere with Sugarcreek's right to collect its share of the minimum levies on the property under the same statutes." *Sugarcreek I*, at ¶4.

We reversed the judgment of the trial court and remanded the cause for further proceedings consistent with our Opinion. On remand, the parties could not agree on the correct application of our judgment to the parties' motions for summary judgment with regard to the TIF plan that Centerville had agreed to implement in the preannexation agreements. Following additional briefing by the parties, the trial court applied our reasoning with regard to revenue each entity could receive from the minimum levies (or statutory "inside millage"), and further found that Centerville and Sugarcreek were each entitled to their respective revenues from additional levies (or voted "outside millage") imposed by each for the annexed territory. Consequently, Centerville could not adopt a TIF plan that would affect Sugarcreek's right to its outside millage. The trial court explained:

"Centerville's and Sugarcreek's shares of the outside millage, are the outside millage real property taxes voted respectively by the residents of Centerville and Sugarcreek, including residents of the annexed territory, and applicable to Centerville and Sugarcreek respectively, including the annexed territory. Centerville may enact a TIF Plan to exempt its own share of the outside millage applicable to the annexed territory.[] But Centerville may not enact a TIF Plan to exempt Sugarcreek's share of the outside millage, i.e., real estate taxes voted by Sugarcreek, on Sugarcreek Township including the annexed territory. Those Sugarcreek real estate taxes remain subject to Sugarcreek Township pursuant to O.R.C. § 709.023(H).

Otherwise the last phrase of R.C. § 709.023(H) would refer only to inside millage, a limitation not expressed or implied in the law, and, in the opinion of this Court, a conclusion not intended by the Court of Appeals' Opinion on September 11, 2009." (Dkt. 272, p. 15-16.)

Centerville filed a notice of appeal, raising the following two assignments of error:

FIRST ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT A MUNICIPALITY CANNOT TIF THE VOTED (OUTSIDE) MILLAGE OF A TOWNSHIP'S REAL PROPERTY TAXES ON TERRITORY THAT HAS BEEN ANNEXED UTILIZING THE R.C. 709.023 (EXPEDITED TYPE-2) ANNEXATION PROCESS."

SECOND ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED AS A MATTER OF LAW BY RE-CONSTRUING THEN MISAPPLYING R.C. 709.023(H) ON REMAND CONTRARY TO THIS COURT'S CONSTRUCTION AND OPINION AND BY ADDING LANGUAGE TO R.C. 5709.40 THAT JUDICIALLY AMENDED THE MUNICIPAL TIF STATUTE."

When reviewing a trial court's grant of summary judgment, an appellate court conducts a de novo review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. "De Novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland City Schools Bd. Of Edn.* (1997), 122 Ohio App.3d 378, 383, citing *Dupler v. Mansfield Journal Co.*

(1980), 64 Ohio St.2d 116, 119-20. Therefore, the trial court's decision is not granted any deference by the reviewing appellate court. *Brown v. Scioto Cty. Bd. Of Commrs.* (1993), 87 Ohio App.3d 704, 711.

Centerville argues that the trial court erred and varied from our mandate in *Sugarcreek I* in holding that any TIF plan Centerville may adopt cannot interfere with *Sugarcreek's* right to revenue from the outside millage tax on the two annexed parcels that *Sugarcreek* imposed. Because municipal annexations are governed by statute, we necessarily refer to the sections of the Revised Code implicated by Centerville's argument.

Annexation is governed by R.C. Chapter 709. R.C. 709.02 to 709.11 governs petitions for annexation filed by a majority of the owners of real property contiguous to a municipal corporation. Prior to the enactment of S.B. 5 in 2001, once a municipality annexed contiguous land that was situated in a township, the municipality then had to petition the county's board of commissioners to conform the resulting new boundaries of the municipality and the township pursuant to R.C. 503.07. *Sugarcreek I*, at ¶104. If a municipality failed to so petition, the annexed property became part of the municipal corporation but also remained part of the township. The taxpayers in the annexed area then resided both in the city and in the township and were obligated to pay both taxes levied by the township and taxes levied by the municipality. *Id.* at ¶106. If, however, a municipality successfully petitioned to conform the boundaries

pursuant to R.C. 503.07, the annexed land was no longer a part of the township, but the municipality then was required to pay the township real property tax on the annexed area. R.C. 709.19. "This indicates an intent to benefit townships, by allowing payment whenever any taxable property is excluded from the township." *Sugarcreek I*, at ¶111.

S.B. 5 was enacted in 2001. Among other things, the bill provided for an expedited type-2 annexation procedure. The section governing that form of annexation is R.C. 709.023. *Sugarcreek I*, at ¶97-98. The section is not analogous to any sections of the Revised Code enacted prior to 2001. *Id.* at ¶98. R.C. 709.023 provides for an expedited annexation procedure in which the land annexed may not be excluded from the township pursuant to the boundary conformity provisions of R.C. 503.07, and therefore remains a part of the township. R.C. 709.023(A). R.C. 709.023(H) provides:

"Notwithstanding anything to the contrary in section 503.07 of the Revised Code, unless otherwise provided in an annexation agreement entered into pursuant to section 709.192 of the Revised Code or in a cooperative economic development agreement entered into pursuant to section 701.07 of the Revised Code, territory annexed into a municipal corporation pursuant to this section shall not at any time be excluded from the township under section 503.07 of the Revised Code and, thus, remains subject to the township's real property taxes." (Emphasis supplied.)

The issue the present case involves is whether R.C.

709.023(H), and particularly its final clause, precludes Centerville from adopting a TIF plan that diminishes the tax revenue to which Sugarcreek is entitled from the outside millage Sugarcreek imposes on land covered by the proposed Centerville TIF plan. It is undisputed that Centerville's TIF plan may not affect Sugarcreek's right to tax revenue from its share of the statutory inside millage, per *Sugarcreek I*.

Townships, like municipalities, are taxing authorities, R.C. 5705.01(A) and (C), and, like municipalities, townships have authority to tax co-extensively within their borders. R.C. 5705.03; *Roderer v. Miami Twp. Bd. Of Trustees* (1983), 14 Ohio App.3d 155, 158. R.C. 709.023(H) precludes a municipality that annexes land from a township through an expedited type-2 annexation from petitioning to conform their boundaries pursuant to R.C. 503.07, and further provides that the annexed land "remains subject to the township's real property taxes." Because Sugarcreek may tax co-extensively with its borders, Sugarcreek remains authorized after an expedited type-2 annexation to the revenue from the outside millage tax that Sugarcreek imposed on the two parcels of land that Centerville annexed. Consistent with Sugarcreek's right in that respect, Centerville may not adopt a TIF plan that diminishes the tax revenue from outside millage Sugarcreek remains entitled to receive.

Centerville argues that the plain language of R.C. 709.023(H) merely precludes Centerville from conforming the boundaries of Centerville and Sugarcreek under R.C. 503.07, and

does not preclude Centerville from adopting a TIF ordinance under R.C. 5709.40 that limits Sugarcreek's ability to collect property taxes on the annexed property. As we explained in our prior Opinion, however, "R.C. 709.023(H) is not quite as narrow as Centerville contends. R.C. 709.023(H) does not merely indicate that boundaries may not be conformed; it also clearly states that, as a consequence of that prohibition, the annexed property 'remains subject to the township's real property taxes.'" Sugarcreek I, at ¶134. 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.

Centerville argues that it should be able to adopt a TIF plan that affects Sugarcreek's voted outside millage because the legislature could have amended R.C. 5709.40(F) to prevent such a result, but it did not. R.C. 5709.40(C)(1) provides, in part:

"The legislative authority of a municipal corporation may adopt an ordinance creating an incentive district and declaring improvements to parcels within the district to be a public purpose and, except as provided in division (F) of this section, exempt from taxation as provided in this section . . . ."

R.C. 5709.40(F)(1)-(12) identifies twelve local tax levies that are excepted from the TIF plan tax exemption authorized by R.C. 5709.40(C)(1). Township real property taxes are not included among the twelve exceptions. According to Centerville,

the failure of the legislature to include an exception for township real property taxes in R.C. 5709.40(F) demonstrates that the legislature did not intend to preclude municipalities from enacting TIF plans that interfere with the township's authority to tax property within its borders. We do not agree.

In matters of statutory interpretation, expression of one thing generally suggests exclusion of others. The twelve exceptions in R.C. 5709.40(F) were not added until well after the passage of Senate Bill 5, authorizing expedited type-2 annexation. However, it was not necessary to include an exception for expedited type-2 annexations in R.C. 5709.40(F) because the savings clause in R.C. 709.023(H), specifying that land thus annexed "remains subject to the township's real property taxes," served the same purpose. The expression of legislative intent is the same under either alternative.

Further, our interpretation of R.C. 709.023(H) is consistent with the legislature's intent to benefit townships. For example, pursuant to R.C. 709.19(C)(2), a municipality that conforms boundaries under R.C. 503.07 must continue to make tax payments to a township even after the municipality has exempted the annexed property from the township's real property taxes through a TIF plan adopted pursuant to R.C. 5709.40. *Sugarcreek I*, at ¶115-16; R.C. 709.19(C)(2). It would be an absurd result to then permit municipalities that are precluded by R.C. 709.023(H) from conforming boundaries to adopt a TIF plan that limits a township's ability to impose taxes on and receive tax payments

for property within its borders.

Centerville also argues that, being a special provision, R.C. 5709.40(F) prevails over R.C. 709.023(H), which is the more general provision, pursuant to R.C. 1.51. However, that section applies only when a "conflict between the provisions is irreconcilable." Id. Otherwise, the provisions "shall be construed, if possible, so that effect is given to both." Id. That outcome is readily available here.

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.

The assignments of error are overruled. The judgment of the trial court will be affirmed.

FAIN, J. and FROELICH, J. concur.

Copies mailed to:

Richard C. Brahm, Esq.  
Catherine A. Cunningham, Esq.  
Scott D. Phillips, Esq.  
Joseph W. Walker, Esq.  
Matthew J. DeTemple, Esq.  
Hon. Stephen A. Wolaver

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

SUGARCREEK TOWNSHIP  
Plaintiff-Appellee

:

C.A. CASE NO. 2010-CA-52

vs.

:

T.C. CASE NO. 2006CV0784

:

FINAL ENTRY

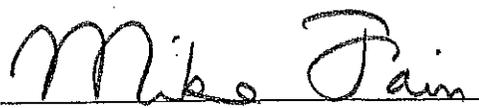
CITY OF CENTERVILLE  
Defendant-Appellant

:

.....

Pursuant to the opinion of this court rendered on the  
15th day of April, 2011, the judgment of the trial  
court is Affirmed. Costs are to be paid as provided in App.R.  
24.

  
THOMAS J. GRADY, PRESIDING JUDGE

  
MIKE FAIN, JUDGE

  
JEFFREY H. FROELICH, JUDGE

Copies mailed to:

Richard C. Brahm, Esq.  
Catherine A. Cunningham, Esq.  
145 East Rich Street  
Columbus, OH 43215-5240

Scott D. Phillips, Esq.  
Joseph W. Walker, Esq.  
9277 Centre Point Drive, Suite 300  
West Chester, OH 45069

Matthew J. DeTemple, Esq.  
6500 Taylor Road, Suite A  
Blacklick, OH 43004

Hon. Stephen A. Wolaver  
45 N. Detroit Street  
Xenia, OH 45385-2998

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

SUGARCREEK TOWNSHIP  
Plaintiff-Appellee

vs.

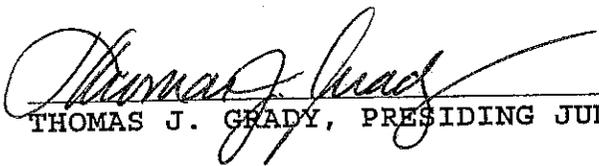
CITY OF CENTERVILLE  
Defendant-Appellant

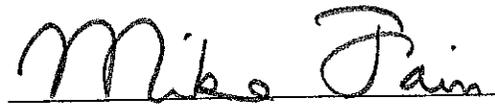
:  
: C.A. CASE NO. 2010-CA-52  
: T.C. CASE NO. 2006CV0784  
: FINAL ENTRY

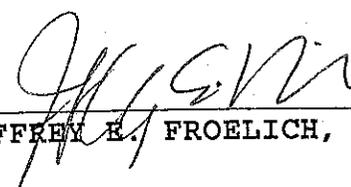
.....

Pursuant to the opinion of this court rendered on the  
15th day of April, 2011, the judgment of the trial  
court is Affirmed. Costs are to be paid as provided in App.R.

24.

  
THOMAS J. GRADY, PRESIDING JUDGE

  
MIKE FAIN, JUDGE

  
JEFFREY R. FROELICH, JUDGE

Copies mailed to:

Richard C. Brahm, Esq.  
Catherine A. Cunningham, Esq.  
145 East Rich Street  
Columbus, OH 43215-5240

Scott D. Phillips, Esq.  
Joseph W. Walker, Esq.  
9277 Centre Point Drive, Suite 300  
West Chester, OH 45069

Matthew J. DeTemple, Esq.  
6500 Taylor Road, Suite A  
Blacklick, OH 43004

Hon. Stephen A. Wolaver  
45 N. Detroit Street  
Xenia, OH 45385-2998

FILED

2011 APR 15 AM 10:53



IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

SUGARCREEK TOWNSHIP  
 Plaintiff-Appellee : C.A. CASE NO. 2010-CA-52

vs. : T.C. CASE NO. 2006CV0784

CITY OF CENTERVILLE  
 Defendant-Appellant : (Civil Appeal from  
 Common Pleas Court)

O P I N I O N

Rendered on the 15<sup>th</sup> day of April, 2011.

Richard C. Brahm, Atty. Reg. No. 0009481, Catherine A. Cunningham, Atty. Reg. No. 0015730, 145 East Rich Street, Columbus, OH 43215-5240  
 Attorneys for Plaintiff-Appellee Sugarcreek Township

Scott D. Phillips, Atty. Reg. No. 0043654, Joseph W. Walker, Atty. Reg. No. 0079369, 9277 Centre Point Drive, Suite 300, West Chester, OH 45069  
 Attorneys for Defendant-Appellant City of Centerville

Matthew J. DeTemple, Atty. Reg. No. 0023294, 6500 Taylor Road, Suite A, Blacklick, OH 43004  
 Attorney for Amici Curiae the Ohio Township Association and Coalition of Large Ohio Urban Townships

GRADY, P.J.:

This appeal concerns a dispute between Plaintiff, Sugarcreek Township, and Defendant, City of Centerville, regarding land located in Sugarcreek Township that was annexed by Centerville in 2006 pursuant to R.C. 709.023. This is the second time this dispute is before us. We issued a prior decision on September

Computer

THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT

Copy to C.O.A.  
 Date 4-18-11  
 \$ 1.00 Postage

11-04-2377

11, 2009, which reversed the judgment of the trial court and remanded the cause for further proceedings. *Sugarcreek Township v. City of Centerville*, 184 Ohio App.3d 480, 2009-Ohio-4794 ("*Sugarcreek I*").

In 2006, Centerville entered into a preannexation agreement with the owner of two parcels of real property located in Sugarcreek Township. The annexation was an expedited type-2 annexation pursuant to R.C. 709.023, in which the annexed land nevertheless also remains part of the township from which it was annexed. The terms of the preannexation agreement required Centerville to enact an ordinance adopting a tax increment financing plan ("TIF plan") that would apply to the annexed land. On April 20, 2006, prior to the filing of the annexation petitions with the Greene County Board of Commissioners, Sugarcreek adopted its own TIF plan that encompassed some of the annexed lands.

A TIF plan "is a method of financing that is used to pay for public improvements. A public entity will sell bonds for public improvements and recoup the money from the increase in value of property that is enhanced by the public improvements. The property owners make service payments to a fund in lieu of property taxes, and the public entity pays the bond obligations with the money in this fund, rather than with the public entity's general revenue fund." *Sugarcreek I*, at ¶24. R.C. 5709.40 authorizes a municipality to adopt an ordinance creating a TIF plan.

In late June and early July 2006, Greene County granted Centerville's annexation petitions. In September of 2006, Sugarcreek commenced an action for declaratory judgment in the common pleas court. In paragraph 58 of its Second Amended Complaint, Sugarcreek sought "a declaration that Centerville may not implement a TIF on the Annexed Land, both because Sugarcreek is entitled to all real property tax receipts from the Annexed Land and because Centerville may not adopt a TIF on land that is already covered by Sugarcreek's TIF." Sugarcreek also sought a declaration that Centerville's annexation of the two parcels of real property located in Sugarcreek Township was invalid because proper procedures were not followed in annexing the land.

The parties filed motions for summary judgment in the declaratory judgment action. The trial court found that Sugarcreek is entitled to all real property taxes collected from the two parcels of land annexed by Centerville. Therefore, Centerville could not adopt a TIF plan covering the annexed land. The court reasoned "that Centerville's commitment in the Pre-Annexation Agreement, that would result in Centerville's TIF for the annexed land, would divert real property taxes from Sugarcreek in violation of R.C. § 709.023(H)." (Dkt. 235, p. 7.) The trial court granted Sugarcreek a declaratory judgment "that the City of Centerville may not implement a TIF on the annexed land . . . that would in any way divert real property taxes for the annexed territory from Sugarcreek Township." (Dkt. 235, p. 12.) The trial court also found that the annexations of the two

parcels of land were properly petitioned, granted, accepted, and completed in accordance with the requirements of applicable law.

Centerville filed a notice of appeal from the trial court's judgment, arguing that Sugarcreek Township neither had standing to challenge the annexation nor had presented a real case or controversy. Centerville also argued that the trial court erred in finding that a municipality may not enact a TIF plan covering property that has been annexed under the expedited annexation procedure in R.C. 709.023.

Based on our review of the record before us, we found that the trial court did not err in holding that Sugarcreek had standing to bring a declaratory-judgment action and that the controversy was ripe for adjudication. Further, we concluded that:

"the trial court erred in part in holding that Sugarcreek is entitled to all property tax revenues from the annexed property. The trial court correctly concluded that Centerville cannot interfere with Sugarcreek's collection of real property tax revenue levied on the unimproved and improved value of the real estate that remains in the township. However, the court failed to recognize that Centerville is also entitled to its own share of the minimum levies on the property under R.C. 5709.31 and 5709.315 and can therefore enact TIF legislation to the extent that it does not interfere with Sugarcreek's right to collect its share of the minimum levies on the property under the same statutes." *Sugarcreek I*, at ¶4.

We reversed the judgment of the trial court and remanded the cause for further proceedings consistent with our Opinion. On remand, the parties could not agree on the correct application of our judgment to the parties' motions for summary judgment with regard to the TIF plan that Centerville had agreed to implement in the preannexation agreements. Following additional briefing by the parties, the trial court applied our reasoning with regard to revenue each entity could receive from the minimum levies (or statutory "inside millage"), and further found that Centerville and Sugarcreek were each entitled to their respective revenues from additional levies (or voted "outside millage") imposed by each for the annexed territory. Consequently, Centerville could not adopt a TIF plan that would affect Sugarcreek's right to its outside millage. The trial court explained:

"Centerville's and Sugarcreek's shares of the outside millage, are the outside millage real property taxes voted respectively by the residents of Centerville and Sugarcreek, including residents of the annexed territory, and applicable to Centerville and Sugarcreek respectively, including the annexed territory. Centerville may enact a TIF Plan to exempt its own share of the outside millage applicable to the annexed territory.[] But Centerville may not enact a TIF Plan to exempt Sugarcreek's share of the outside millage, i.e., real estate taxes voted by Sugarcreek, on Sugarcreek Township including the annexed territory. Those Sugarcreek real estate taxes remain subject to Sugarcreek Township pursuant to O.R.C. § 709.023(H).

Otherwise the last phrase of R.C. § 709.023(H) would refer only to inside millage, a limitation not expressed or implied in the law, and, in the opinion of this Court, a conclusion not intended by the Court of Appeals' Opinion on September 11, 2009." (Dkt. 272, p. 15-16.)

Centerville filed a notice of appeal, raising the following two assignments of error:

FIRST ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT A MUNICIPALITY CANNOT TIF THE VOTED (OUTSIDE) MILLAGE OF A TOWNSHIP'S REAL PROPERTY TAXES ON TERRITORY THAT HAS BEEN ANNEXED UTILIZING THE R.C. 709.023 (EXPEDITED TYPE-2) ANNEXATION PROCESS."

SECOND ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED AS A MATTER OF LAW BY RE-CONSTRUCTING THEN MISAPPLYING R.C. 709.023(H) ON REMAND CONTRARY TO THIS COURT'S CONSTRUCTION AND OPINION AND BY ADDING LANGUAGE TO R.C. 5709.40 THAT JUDICIALLY AMENDED THE MUNICIPAL TIF STATUTE."

When reviewing a trial court's grant of summary judgment, an appellate court conducts a de novo review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. "De Novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland City Schools Bd. Of Edn.* (1997), 122 Ohio App.3d 378, 383, citing *Dupler v. Mansfield Journal Co.*

(1980), 64 Ohio St.2d 116, 119-20. Therefore, the trial court's decision is not granted any deference by the reviewing appellate court. *Brown v. Scioto Cty. Bd. Of Commrs.* (1993), 87 Ohio App.3d 704, 711.

Centerville argues that the trial court erred and varied from our mandate in *Sugarcreek I* in holding that any TIF plan Centerville may adopt cannot interfere with Sugarcreek's right to revenue from the outside millage tax on the two annexed parcels that Sugarcreek imposed. Because municipal annexations are governed by statute, we necessarily refer to the sections of the Revised Code implicated by Centerville's argument.

Annexation is governed by R.C. Chapter 709. R.C. 709.02 to 709.11 governs petitions for annexation filed by a majority of the owners of real property contiguous to a municipal corporation. Prior to the enactment of S.B. 5 in 2001, once a municipality annexed contiguous land that was situated in a township, the municipality then had to petition the county's board of commissioners to conform the resulting new boundaries of the municipality and the township pursuant to R.C. 503.07. *Sugarcreek I*, at ¶104. If a municipality failed to so petition, the annexed property became part of the municipal corporation but also remained part of the township. The taxpayers in the annexed area then resided both in the city and in the township and were obligated to pay both taxes levied by the township and taxes levied by the municipality. *Id.* at ¶106. If, however, a municipality successfully petitioned to conform the boundaries

pursuant to R.C. 503.07, the annexed land was no longer a part of the township, but the municipality then was required to pay the township real property tax on the annexed area. R.C. 709.19. "This indicates an intent to benefit townships, by allowing payment whenever any taxable property is excluded from the township." *Sugarcreek I*, at ¶111.

S.B. 5 was enacted in 2001. Among other things, the bill provided for an expedited type-2 annexation procedure. The section governing that form of annexation is R.C. 709.023. *Sugarcreek I*, at ¶97-98. The section is not analogous to any sections of the Revised Code enacted prior to 2001. *Id.* at ¶98. R.C. 709.023 provides for an expedited annexation procedure in which the land annexed may not be excluded from the township pursuant to the boundary conformity provisions of R.C. 503.07, and therefore remains a part of the township. R.C. 709.023(A). R.C. 709.023(H) provides:

"Notwithstanding anything to the contrary in section 503.07 of the Revised Code, unless otherwise provided in an annexation agreement entered into pursuant to section 709.192 of the Revised Code or in a cooperative economic development agreement entered into pursuant to section 701.07 of the Revised Code, territory annexed into a municipal corporation pursuant to this section shall not at any time be excluded from the township under section 503.07 of the Revised Code and, thus, remains subject to the township's real property taxes." (Emphasis supplied.)

The issue the present case involves is whether R.C.

709.023(H), and particularly its final clause, precludes Centerville from adopting a TIF plan that diminishes the tax revenue to which Sugarcreek is entitled from the outside millage Sugarcreek imposes on land covered by the proposed Centerville TIF plan. It is undisputed that Centerville's TIF plan may not affect Sugarcreek's right to tax revenue from its share of the statutory inside millage, per *Sugarcreek I*.

Townships, like municipalities, are taxing authorities, R.C. 5705.01(A) and (C), and, like municipalities, townships have authority to tax co-extensively within their borders. R.C. 5705.03; *Roderer v. Miami Twp. Bd. Of Trustees* (1983), 14 Ohio App.3d 155, 158. R.C. 709.023(H) precludes a municipality that annexes land from a township through an expedited type-2 annexation from petitioning to conform their boundaries pursuant to R.C. 503.07, and further provides that the annexed land "remains subject to the township's real property taxes." Because Sugarcreek may tax co-extensively with its borders, Sugarcreek remains authorized after an expedited type-2 annexation to the revenue from the outside millage tax that Sugarcreek imposed on the two parcels of land that Centerville annexed. Consistent with Sugarcreek's right in that respect, Centerville may not adopt a TIF plan that diminishes the tax revenue from outside millage Sugarcreek remains entitled to receive.

Centerville argues that the plain language of R.C. 709.023(H) merely precludes Centerville from conforming the boundaries of Centerville and Sugarcreek under R.C. 503.07, and

does not preclude Centerville from adopting a TIF ordinance under R.C. 5709.40 that limits Sugarcreek's ability to collect property taxes on the annexed property. As we explained in our prior Opinion, however, "R.C. 709.023(H) is not quite as narrow as Centerville contends. R.C. 709.023(H) does not merely indicate that boundaries may not be conformed; it also clearly states that, as a consequence of that prohibition, the annexed property 'remains subject to the township's real property taxes.'" *Sugarcreek I*, at ¶134. 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.

Centerville argues that it should be able to adopt a TIF plan that affects Sugarcreek's voted outside millage because the legislature could have amended R.C. 5709.40(F) to prevent such a result, but it did not. R.C. 5709.40(C)(1) provides, in part:

"The legislative authority of a municipal corporation may adopt an ordinance creating an incentive district and declaring improvements to parcels within the district to be a public purpose and, except as provided in division (F) of this section, exempt from taxation as provided in this section . . . ."

R.C. 5709.40(F)(1)-(12) identifies twelve local tax levies that are excepted from the TIF plan tax exemption authorized by R.C. 5709.40(C)(1). Township real property taxes are not included among the twelve exceptions. According to Centerville,

the failure of the legislature to include an exception for township real property taxes in R.C. 5709.40(F) demonstrates that the legislature did not intend to preclude municipalities from enacting TIF plans that interfere with the township's authority to tax property within its borders. We do not agree.

In matters of statutory interpretation, expression of one thing generally suggests exclusion of others. The twelve exceptions in R.C. 5709.40(F) were not added until well after the passage of Senate Bill 5, authorizing expedited type-2 annexation. However, it was not necessary to include an exception for expedited type-2 annexations in R.C. 5709.40(F) because the savings clause in R.C. 709.023(H), specifying that land thus annexed "remains subject to the township's real property taxes," served the same purpose. The expression of legislative intent is the same under either alternative.

Further, our interpretation of R.C. 709.023(H) is consistent with the legislature's intent to benefit townships. For example, pursuant to R.C. 709.19(C)(2), a municipality that conforms boundaries under R.C. 503.07 must continue to make tax payments to a township even after the municipality has exempted the annexed property from the township's real property taxes through a TIF plan adopted pursuant to R.C. 5709.40. *Sugarcreek I*, at ¶115-16; R.C. 709.19(C)(2). It would be an absurd result to then permit municipalities that are precluded by R.C. 709.023(H) from conforming boundaries to adopt a TIF plan that limits a township's ability to impose taxes on and receive tax payments

for property within its borders.

Centerville also argues that, being a special provision, R.C. 5709.40(F) prevails over R.C. 709.023(H), which is the more general provision, pursuant to R.C. 1.51. However, that section applies only when a "conflict between the provisions is irreconcilable." *Id.* Otherwise, the provisions "shall be construed, if possible, so that effect is given to both." *Id.* That outcome is readily available here.

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.

The assignments of error are overruled. The judgment of the trial court will be affirmed.

FAIN, J. and FROELICH, J. concur.

Copies mailed to:

Richard C. Brahm, Esq.  
Catherine A. Cunningham, Esq.  
Scott D. Phillips, Esq.  
Joseph W. Walker, Esq.  
Matthew J. DeTemple, Esq.  
Hon. Stephen A. Wolaver

FILED

2010 JUL -9 AM 10: 02

TERESA A. MAZUR, CLERK  
COMMON PLEAS COURT  
GREENE COUNTY, OHIO

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO  
GENERAL DIVISION (CIVIL)

SUGARCREEK TOWNSHIP,

CASE NO. 2006 CV 0784

Plaintiff

JUDGE WOLAVER

-vs-

CITY OF CENTERVILLE, et al.,

JUDGMENT ENTRY ADOPTING  
MAGISTRATE'S DECISION ON  
CROSS-MOTIONS FOR SUMMARY  
JUDGMENT FOLLOWING REMAND

Defendants

**FINAL APPEALABLE  
ORDER**

I. Background:

This matter is before the Court for independent review, pursuant to Civ.R. 53(D)(4)(d), as to objected matters set forth in objections to the Magistrate's Decision filed on May 5, 2010.

Defendant, City of Centerville, timely filed objections on May 18, 2010. On May 28, 2010, Plaintiff, Sugarcreek Township, filed its Response to Defendant Centerville's objections.

II. Magistrate's Decision:

In the Magistrate's Decision filed on May 5, 2010, the Magistrate approved and incorporated in the Decision, the Stipulations of the Parties, City of Centerville, Sugarcreek Township, Dille Laboratories Corporation and Charles A. Dille Trust.

The Parties' Stipulations were:

"This matter is before this Court on remand following a memorandum Opinion and Final Entry of the Greene County Court of Appeals, Second Appellate District in Appellate Case

Computer

10-07-1462

Number 2009-CA-27, affirming in part and reversing in part this Court's Judgment Entry filed on March 18, 2009 on issues raised in the Defendant-Appellant, City of Centerville's third assignment of error on tax increment financing on property that has been annexed utilizing the R.C. 709.023 expedited (type 2) annexation process. All other aspects of this Court's Judgment Entry filed on March 18, 2009, remain as affirmed by the Court of Appeals.

"After review of the Court of Appeals' decision, Trial Court Judgment Entry, March 18, 2009, Decision of the Magistrate filed on February 17, 2009 and the Order of the Magistrate dated December 28, 2009, and in accordance therewith, the parties stipulate and agree to the following law and facts already in the record before this Court:

"On April 3, 2006, Centerville entered into three pre-annexation agreements with the property owner, Dille Corporation and the developer, Bear Creek Capital, LLC relating to the property that is the subject of this action to the City of Centerville. (Opinion, p. 5). In the pre-annexation agreements, Centerville made a commitment to present Tax Increment Financing ("TIF") legislation to City Council or to implement a TIF plan for the annexed territory following completion of the annexation process. (Opinion, p. 17). The TIF commitment set forth in the pre-annexation agreements was never nullified or rescinded. (Opinion, p. 17). Bear Creek Capital, LLC is no longer a party to this litigation.

"On April 20, 2006, Sugarcreek adopted Resolution No. 2006-04-20-01 "Declaring Improvements To Parcels Of Real Property Located In Sugarcreek Township, Ohio To Be A Public Purpose Under Section 5709.73(B) of the Ohio Revised Code, Exempting Such Improvements from Real Property Taxation, Authoring The Execution Of A Service Agreement And Such Other Document As May Be Necessary Establishing A Tax Increment Equivalent Fund" to create a Tax Increment Financing ("TIF") district. (Opinion p. 8-9; Trial Court Judgment Entry, Mar. 18, 2009, p. 5; Magistrate's Decision, Feb. 17, 2009, p. 14). A true and correct copy of Resolution No. 2006-04-20-01 is part of the record.

"The validity of the township's TIF resolution was not an issue in this case. (Opinion, p. 48).

"In late June and early July 2006, the Greene County Board of County Commissioners granted the annexation petitions. (Opinion, p. 9). Centerville then accepted each annexation in October 2006. (Opinion, p. 9).

10-07-1463

“In September 2006, Sugarcreek filed an action for declaratory judgment seeking a declaration that Centerville could not establish a TIF plan for the land annexed into the city. (Opinion, p. 9-10; Magistrate’s Decision, Feb. 17, 2009, p. 2).

“In May 2007, Sugarcreek amended its complaint to include allegations that the annexations and Centerville’s acceptance of the annexations were invalid. (Opinion, p. 10).

“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. (Opinion, p. 8-9; Trial Court Judgment Entry, Mar. 18, 2009, p. 6, p. 10, ¶B(1); Magistrate’s Decision, Feb. 17, 2009, p. 72). There are no issues relating to the validity of the annexations before this Court on remand.

“The only issue before the trial court on remand is the application of the decision of the court of appeals to the decision of the trial court as it relates to the determination of the TIF/real property tax issue that was before the court on Plaintiff Sugarcreek Township’s Motion for Summary Judgment and the Defendants’ responses thereto. More specifically, the parties agree that the Court must reconcile the court of appeals opinion as it relates to Centerville’s Third Assignment of Error with this Court’s findings set forth in its March 18, 2009 Judgment Entry.

“Sugarcreek Township has standing to bring a declaratory judgment action under R.C. 2721.03 with regard to the TIF claims. (Opinion, p. 11, 20).

“The TIF claims made by Sugarcreek Township present a real case in controversy and are ripe for determination. (Opinion, p. 22).

“The parties cannot stipulate or agree upon the terms of the application of the Opinion of the Court of Appeals. Accordingly, the issue will be briefed and submitted to this Court for consideration and application.”

The Magistrate decided that:

As to the TIF/real property tax issue, subject of the City of Centerville’s Third Assignment of Error, SUSTAINED IN PART, and OVERRULED IN PART by the Court of Appeals on September 11, 2009, the Magistrate GRANTED Sugarcreek Township’s Motion for Summary Judgment, in part, and GRANTED City of Centerville’s Motion for Summary Judgment in part.

10-07-1464

It was the Magistrate's Decision to GRANT Summary Judgment in favor of Centerville and to GRANT Summary Judgment in favor of Sugarcreek, and against Centerville and Sugarcreek, in part, respectively, as follows:

(a) Both Centerville and Sugarcreek may impose real estate taxes on the residents of the annexed area. The Court of Appeals stated at p. 47 of the Court's Opinion: "...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."

(b) Centerville and Sugarcreek are entitled to their share of the minimum levies ("inside millage"), and 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." As a matter of law, pursuant to R.C. 709.023(H), the entire annexed territory is real estate that remains in the Township after the annexation.

The Court of Appeals stated (at p. 38 of the Court's Opinion), "R.C. 709.023(H) does not merely indicate that boundaries may not be conformed; it also clearly states that the annexed property 'remains subject to the township's real property taxes.'" The Court of Appeals stated (at p. 48), "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. However, 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."

(c) Pursuant to O.R.C. § 709.023(H), and by consistent application to "outside millage," of the Court of Appeals' holding with respect to "inside millage," Centerville and Sugarcreek are also similarly entitled to their respective shares of the outside, i.e., voted millage, applicable to the annexed territory. Centerville's and Sugarcreek's share of the outside millage, is the outside millage voted respectively by the residents of Centerville and Sugarcreek, including residents of the annexed territory, and applicable to Centerville and Sugarcreek respectively, including the annexed territory. Centerville may enact a TIF Plan to exempt its own share of the outside millage applicable to the annexed territory.<sup>1</sup> But Centerville may not

<sup>1</sup> Except as may be exempted by Sugarcreek's pre-annexation, time-limited TIF plan that exempts 75% of the improvements on some, not all, of the annexation property. See Court of Appeals Opinion, p. 48, Footnote 7, and p. 49, first paragraph, last sentence)

10-07-1465

enact a TIF Plan to exempt Sugarcreek's share of the outside millage, i.e., real estate taxes voted by Sugarcreek on Sugarcreek Township including the annexed territory. Those real estate taxes are required to remain with Sugarcreek Township pursuant to O.R.C. § 709.023(H).

Each Party is to bear the Party's own costs.

III. Court's Review of Objections to a Magistrate's Decision:

1. Procedure

The procedure for a trial court to review a Magistrate's Decision is set forth in Civ.R. 53(D)(4)(a) through (e):

*(4) Action of court on magistrate's decision and on any objections to magistrate's decision; entry of judgment or interim order by court. (a) Action of court required. A magistrate's decision is not effective unless adopted by the court. (b) Action on magistrate's decision. Whether or not objections are timely filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate. (c) If no objections are filed. If no timely objections are filed, the court may adopt a magistrate's decision, unless it determines that there is an error of law or other defect evident on the face of the magistrate's decision. (d) Action on objections. If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate. (e) Entry of judgment or interim order by court. A court that adopts, rejects, or modifies a magistrate's decision shall also enter a judgment or interim order.*

2. Ohio Court of Appeals, Second Appellate District's Opinions on the Trial Court's Review of Objections to a Magistrate's Decision:

a. The trial Court must conduct an independent review:

10-07-1466

“In reviewing the magistrate's decision, however, the trial court must conduct an independent, de novo, review of the magistrate's factual and legal conclusions:

A magistrate functions as an arm of the trial court, which is in no way bound to follow or accept the findings or recommendations of its magistrate. *Seagraves v. Seagraves* (August 25, 1995), Montgomery App. Nos. 15047 and 15069, unreported. In accordance with Civ.R. 53, the trial court must conduct an independent de novo review of the facts and conclusions contained in the magistrate's report and recommendations and enter its own judgment. *Dayton v. Whiting* (March 29, 1996), Montgomery App. No. 15432, unreported. The trial court may adopt the magistrate's findings, conclusions, and recommendations, but the court's discretion in that regard is not limited. Therefore, the court cannot abuse its discretion by rejecting some or all of its magistrate's findings.” *Seagraves*, supra.

“The roles of a magistrate and the trial court are different. The function of a magistrate is to aid the court in the expedition of the court's business, not to act as a separate or substitute judicial officer. *Whiting*, supra.”

*Breece v. Breece*, 1999 WL 999759, (Ohio App. 2 Dist.,1999)

b. Sufficiency of review:

“We conclude that an order is sufficient for the purposes of Civ.R. 53(E)(4) if it announces that, upon independent review, the trial court has decided to adopt the magistrate's decision.”<sup>2</sup>

#### IV. Court's Review

The Court has independently reviewed the Magistrate's Decision filed on May 5, 2010, and each of the objected matters.

Applying the law to the undisputed facts as set forth in the Stipulations, the Court determines that the Magistrate properly determined the factual issues and appropriately applied the law to Centerville's Motion for Summary Judgment and to Sugarcreek Township's (“Sugarcreek's”) Motion for Summary Judgment.

Upon the Court's independent review, the Court OVERRULES every objection of Centerville and ADOPTS the Magistrate's Decision filed on May 5, 2010 (copy attached) as the ORDER of the Court.

<sup>2</sup> *Dayton Area School E.F.C.U. v. Nath*, 1998 WL 906397, (Ohio App. 2 Dist.,1998)

10-07-1467

### Centerville's Objections

The Court will specifically address the principal Objections of City of Centerville.

#### (1) Objection at p.3:

Magistrate erred when the Magistrate concluded as a matter of law that the Court of Appeals "ruled on TIF plans that would exempt respective shares of 'inside millage or unvoted millage,' on the annexed property, but did not expressly rule on TIF plans that would exempt respective shares of 'outside' or 'voted' millage on the annexed property." (May 5, 2010 Magistrate's Decision, p.5, attached to the Centerville objections as Exhibit B)

Centerville stated that the Magistrate's Decision was wrong because the Court of Appeals specifically held, "the trial court erred in concluding that Centerville could never pass TIF legislation that would divert any of the property taxes from Sugarcreek." (Opinion p.49)

#### Court ruling

The Court overrules the objection of Centerville. In its Opinion, the Court of Appeals found that the trial court had erred in its judgment entry filed on March 18, 2009, in not recognizing that Centerville could pass a TIF plan on Centerville's share of the inside millage on the annexed territory.

In overruling the objection, the Court concludes that Centerville may also pass TIF legislation that may exempt outside millage real property taxes on the annexed territory, as to taxes enacted by Centerville. However, Centerville may not pass TIF legislation that would exempt outside millage real property taxes enacted by Sugarcreek Township on the annexed territory.

In so concluding, the Court finds that the Court of Appeals did not interpret the TIF statutes to allow Centerville to TIF inside millage real property taxes of Sugarcreek Township. Such inside millage is authorized by the Ohio Constitution and by statute, and is reserved to the Township by operation of R.C. § 709.023(H). Similarly, this Court concludes that the TIF statutes do not allow Centerville to TIF outside millage real property taxes allowed by statute and reserved to the Township by operation of R.C. § 709.023(H).

The City of Centerville argued that R.C. § 5709.40 entitles Centerville to TIF the annexed territory even as to exempting outside millage authorized by the voters of Sugarcreek Township. The Court does not agree with Centerville's argument as to outside millage, not only

10-07-1468

because the Court of Appeals previously rejected that argument of Centerville with respect to inside millage, but also because of the express language in R.C. § 5709.40(F) with respect to voted or outside millage.

R.C. § 5709.40(C)(1) states that, “The legislative authority of a municipal corporation may adopt an ordinance creating an incentive district and declaring improvements to parcels within the district to be a public purpose and, except as provided in division (F) of this section, exempt from taxation as provided in this section....”

R.C. § 5709.40(F) states in pertinent part:

“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 authority from the following levies were it not for the exemption authorized under division (C) of this section....” (Emphasis supplied by the Court)

The Court concludes that pursuant to R.C. § 5709.40(C)(1), the legislative authority of a municipal corporation such as Centerville may create an incentive district within its boundaries, declare improvements within the district to be a public purpose under (C)(1), and exempt the improvements from a voted levy; but, under the exception language in (F), the legislative authority of a municipal corporation may do so only for levies voted and authorized by the voters [of the municipal corporation].<sup>3</sup> Therefore, when Centerville voters, including voters of the annexed territory, in a Centerville election, have voted for and authorized outside millage levies applicable to the annexed territory, those levies are subject to a TIF Plan and exemption by Centerville under R.C. §5709.40(C)(1). But when voters of Sugarcreek Township, including voters of the annexed territory, have voted for and authorized outside millage levies, those levies

<sup>3</sup> Bracketed language “[of the municipal corporation]” added by Court consistent with context of statute.

10-07-1469

are not subject to a TIF Plan and exemption enacted by Centerville for the annexed territory.

(2) Objection at p. 5

Centerville stated at p.5 of its Objections that “Unlike the voted (inside) [sic] and unvoted (outside) [sic] millage of the various taxing authorities, tax increment financing (TIF) is not a tax, it’s a temporary exception to tax payments...TIF is the *statutory exemption* of “improvements” from the real property taxes *of all taxing authorities*...a TIF operates to temporarily redirect real property taxes from the *increase in the assessed value of any real property from the improvements* after the effective date of the TIF...a municipality has no authority to create a “TIF Plan” that selectively excludes (or reimburses) township taxes from a statutory TIF exemption....” (Emphasis supplied by Centerville in its objection.)

Centerville then excerpted, at p.7, a quote from the Court of Appeals’ Opinion at p.48: “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. However, Sugarcreek and Centerville may not enact TIF resolutions that interfere with each other’s share of the minimum levies [inside or unvoted millage] on the real property within the annexation area.” (emphasis and bracketed language added to quote by Centerville in its objection)

Centerville further stated in its objection (p.8 of the Objections), “The General Assembly did not place any limitation on the application of a TIF to the city or township’s outside millage and the Court of Appeals found no exclusion of outside millage from TIF exemption.”

Centerville argued that the Magistrate erred in determining that Centerville could not TIF Sugarcreek Township’s share of the outside millage on the annexed territory, as the Court of Appeals had determined that Centerville could not TIF Sugarcreek Township’s share of the inside millage on the annexed property.

Court ruling

The Court overrules the objection of Centerville. The Court of Appeals Opinion expressly found that “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.” (Opinion, p.48) The argument that Centerville made with respect to outside millage and Centerville’s argued entitlement to enact TIF legislation that interferes with Sugarcreek Township’s share of the outside millage, was effectively rejected by the Court of Appeals when

10-07-1470

the Court ruled that the TIF statutes do not entitle Centerville to enact TIF resolutions that interfere with Sugarcreek's share of the inside millage on the real property within the annexation area.

Similarly, on the basis of R.C. § 709.023(H), and the language of R.C. § 5709.40(F), the Court finds that Centerville may not pass TIF resolutions that interfere with Sugarcreek's share of the outside millage that Sugarcreek voted applicable to the annexed territory.

Hence, Centerville and Sugarcreek may enact TIF resolutions that exempt real property taxes that represent their own shares of the inside millage and outside millage on the annexed territory, but neither Centerville nor Sugarcreek may enact TIF resolutions that interfere with each other's shares of the inside or outside millage. The one exception noted by the Court of Appeals was the TIF plan enacted by Sugarcreek Township prior to the annexation, applicable to portions of the annexed territory.

(3) Objection at p. 10

Centerville objected at p.10 of its Objections that the Magistrate erred in concluding that, "Sugarcreek's share of both the inside and outside millage may not be exempted by Centerville under a TIF plan." Centerville stated that this is exactly what the Magistrate decided before and what was rejected by the Court of Appeals.

Court ruling

The Court overrules the Objection of Centerville. On March 18, 2009, the Court filed a Judgment Entry that adopted the February 17, 2009 Magistrate's Decision. The Court concluded that all real property taxes on the annexed territory remain with the township pursuant to 709.023(H) in an expedited type-2 annexation.

But now, based on the Court of Appeals' Opinion rendered on September 11, 2009, the Magistrate's Decision filed on May 5, 2010, and the Court's Judgment Entry Adopting the May 5, 2010 Magistrate's Decision, follow the Court of Appeals' Opinion.

The Court OVERRULES every objection of Defendant, City of Centerville, to the Magistrate's Decision, whether or not specifically discussed herein by the Court.

10-07-1471

V. Order of Adoption and Judgment Entry

Accordingly, the Court:

A. ADOPTS as the Order of the Court the Magistrate's Decision filed on May 5, 2010  
(Copy Attached);

B. ORDERS:

(1) The Stipulations of the Parties are APPROVED and incorporated herein as the  
ORDER of the Court. The Stipulations are:

"This matter is before this Court on remand following a memorandum Opinion and Final Entry of the Greene County Court of Appeals, Second Appellate District in Appellate Case Number 2009-CA-27, affirming in part and reversing in part this Court's Judgment Entry filed on March 18, 2009 on issues raised in the Defendant-Appellant, City of Centerville's third assignment of error on tax increment financing on property that has been annexed utilizing the R.C. 709.023 expedited (type 2) annexation process. All other aspects of this Court's Judgment Entry filed on March 18, 2009, remain as affirmed by the Court of Appeals.

"After review of the Court of Appeals' decision, Trial Court Judgment Entry, March 18, 2009, Decision of the Magistrate filed on February 17, 2009 and the Order of the Magistrate dated December 28, 2009, and in accordance therewith, the parties stipulate and agree to the following law and facts already in the record before this Court:

"On April 3, 2006, Centerville entered into three pre-annexation agreements with the property owner, Dille Corporation and the developer, Bear Creek Capital, LLC relating to the property that is the subject of this action to the City of Centerville. (Opinion, p. 5). In the pre-annexation agreements, Centerville made a commitment to present Tax Increment Financing ("TIF") legislation to City Council or to implement a TIF plan for the annexed territory following completion of the annexation process. (Opinion, p. 17). The TIF commitment set forth in the pre-annexation agreements was never nullified or rescinded. (Opinion, p. 17). Bear Creek Capital, LLC is no longer a party to this litigation.

"On April 20, 2006, Sugarcreek adopted Resolution No. 2006-04-20-01 "Declaring Improvements To Parcels Of Real Property Located In Sugarcreek Township, Ohio To Be A Public Purpose Under Section 5709.73(B) of the Ohio Revised Code, Exempting Such Improvements from Real Property Taxation, Authoring The Execution Of A Service Agreement And Such Other Document As May Be Necessary Establishing A Tax Increment Equivalent

10-07-1472

Fund” to create a Tax Increment Financing (“TIF”) district. (Opinion p. 8-9; Trial Court Judgment Entry, Mar. 18, 2009, p. 5; Magistrate’s Decision, Feb. 17, 2009, p. 14). A true and correct copy of Resolution No. 2006-04-20-01 is part of the record.

“The validity of the township’s TIF resolution was not an issue in this case. (Opinion, p. 48).

“In late June and early July 2006, the Greene County Board of County Commissioners granted the annexation petitions. (Opinion, p. 9). Centerville then accepted each annexation in October 2006. (Opinion, p. 9).

“In September 2006, Sugarcreek filed an action for declaratory judgment seeking a declaration that Centerville could not establish a TIF plan for the land annexed into the city. (Opinion, p. 9-10; Magistrate’s Decision, Feb. 17, 2009, p. 2).

“In May 2007, Sugarcreek amended its complaint to include allegations that the annexations and Centerville’s acceptance of the annexations were invalid. (Opinion, p. 10).

“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. (Opinion, p. 8-9; Trial Court Judgment Entry, Mar. 18, 2009, p. 6, p. 10, ¶B(1); Magistrate’s Decision, Feb. 17, 2009, p. 72). There are no issues relating to the validity of the annexations before this Court on remand.

“The only issue before the trial court on remand is the application of the decision of the court of appeals to the decision of the trial court as it relates to the determination of the TIF/real property tax issue that was before the court on Plaintiff Sugarcreek Township’s Motion for Summary Judgment and the Defendants’ responses thereto. More specifically, the parties agree that the Court must reconcile the court of appeals opinion as it relates to Centerville’s Third Assignment of Error with this Court’s findings set forth in its March 18, 2009 Judgment Entry.

“Sugarcreek Township has standing to bring a declaratory judgment action under R.C. 2721.03 with regard to the TIF claims. (Opinion, p. 11, 20).

“The TIF claims made by Sugarcreek Township present a real case in controversy and are ripe for determination. (Opinion, p. 22).

“The parties cannot stipulate or agree upon the terms of the application of the Opinion of the Court of Appeals. Accordingly, the issue will be briefed and submitted to this Court for consideration and application.”

10-07-1473

- (2) Counts I through IV of the Second Amended Complaint have been determined as set forth in the foregoing Stipulations of the Parties, in accordance with the Opinion of the Court of Appeals of Ohio (2<sup>nd</sup> Dist.), rendered on September 11, 2009 in Case No. 2009-CA-27, that reversed [in part] this Court's Judgment Entry filed on March 18, 2009 and remanded the Case for further proceedings consistent with the Opinion of the Court of Appeals.
- (3) In Count V of the Second Amended Complaint, Plaintiff, Sugarcreek Township, sought Declaratory Relief that Defendant Centerville, "may not implement a TIF on the Annexed Land, both because Sugarcreek is entitled to all real property tax receipts from the Annexed Land and because Centerville may not adopt a TIF on land that is already covered by Sugarcreek's TIF." The Sugarcreek TIF was specifically addressed by the Court of Appeals at footnote 7, page 48 of the Court's Opinion.
- (4) Count V presents the only remaining issue for this Court to decide, an issue upon which the Parties could not agree. The Parties opposing positions are:
- (i) Centerville argued in its Objections that the Court of Appeals decided that Sugarcreek's share of the inside millage real property taxes on the annexed territory are the only Township real property taxes with which Centerville may not interfere. Centerville further argued, that Centerville, by TIF Plan ("Tax Increment Financing Plan"), can exempt all the other real property taxes, i.e. outside millage, including outside millage that Sugarcreek may vote, applicable to the annexed territory.
  - (ii) Sugarcreek argued in its Response, that the Court of Appeals decided that the only real property taxes applicable to the annexed territory that are subject to a Centerville TIF Plan, are Centerville's share of the inside millage. Sugarcreek argued that the Court of Appeals decided that all other real property taxes remain with the Township, and that Centerville may not interfere with all other such taxes applicable to the annexed territory.

10-07-1474

- (5) This Judgment Entry does not adopt either of the opposing positions argued by Centerville and Sugarcreek Township, respectively.
- (6) Upon independent review, the Court agrees with and ADOPTS the Magistrate's Decision of May 5, 2010, that the Court finds is consistent with the Court of Appeals' September 11, 2009 Opinion, the tax statutes reviewed by the Court of Appeals in its Opinion, the TIF Statutes, and the Type 2 Expedited Annexation Statute (R.C. 709.023).
- (7) Accordingly, as to the TIF/real property tax issue, subject of Count V of the Second Amended Complaint, and of the City of Centerville's Third Assignment of Error, SUSTAINED IN PART, and OVERRULED IN PART by the Court of Appeals on September 11, 2009, the Court GRANTS Sugarcreek Township's Motion for Summary Judgment, in part, and GRANTS City of Centerville's Motion for Summary Judgment in part. The Court GRANTS Summary Judgment in favor of Centerville and GRANTS Summary Judgment in favor of Sugarcreek, and against Centerville and Sugarcreek, in part, respectively, as follows:
- (i) Both Centerville and Sugarcreek may impose real estate taxes on the residents of the annexed area. The Court of Appeals stated at p. 47 of the Court's Opinion: "...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."
  - (ii) Centerville and Sugarcreek are entitled to their share of the minimum levies ("inside millage"), and 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." As a matter of law, pursuant to R.C. 709.023(H), the entire annexed territory is real estate that remains in the Township after the annexation. The Court of Appeals stated (at p. 38 of the Court's Opinion), "R.C. 709.023(H) does not merely indicate that boundaries may

10-07-1475

not be conformed; it also clearly states that the annexed property 'remains subject to the township's real property taxes.'" The Court of Appeals stated (at p. 48), "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. However, 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." The Court of Appeals' Opinion stated that the TIF statutes do not permit Centerville to TIF Sugarcreek's share of the inside millage.

- (iii) Pursuant to O.R.C. § 709.023(H), and by consistent application to "outside millage," of the Court of Appeals' holding with respect to "inside millage," Centerville and Sugarcreek are also each entitled to their respective shares of the outside, i.e., voted millage, applicable to the annexed territory. And just as with inside millage, and for the reasons previously stated in this Judgment Entry, this Court concludes that the TIF Statutes do not permit Centerville to TIF Sugarcreek's share of the outside millage.

Centerville's and Sugarcreek's shares of the outside millage, are the outside millage real property taxes voted respectively by the residents of Centerville and Sugarcreek, including residents of the annexed territory, and applicable to Centerville and Sugarcreek respectively, including the annexed territory. Centerville may enact a TIF Plan to exempt its own share of the outside millage applicable to the annexed territory.<sup>4</sup> But Centerville may not enact a TIF Plan to exempt Sugarcreek's share of the outside millage, i.e., real estate taxes voted by Sugarcreek on Sugarcreek Township including the annexed territory. Those Sugarcreek real estate taxes remain

<sup>4</sup> Except as may be exempted by Sugarcreek's pre-annexation, time-limited TIF plan that exempts 75% of the improvements on some, not all, of the annexation property. See Court of Appeals Opinion, p. 48, Footnote 7, and p. 49, first paragraph, last sentence)

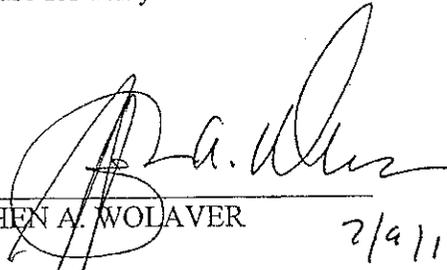
10-07-1476

subject to Sugarcreek Township pursuant to O.R.C. § 709.023(H). Otherwise the last phrase of R.C. § 709.023(H) would refer only to inside millage, a limitation not expressed or implied in the law, and, in the opinion of this Court, a conclusion not intended by the Court of Appeals' Opinion on September 11, 2009.

The Court ORDERS that each Party shall bear its own costs.

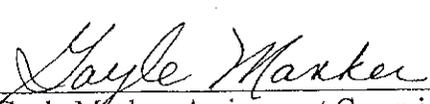
This is a Final Appealable Order. There is no just cause for delay.

IT IS SO ORDERED.

  
\_\_\_\_\_  
JUDGE STEPHEN A. WOLAVER

2/9/10

CERTIFICATE OF SERVICE: A copy hereof was served upon:  
SCOTT D. PHILLIPS, ESQ., and JOSEPH W. WALKER, ESQ., 9277 Centre Point Drive, Suite 300, West Chester, OH 45069 via facsimile (513) 870-0999  
RICHARD C. BRAHM, ESQ., and CATHERINE A. CUNNINGHAM, ESQ., 145 E. Rich Street, Fourth Floor, Columbus, OH 43215-5240 via facsimile (614) 228-1472  
SCOTT A. LIBERMAN, ESQ., 1700 One Dayton Centre, One South Main Street, Dayton, OH 45402 via facsimile (937) 223-5100  
JOHN M. CLOUD, ESQ., and BARRY W. MANCZ, ESQ., 2160 Kettering Tower, Dayton, OH 45423 via facsimile (937) 223-1649  
by faxing to them on the date of filing.

  
\_\_\_\_\_  
Gayle Manker, Assignment Commissioner

10-07-1477

2010 MAY -5 AM 11:15

CLERK  
COURT  
OHIO

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO  
GENERAL DIVISION (CIVIL)

SUGARCREEK TOWNSHIP  
PLAINTIFF

CASE NO. 2006 CV 784

JUDGE WOLAVER  
MAGISTRATE REYNOLDS

-vs-

CITY OF CENTERVILLE, ET AL.  
DEFENDANTS

MAGISTRATE'S DECISION  
ON CROSS MOTIONS FOR  
SUMMARY JUDGMENT  
FOLLOWING REMAND

This matter came before the Magistrate on the Motion for Summary Judgment filed by Plaintiff, Sugarcreek Township, on January 22, 2010; and, on the Motion for Summary Judgment filed by Defendant City of Centerville on January 22, 2010. Also before the Magistrate were the Response and Memorandum, both filed on February 16, 2010, in Opposition to the other Party's Motion for Summary Judgment. On February 23, 2010, each Party filed a Reply to the other Party's Response or Memorandum in Opposition.

On February 26, 2010, at 9:00 a.m., the Magistrate heard oral argument on the Parties' Cross Motions for Summary Judgment. At the oral argument, Scott D. Phillips, Esq., and Joseph W. Walker, Esq., appeared on behalf of Plaintiff, Sugarcreek Township. Richard C. Brahm, Esq., and Catherine A. Cunningham, Esq., appeared on behalf of Defendant, City of Centerville. Scott A. Liberman, Esq., an attorney of record for Defendant City of Centerville, appeared for the hearing. Representatives of Sugarcreek Township and the City of Centerville were also present.

John M. Cloud, Esq., appeared on behalf of Defendants, Dille Laboratories Corporation

10-07-1478

Computer

and Charles A. Dille Trust.

Defendant, Bear Creek Capital, LLC, did not appear at the hearing.

Background:

On September 24, 2008, the Court referred this matter to the Magistrate for all purposes permitted by Civ.R. 53.

On September 11, 2009, the Court of Appeals of Ohio (2<sup>nd</sup> District), in Appellate Case No. 2009-CA-27, reversed this Court's Judgment Entry filed on March 18, 2009, and remanded the Case to this Court. At the status conference on November 17, 2009, the Parties, by Counsel, agreed to attempt to prepare a mutually acceptable, proposed Agreed Judgment Entry settling the remaining issues in this Case. The Parties were not able to reach agreement.

At the December 17, 2009 status conference, the Magistrate observed that a summary judgment process appeared practicable for resolution of the Case, there appearing to be no genuine issues of material fact, just apparent differences of interpretation of the law, in the Parties' understanding of the Court of Appeals' Opinion rendered on September 11, 2009.

The Parties agreed to file their respective Motions for Summary Judgment incorporating jointly agreed stipulations of fact and law, and requesting summary judgment relief as to contested issues of law, and, if appropriate, contested fact.

As part of the Summary Judgment process, the Parties drafted joint stipulations as to the conclusions of fact and law upon which the Parties agreed, and filed the joint stipulations on January 15, 2010. Those stipulations include the undisputed facts upon which the Parties have based their respective Motions for Summary Judgment, and the undisputed, material facts upon which the Magistrate bases this Magistrate's Decision on the Parties' Cross Motions for Summary Judgment.

The stipulations are consistent with the facts and conclusions stated by the Court of Appeals in the Court's Opinion rendered on September 11, 2009. There are no disputed material facts. Consequently, there are no genuine issues of material fact.

Parties' Stipulations

"This matter is before this Court on remand following a memorandum Opinion and Final Entry of the Greene County Court of Appeals, Second Appellate District in Appellate Case Number 2009-CA-27, affirming in part and reversing in part this Court's Judgment Entry filed

on March 18, 2009 on issues raised in the Defendant-Appellant, City of Centerville's third assignment of error on tax increment financing on property that has been annexed utilizing the R.C. 709.023 expedited (type 2) annexation process. All other aspects of this Court's Judgment Entry filed on March 18, 2009, remain as affirmed by the Court of Appeals.

"After review of the Court of Appeals' decision, Trial Court Judgment Entry, March 18, 2009, Decision of the Magistrate filed on February 17, 2009 and the Order of the Magistrate dated December 28, 2009, and in accordance therewith, the parties stipulate and agree to the following law and facts already in the record before this Court:

"On April 3, 2006, Centerville entered into three pre-annexation agreements with the property owner, Dille Corporation and the developer, Bear Creek Capital, LLC relating to the property that is the subject of this action to the City of Centerville. (Opinion, p. 5). In the pre-annexation agreements, Centerville made a commitment to present Tax Increment Financing ("TIF") legislation to City Council or to implement a TIF plan for the annexed territory following completion of the annexation process. (Opinion, p. 17). The TIF commitment set forth in the pre-annexation agreements was never nullified or rescinded. (Opinion, p. 17). Bear Creek Capital, LLC is no longer a party to this litigation.

"On April 20, 2006, Sugarcreek adopted Resolution No. 2006-04-20-01 "Declaring Improvements To Parcels Of Real Property Located In Sugarcreek Township, Ohio To Be A Public Purpose Under Section 5709.73(B) of the Ohio Revised Code, Exempting Such Improvements from Real Property Taxation, Authoring The Execution Of A Service Agreement And Such Other Document As May Be Necessary Establishing A Tax Increment Equivalent Fund" to create a Tax Increment Financing ("TIF") district. (Opinion p. 8-9; Trial Court Judgment Entry, Mar. 18, 2009, p. 5; Magistrate's Decision, Feb. 17, 2009, p. 14). A true and correct copy of Resolution No. 2006-04-20-01 is part of the record.

"The validity of the township's TIF resolution was not an issue in this case. (Opinion, p. 48).

"In late June and early July 2006, the Greene County Board of County Commissioners granted the annexation petitions. (Opinion, p. 9). Centerville then accepted each annexation in October 2006. (Opinion, p. 9).

"In September 2006, Sugarcreek filed an action for declaratory judgment seeking a

10-07-1480

declaration that Centerville could not establish a TIF plan for the land annexed into the city. (Opinion, p. 9-10; Magistrate's Decision, Feb. 17, 2009, p. 2).

"In May 2007, Sugarcreek amended its complaint to include allegations that the annexations and Centerville's acceptance of the annexations were invalid. (Opinion, p. 10).

"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. (Opinion, p. 8-9; Trial Court Judgment Entry, Mar. 18, 2009, p. 6, p. 10, ¶B(1); Magistrate's Decision, Feb. 17, 2009, p. 72). There are no issues relating to the validity of the annexations before this Court on remand.

"The only issue before the trial court on remand is the application of the decision of the court of appeals to the decision of the trial court as it relates to the determination of the TIF/real property tax issue that was before the court on Plaintiff Sugarcreek Township's Motion for Summary Judgment and the Defendants' responses thereto. More specifically, the parties agree that the Court must reconcile the court of appeals opinion as it relates to Centerville's Third Assignment of Error with this Court's findings set forth in its March 18, 2009 Judgment Entry. Sugarcreek Township has standing to bring a declaratory judgment action under R.C. 2721.03 with regard to the TIF claims. (Opinion, p. 11, 20).

"The TIF claims made by Sugarcreek Township present a real case in controversy and are ripe for determination. (Opinion, p. 22).

"The parties cannot stipulate or agree upon the terms of the application of the Opinion of the Court of Appeals. Accordingly, the issue will be briefed and submitted to this Court for consideration and application."

#### Application of the Opinion of the Court of Appeals

As a result of their Stipulations, the Parties have mutually resolved the matter except as to one issue:

Centerville contends that Centerville may exempt all "outside millage," also known as "voted millage," from real property taxation under a TIF plan applicable to the annexed territory. According to Centerville, that would include outside millage enacted by Centerville, as well as outside millage enacted by Sugarcreek.

Sugarcreek agrees that Centerville may exempt Centerville's own enacted outside millage

applicable to the annexed territory, but states that Centerville may not impose a TIF plan on the outside millage applicable to the annexed territory that is “outside millage” or “voted millage,” voted by Sugarcreek. The Court of Appeals’ Opinion ruled on TIF plans that would exempt respective shares of “inside millage” or “unvoted millage,” on the annexed property, but did not expressly rule on TIF plans that would exempt respective shares of “outside” or “voted” millage on the annexed property.

The facts and procedural history of the Case were set forth by the Court of Appeals in the Court’s Opinion (pp. 3- 12). Annexation of approximately 157 acres on the west side of I-675, and annexation of approximately 73 acres on the east side of I-675 were accepted by the City of Centerville.

In the Court’s Opinion rendered on September 11, 2009, the Court of Appeals overruled Defendant’s, City of Centerville’s, first two assignments of error in its appeal from this Court’s Judgment Entry filed on March 18, 2009. The underlying facts and the Court of Appeals’ legal conclusions in the Court’s overruling the first two assignments of error are subsumed by the Parties’ Stipulations, set forth above.

The Court of Appeals determined on September 11, 2009 that:

(1) Sugarcreek Township had standing on two separate grounds to maintain a declaratory judgment action under R.C. § 2721.03, the action filed by Sugarcreek Township in the trial court, and pleaded in the Second Amended Complaint for Declaratory Judgment and Injunctive Relief; and that,

(2) The dispute between the Parties as to Centerville’s Tax Increment Financing (“TIF”) plans for the annexed area, is not hypothetical or abstract, but presents a real case or controversy between the Parties. The Court of Appeals then proceeded to decide Centerville’s Third Assignment of Error.

Centerville’s Third Assignment of Error:

Third Assignment of Error: “The Trial Court erred in finding that a municipality may not utilize tax increment financing on property that has been annexed utilizing the R.C. 709.23 (sic) expedited (Type 2) annexation process.”

The Court of Appeals (at p.23) summarized the parties’ respective positions, and applied the applicable law to the facts in “sustain[ing] in part, and overrul[ing] in part” Centerville’s

10-07-1482

Third Assignment of Error. (Opinion p.49)

In the Court of Appeals' Opinion, the Court reviewed the General Principles of Property Taxation, the General Principles of Annexation, Changes in Annexation Law after the 2001 Amendments in Senate Bill 5, and the Effect of Annexation in a Type-2 Annexation, or other Special procedure under Senate Bill 5, where the property remains in the Township. The Court of Appeals stated the Court's conclusions in Section F., "How to Reconcile All the Statutes Involved in this Case." (Opinion pp. 23-49)

The Court reconciled the Statutes involved in this Case by concluding:

- (1) The residents in the annexation area are considered residents of both areas [City of Centerville and Sugarcreek Township].
- (2) Both Centerville and Sugarcreek are entitled to retain their minimum levies on the real property in the annexation area, calculated pursuant to R.C. 5705.31. Absent an agreement for the sharing of the inside millage, the Parties shall each receive one-half of the inside millage available for use within the portion of the territory annexed to Centerville that remains within Sugarcreek Township. For this conclusion that each of the Parties will receive one-half the inside millage, the Court relied upon R.C. 3705.315(B). If Centerville and Sugarcreek enter into an annexation agreement to reallocate their shares of the minimum levies, the Court of Appeals held that the county auditor must allocate, to the extent possible, the minimum levy according to their agreement. R.C. 3705.31(D).
- (3) 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. However, Sugarcreek and Centerville may not enact TIF resolutions that interfere with each other's share of the minimum levies ["inside" or "unvoted" millage] on the real property within the annexation area.
- (4) In view of the preceding discussion: (Court of Appeals' Opinion, p. 49)

10-07-1483

- (a) The trial court erred in concluding that Centerville could never pass TIF legislation that would divert any of the property taxes from Sugarcreek Township.
- (b) The court was correct in concluding that 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.
- (c) Since Sugarcreek has already enacted a TIF plan that exempts 75% of the improvements on some of the annexation property, Centerville's proposed TIF, exempting 75% of the property from taxation, would violate R.C. 709.023(H).
- (d) The trial court failed to recognize that Centerville is also entitled to its share of the minimum levies on the property under R.C. 5709.31 and R.C. 5709.315, and can, therefore, enact TIF legislation to the extent that it does not interfere with Sugarcreek's right to collect its share of the minimum levies on the property.

Discussion:

At oral argument on February 26, 2010, consistent with their respective Motions, Memoranda in Response, and Replies, the Parties agreed on the record that both Centerville and Sugarcreek may impose real estate taxes on the residents of the annexed area. The Parties also recognized that the Court of Appeals found that both Centerville and Sugarcreek are entitled to their respective shares of the minimum levies, and that Centerville "cannot interfere with Sugarcreek's collection of its [Sugarcreek's] share of the minimum levies on the unimproved and improved value of the real estate that still remains in the Township." As a matter of law, pursuant to R.C. 709.023(H), the entire annexed territory is real estate that remains in the Township after the annexation.

Centerville and Sugarcreek recognized in their written submissions and at oral argument, that both Centerville and Sugarcreek may also impose "voted millage" or "outside millage" on the residents of the annexed area, who, as residents of both Centerville and Sugarcreek, are subject to real property taxation by both jurisdictions.

10-07-1484

But at oral argument and in their motions and related written submissions, the Parties disagreed on one issue:

Centerville argued that it could impose TIF legislation on the annexed area to collect service payments in lieu of real property taxes, and could 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 that is “outside millage,” voted by either or both Centerville and Sugarcreek Township applicable to the annexed territory. City of Centerville argued that the TIF statutes were not amended as part of Senate Bill 5 that included R.C. 709.023. Therefore, Centerville argued, there was no statutory prohibition against Centerville’s imposing a Tax Increment Financing Plan to collect service payments in lieu of the voted taxes or outside millage, and enact TIF resolutions to exempt improvements on real property within the annexation area, including the assessed value of improvements to the real property, from real property taxation, even as to outside millage voted by Sugarcreek Township and applicable to the annexed territory.

Sugarcreek Township argued that Centerville could enact TIF legislation to collect service payments in lieu of real property taxes, and could 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 that is “voted millage,” also known as “outside millage,” voted by residents of Centerville applicable to the annexed territory. But Sugarcreek argued that Centerville could not enact TIF legislation to collect service payments in lieu of voted or outside millage taxes, and could not enact TIF resolutions that exempt improvements on real property within the annexation area, that is outside millage voted by residents of Sugarcreek Township and applicable to the annexed territory. Sugarcreek Township based its argument on the Court of Appeals’ Opinion issued on September 11, 2009, and the Court’s conclusions with respect to “inside millage,” in light of R.C. 709.023(H).

R.C. 709.023(H) is uniquely applicable to Type 2 Expedited Annexations, such as the annexations in this Case, and states: “Notwithstanding anything to the contrary in section 503.07 of the Revised Code, \* \* \* territory annexed into a municipal corporation pursuant to this section *shall not at any time be excluded from the township under section 503.07 of the Revised Code and, thus, remains subject to the township's real property taxes.*” (Emphasis added.)

10-07-1485

The Magistrate concludes that the framework for taxation and TIF Plans that the Court of Appeals ruled applies to each jurisdiction's share of inside millage or unvoted millage on the annexed territory, is similarly applicable to each jurisdiction's share of outside or voted millage on the annexed territory.

Sugarcreek's share of the outside millage is the outside millage voted by residents of Sugarcreek Township pursuant to law, and applicable to Sugarcreek Township, including the annexed territory. Similarly, Centerville's share of the outside millage is the outside millage voted by residents of the City of Centerville pursuant to law, and applicable to Centerville, including the annexed territory.

The Magistrate concludes as a matter of law, pursuant to R.C. § 709.023(H), and under the precedent of the Court of Appeals Opinion on September 11, 2009, that Sugarcreek's share of the outside millage, its voted millage, must remain with Sugarcreek, in the same way that the Court of Appeals determined that Sugarcreek's share of the inside millage must remain with Sugarcreek. Hence, Sugarcreek's share of both the inside and outside millage may not be exempted by Centerville under a TIF Plan.

In further reliance on the Court of Appeals' Opinion, the Magistrate concludes that Centerville may enact a TIF Plan to exempt its own share of the outside millage, i.e., outside millage voted by the residents of Centerville, and applicable to real property in the City of Centerville including the annexed territory. But Centerville may not exempt Sugarcreek's share of the outside millage, i.e., outside millage voted by residents of Sugarcreek and applicable to real property in Sugarcreek Township including the annexed territory.

#### Decision

Accordingly, and in reliance on the Court of Appeals' Opinion rendered on September 11, 2009, it is the Magistrate's Decision to approve and to incorporate in this Magistrate's Decision, the Stipulations of the Parties, City of Centerville, Sugarcreek Township, Dille Laboratories Corporation and Charles A. Dille Trust, and to decide that:

(1) This matter is before this Court on remand following a memorandum Opinion and Final Entry of the Greene County Court of Appeals, Second Appellate District in Appellate Case Number 2009-CA-27, affirming in part and reversing in part this Court's Judgment Entry filed on March 18, 2009 on issues raised in the Defendant-Appellant, City of Centerville's third

10-07-1486

assignment of error on tax increment financing on property that has been annexed utilizing the R.C. 709.023 expedited (type 2) annexation process. All other aspects of this Court's Judgment Entry filed on March 18, 2009, remain as affirmed by the Court of Appeals.

(2) After review of the Court of Appeals' decision, Trial Court Judgment Entry, Mar. 18, 2009, Decision of the Magistrate filed on Feb. 17, 2009 and the Order of the Magistrate dated Dec. 28, 2009, and in accordance therewith, the parties have stipulated and agreed to, and the Magistrate approves and incorporates in this Decision, the following law and facts already in the record before this Court:

(3) On April 3, 2006, Centerville entered into three pre-annexation agreements with the property owner, Dille Corporation and the developer, Bear Creek Capital, LLC relating to the property that is the subject of this action to the City of Centerville. (Opinion, p. 5). In the pre-annexation agreements, Centerville made a commitment to present Tax Increment Financing ("TIF") legislation to City Council or to implement a TIF plan for the annexed territory following completion of the annexation process. (Opinion, p. 17). The TIF commitment set forth in the pre-annexation agreements was never nullified or rescinded. (Opinion, p. 17). Bear Creek Capital, LLC is no longer a party to this litigation.

(4) On April 20, 2006, Sugarcreek adopted Resolution No. 2006-04-20-01 "Declaring Improvements To Parcels Of Real Property Located In Sugarcreek Township, Ohio To Be A Public Purpose Under Section 5709.73(B) of the Ohio Revised Code, Exempting Such Improvements from Real Property Taxation, Authoring The Execution Of A Service Agreement And Such Other Document As May Be Necessary Establishing A Tax Increment Equivalent Fund" to create a Tax Increment Financing ("TIF") district. (Opinion p. 8-9; Trial Court Judgment Entry, Mar. 18, 2009, p. 5; Magistrate's Decision, Feb. 17, 2009, p. 14). A true and correct copy of Resolution No. 2006-04-20-01 is part of the record.

(5) The validity of the township's TIF resolution was not an issue in this case. (Opinion, p. 48).

(6) In late June and early July 2006, the Greene County Board of County Commissioners granted the annexation petitions. (Opinion, p. 9). Centerville then accepted each annexation in October 2006. (Opinion, p. 9).

(7) In September 2006, Sugarcreek filed an action for declaratory judgment seeking a

declaration that Centerville could not establish a TIF plan for the land annexed into the city. (Opinion, p. 9-10; Magistrate's Decision, Feb. 17, 2009, p. 2).

(8) In Sugarcreek Township's Second Amended Complaint, Sugarcreek included allegations that the annexations and Centerville's acceptance of the annexations were invalid. (Opinion, p. 10).

(9) 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. (Opinion, p. 8-9; Trial Court Judgment Entry, Mar. 18, 2009, p. 6, p. 10, ¶B(1); Magistrate's Decision, Feb. 17, 2009, p. 72).

(10) There are no issues relating to the validity of the annexations before this Court on remand.

(11) The only issue before the trial court on remand is the application of the decision of the court of appeals to the decision of the trial court as it relates to the determination of the TIF/real property tax issue that was before the court on Plaintiff Sugarcreek Township's Motion for Summary Judgment and the Defendants' responses thereto. More specifically, the parties agreed that the Court must reconcile the court of appeals opinion as it relates to Centerville's Third Assignment of Error with this Court's findings set forth in its March 18, 2009 Judgment Entry.

(12) Sugarcreek Township has standing to bring a declaratory judgment action under R.C. 2721.03 with regard to the TIF claims. (Opinion, p. 11, 20).

(13) The TIF claims made by Sugarcreek Township present a real case in controversy and are ripe for determination. (Opinion, p. 22).

(14) As to the TIF/real property tax issue, subject of the City of Centerville's Third Assignment of Error, SUSTAINED IN PART, and OVERRULED IN PART by the Court of Appeals on September 11, 2009, the Magistrate GRANTS Sugarcreek Township's Motion for Summary Judgment, in part, and GRANTS City of Centerville's Motion for Summary Judgment in part. It is the Magistrate's Decision to GRANT Summary Judgment in favor of Centerville and to GRANT Summary Judgment in favor of Sugarcreek, and against Centerville and Sugarcreek, in part, respectively, as follows:

(a) Both Centerville and Sugarcreek may impose real estate taxes on the residents

of the annexed area. The Court of Appeals stated at p. 47 of the Court's Opinion:

"...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."

(b) Centerville and Sugarcreek are entitled to their share of the minimum levies ("inside millage"), and 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." As a matter of law, pursuant to R.C. 709.023(H), the entire annexed territory is real estate that remains in the Township after the annexation.

The Court of Appeals stated (at p. 38 of the Court's Opinion), "R.C. 709.023(H) does not merely indicate that boundaries may not be conformed; it also clearly states that the annexed property 'remains subject to the township's real property taxes.'" The Court of Appeals stated (at p. 48), "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. However, 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."

(c) Pursuant to O.R.C. § 709.023(H), and by consistent application to "outside millage," of the Court of Appeals' holding with respect to "inside millage," Centerville and Sugarcreek are also similarly entitled to their respective shares of the outside, i.e., voted millage, applicable to the annexed territory. Centerville's and Sugarcreek's share of the outside millage, is the outside millage voted respectively by the residents of Centerville and Sugarcreek, including residents of the annexed territory, and applicable to Centerville and Sugarcreek respectively, including the annexed territory. Centerville may enact a TIF Plan to exempt its own share of the outside millage applicable to the annexed territory.<sup>1</sup> But Centerville may not enact a TIF Plan to exempt Sugarcreek's share of the outside millage, i.e., real estate taxes voted by Sugarcreek on Sugarcreek Township including the annexed territory. Those real estate taxes

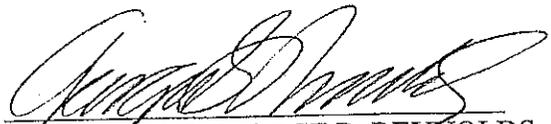
---

<sup>1</sup> Except as may be exempted by Sugarcreek's pre-annexation, time-limited TIF plan that exempts 75% of the improvements on some, not all, of the annexation property. See Court of Appeals Opinion, p. 48, Footnote 7, and p. 49, first paragraph, last sentence)

10-07-1489

are required to remain with Sugarcreek Township pursuant to O.R.C. § 709.023(H).

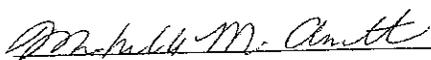
Each Party is to bear the Party's own costs.

  
MAGISTRATE GEORGE B. REYNOLDS

**PARTIES AND COUNSEL ARE REFERRED TO CIV. R. 53 FOR FILING OBJECTIONS TO A MAGISTRATE'S DECISION. THIS MAGISTRATE'S DECISION WILL NOT TAKE EFFECT UNLESS AND UNTIL ADOPTED AS THE ORDER OF THE COURT.**

**PARTIES AND COUNSEL ARE WARNED THAT CIV.R. 53(D)(3)(b)(iv) PROVIDES THAT A PARTY SHALL NOT ASSIGN AS ERROR ON APPEAL A COURT'S ADOPTION OF ANY FACTUAL FINDING OR LEGAL CONCLUSION OF A MAGISTRATE, WHETHER OR NOT SPECIFICALLY DESIGNATED AS A FINDING OF FACT OR CONCLUSION OF LAW UNDER CIV.R. 53(D)(3)(a)(ii), UNLESS THAT PARTY HAS OBJECTED TO THAT FINDING OR CONCLUSION AS REQUIRED BY CIV.R. 53(D)(3)(b).**

CERTIFICATE OF SERVICE: A copy hereof was faxed on the date of filing to:  
Scott D. Phillips, Esq., and Joseph W. Walker, Esq., 2200 PNC Center, 201 E. Fifth Street, Cincinnati, OH, 45202 (FAX# 513-651-6981)  
Scott A. Liberman, Esq., and Matthew D. Stokely, Esq., 1700 One Dayton Center, One South Main Street, Dayton, OH, 45402 (FAX# 937-223-5100)  
Richard C. Brahm, Esq., and Catherine A. Cunningham, Esq., 145 East Rich Street, Columbus, OH 43215-5240 (FAX# 614-228-1472)  
Joseph L. Trauth, Jr., Esq., and Trenton B. Douthett, Esq., One East 4<sup>th</sup> Street, Suite 1400, Cincinnati, OH 45202-3752 (FAX# 513-579-6515)  
John M. Cloud, Esq., 2160 Kettering Tower, Dayton OH 45423 (FAX# 937-223-1649)

  
Michelle M. Arnett,  
Assignment Commissioner/Deputy Clerk of  
Courts for the Limited Purpose of Serving  
Magistrates' Decisions and Orders

10-07-1490

**FILED**  
2009 SEP 11 AM 10:50  
COURT OF APPEALS  
SECOND APPELLATE DISTRICT  
GREENE COUNTY

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
GREENE COUNTY**

SUGARCREEK TOWNSHIP

Plaintiff-Appellee

v.

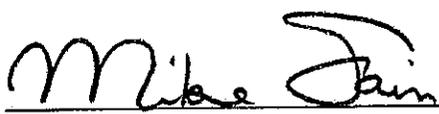
CITY OF CENTERVILLE, et al.

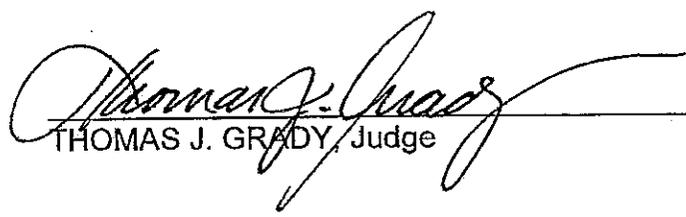
Defendant-Appellants

:  
: Appellate Case No. 2009-CA-27  
:  
: Trial Court Case No. 2006-CV-0784  
:  
: (Civil Appeal from  
: Common Pleas Court)  
:  
: **FINAL ENTRY**

Pursuant to the opinion of this court rendered on the 11th day  
of September, 2009, the judgment of the trial court is **Reversed**, and this cause is  
**Remanded** for further proceedings consistent with the opinion.

Costs to be paid as stated in App.R. 24.

  
\_\_\_\_\_  
MIKE FAIN, Judge

  
\_\_\_\_\_  
THOMAS J. GRADY, Judge

  
\_\_\_\_\_  
JEFFREYE FROELICH, Judge

09-09-1629

Copies mailed to:

Scott D. Phillips  
Joseph W. Walker  
Frost Brown Todd LLC  
9277 Centre Point Drive, Suite 300  
West Chester, OH 45069

Richard C. Brahm  
Catherine A. Cunningham  
Plank & Brahm  
145 E. Rich Street  
Columbus, OH 43215-5240

Hon. Stephen Wolaver  
Greene County Common Pleas Court  
45 N. Detroit Street  
Xenia, OH 45385-2998

**FILED**  
2009 SEP 11 AM 10:50  
COURT OF APPEALS  
GREENE COUNTY

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
GREENE COUNTY**

SUGARCREEK TOWNSHIP

Plaintiff-Appellee

v.

CITY OF CENTERVILLE, et al.

Defendant-Appellants

Appellate Case No. 2009-CA-27

Trial Court Case No. 2006-CV-0784

(Civil Appeal from  
Common Pleas Court)

OPINION

Rendered on the 11<sup>th</sup> day of September, 2009.

SCOTT D. PHILLIPS, Atty. Reg. #0043654, and JOSEPH W. WALKER, Atty. Reg. #0079369, Frost Brown Todd LLC, 9277 Centre Point Drive, Suite 300, West Chester, Ohio 45069

Attorney for Plaintiff-Appellee, Sugarcreek Township

RICHARD C. BRAHM, Atty. Reg. #0009481, CATHERINE A. CUNNINGHAM, Atty. Reg. #0015730, Plank & Brahm, 145 East Rich Street, Columbus, Ohio 43215-5240

Attorneys for Defendant-Appellant, City of Centerville

FAIN, J.

Defendant-appellant City of Centerville appeals from a declaratory judgment of the trial court, which holds that plaintiff-appellee Sugarcreek Township is entitled to all real

09-09-1579

COMPUTER

THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT

COPY TO COA  
DATE 9/11/2009 062

property taxes to be collected from two parcels of land annexed by Centerville. The trial court also held that Centerville violated Sugarcreek's rights under R.C. 709.023(H), by entering into a Pre-Annexation Agreement to enact a tax increment financing (TIF) plan for the annexed parcels.

Centerville contends that the trial court erred in finding that Sugarcreek has standing to enforce the terms of an agreement to which Sugarcreek is not a party. Centerville further contends that the trial court erred in finding that Sugarcreek's claims present a real case in controversy or are ripe for determination. Finally, Centerville contends that the trial court erred in finding that a municipality may not enact a TIF ordinance in connection with property that has been annexed under the expedited annexation procedure in R.C. 709.023.

We conclude that the trial court did not err in holding that Sugarcreek has standing to bring a declaratory judgment action, because Sugarcreek has an interest in having the Pre-Annexation Agreement construed. Sugarcreek's status is also affected by R.C. 709.023(H), and Sugarcreek is entitled to have the statute construed and to obtain a declaration of its rights under the statute. We further conclude that this controversy is ripe for adjudication, because all of the methods Centerville proposed for financing public improvements to the annexation area involve tax abatement on real property that remains in Sugarcreek Township.

Finally, we conclude that the trial court erred in part, in holding that Sugarcreek is entitled to all property tax revenues from the annexed property. The trial court correctly concluded that Centerville cannot interfere with Sugarcreek's collection of real property tax revenue levied on the unimproved and improved value of the real estate that remains in the

township. However, the court failed to recognize that Centerville is also entitled to its own share of the minimum levies on the property under R.C. 5709.31 and R.C. 5709.315, and can, therefore, enact TIF legislation to the extent that it does not interfere with Sugarcreek's right to collect its share of the minimum levies on the property under the same statutes.

Accordingly, the judgment of the trial court is Reversed, and this cause is Remanded to the trial court for further proceedings consistent with this opinion.

I

This case arises from a dispute between adjoining jurisdictions over two parcels of commercially valuable land. Centerville won the battle of whether the land was properly annexed to Centerville, but lost the larger war, because Sugarcreek retained the right to collect all the real property taxes levied on both parcels of land.

The land in question belonged to the Charles A. Dille Irrevocable Trust (Dille Trust). After Dille's death in August 1999, the trust was fully funded with assets, which included some cash, about 70 acres of land owned by the Dille Trust, and shares of Dille Laboratories Corporation (Dille Corp.), which owned about 400 acres of land. A sale of some of the land was desired, in order to fund the Trust with cash.

After speaking to various potential purchasers, Dille Corp. and Dille Trust entered into a purchase agreement with Bear Creek Capital, LLC. (Bear Creek) in September 2004. The purchase agreement covered approximately 157 acres on the west side of Interstate 675 and about 73 acres on the east side of Interstate 675 (referred to respectively as the "northern parcel" and the "southern parcel"). Both parcels were located in Sugarcreek Township, and were considered to have valuable development potential. Bear Creek had

previously developed commercial property in Sugarcreek, and intended to develop a large-scale, multi-use, commercial project on the parcels.

During 2004, Bear Creek worked with the Sugarcreek Township Trustees on development, which would require zoning changes. In February 2005, Bear Creek brought up the possibility of annexation to the adjacent cities of Kettering or Centerville, in the event that Sugarcreek failed to immediately move on the zoning changes. Sugarcreek passed zoning at that time, but negotiations between Sugarcreek and Bear Creek subsequently broke down, due to zoning issues and a merger study that had been placed on the ballot for Sugarcreek Township and the City of Bellbrook. If the merger study passed, annexation to other jurisdictions would be precluded during the time the merger was being studied.

The proposal for a merger study was defeated in November 2005, and Bear Creek then discussed annexation with City of Kettering officials in December 2005. Bear Creek also began discussing annexation with Centerville officials around the same time. In January 2006, Centerville's city manager told the Centerville City Council (City Council) that he hoped to have an annexation agreement approved by the City and Bear Creek within the next few weeks.

In February 2006, officials of Kettering, Centerville, and Sugarcreek met to discuss a plan for how the Dille property would be developed, since the development would affect all three jurisdictions. There is some conflict over what transpired at this meeting. According to Sugarcreek, the parties believed that Bear Creek was shopping its plan with other jurisdictions to get the best economic plan, and concluded that forming a joint economic agreement might be in the best interests of Centerville, Sugarcreek, and Kettering. Sugarcreek left the meeting with the impression that none of the communities

would "go it alone." In contrast, Centerville maintains that its clearly-stated position was that it was open to pursuing joint projects, but that it was also open to annexation if that were the developer's preference.

On April 3, 2006, Centerville City Council held a special meeting to consider passing resolutions authorizing City Manager Greg Horn to enter into a pre-annexation agreement with Bear Creek, Dille Corp., and the Dille Trust regarding the property. Sugarcreek representatives who had been present at the meeting in February 2006, spoke before the City Council, and stated that they were shocked and stunned by the annexation news. Nonetheless, City Council passed resolutions authorizing Horn to enter into the pre-annexation agreements, which were later signed by Horn and the other parties on April 5, 2006.

Three pre-annexation agreements, with virtually identical terms, were signed in April 2006. For purposes of brevity, we will refer to the Pre-Annexation Agreement for the 157-acre parcel, which was signed by Horn, Dille Corp., as the "Owner," and Bear Creek, as the "Developer." The agreement provides in pertinent part, as follows:

"1. Annexation

"(a) The Developer agrees that it will obtain the signature of the Owner and will, at its own expense, prepare and file the necessary annexation petition or petitions with accompanying map or plat with the appropriate board of county commissioners. The Owner agrees that it will sign the annexation petition and will support and not withdraw its name during the annexation process and/or any subsequent administrative or legal action involving pursuit of the annexation. The annexation petition shall be filed as an 'Expedited Type 2' annexation as provided in Section 709.023 of the Ohio Revised Code. \* \* \* The City

agrees to pass a service resolution and/or any necessary supporting resolutions as required by Section 709.023(C) of the Ohio Revised Code within twenty (20) days of the date of the filing of the annexation petition with the appropriate board of county commissioners. A service resolution will set out those services that will be provided by the City upon annexation and will establish the approximate date when those services will be available.

“(b) The Owner, Developer, and the City agree to cooperate and provide information necessary for the county commissioners to make their ‘review’ of the annexation as required by Section 709.023 of the Ohio Revised Code. If, at the conclusion of the review process the county commissioners deny the annexation petition, the Owner agrees to file in the appropriate court a request for a writ of mandamus to compel the county commissioners to approve the annexation as set out in Section 709.023 of the Ohio Revised Code. \* \* \*

“(c) Should the annexation be approved, the Owner, Developer, and the City agree to process the annexation as provided by law subject to the terms of this agreement.” Pre-Annexation Agreement attached as Exhibit C to the Complaint, Section 1(a)-(c), pp. 1-2.

The Pre-Annexation Agreement contains further provisions on zoning, platting, and water, sewer, and public utilities. In Section 5, the Agreement provides as follows with regard to financing improvements:

“The parties recognize that significant improvements may be needed to service the proposed development of the Property in the City, and, accordingly, the parties agree to undertake or participate in the following financing arrangements or mechanisms:

“(a) Coincident with the City’s approving the final plans for development of any portion of the Property that has been annexed to the City, the City shall as soon as practical take steps to present to the City Council legislation to create the Tax Increment Financing (the ‘TIF Ordinance’) to enable the City to collect up to the maximum amount of payments in lieu of taxes which may be generated from the new development without approval from a school district. The payments made in lieu of taxes will be applied by the City to recoup and apply to the costs associated with the construction of the necessary public improvements. Pursuant to the TIF Ordinance, the City and Developer shall enter into a public infrastructure agreement (‘the Infrastructure Agreement’) pursuant to which the City and Developer agree to erect, construct and maintain Public Improvements on the Property or which, in the opinion of the City, benefit or serve the Property or which have been deemed reasonably necessary by the City and the Developer. The TIF Ordinance shall also specify the use of service payments as provided in ORC Section 5709.42.

“(b) The Developer and City shall enter into a service payment agreement reasonably acceptable to Developer and the City (the ‘Service Agreement’) setting forth the duties and obligations of a Tax Increment Financing District that does not involve the deprivation of any school district moneys.

“(c) Upon request of the Developers, the City agrees that it will take such action as is necessary to issue Tax Increment Financing Bonds (the ‘Bonds’) in order to pay the costs of the Public Improvements to be constructed on the Property and that the debt service on the Bonds will be paid solely from Service Payments (which means the Statutory Service Payments and any supplemental payments (the ‘Minimum Service Payments’) as may be required by a Service Agreement. The Public Improvements to be covered by Tax

Increment Financing shall include, but not be limited to, the installation of roads, utility lines, sidewalks, and other public infrastructure improvements deemed reasonably necessary by the Developer and the City." Exhibit C, Section 5(a)-(c), pp. 4-5. (Disparity in open- versus closed-parentheses in original.)

The Pre-Annexation Agreement also contains various representations, including that "This Agreement is the valid and binding act of the City, enforceable against the City in accordance with its terms." Exhibit C, Section 6(c), p. 5. Finally, the Agreement states that any waiver of the terms of the agreement must be made in writing, and that "The representations, warranties and covenants contained in this Agreement shall not terminate for a period of twenty (20) years." Exhibit C, Section 8, p. 6, and Section 19, p. 7.

A Tax Increment Financing plan (TIF plan) is a method of financing that is used to pay for public improvements. A public entity will "float" (i.e., sell) bonds for public improvements, and recoup the money from the increase in value of property that is positively impacted by the public improvements. The property owners make service payments to a fund in lieu of property taxes, and the public entity pays the bond obligations with the money in this fund, rather than with the public entity's general revenue fund.

In late May 2006, annexation petitions were filed with the Greene County Board of Commissioners, seeking annexation of the northern and southern parcels to Centerville. On April 20, 2006, or prior to the time the annexation petitions were filed, Sugarcreek adopted a Tax Increment Financing plan that encompassed some of the annexed lands, among others. The TIF funds were to be used to extend Clio Road in Sugarcreek Township, and for other infrastructure improvements in the area. The Clio Road project had been planned for about twelve years and was needed for safety purposes, so that

citizens could be served by the Safety Building and Fire Station located on Clyo Road. At the time, Clyo Road dead-ended without a connection to other parts of Sugarcreek township.

Sugarcreek had \$300,000 in a bridge fund and had also previously received a \$500,000 public works grant for the Clyo Road project. In addition, Sugarcreek had acquired most of the right of way, and had obtained a \$1,500,000 TIF anticipation loan. Sugarcreek decided to create a TIF in April 2006, due to the potential loss of the public works funding. The Clyo Road project was also a high priority for the township.

The Sugarcreek TIF resolution lists certain public improvements that are to be made in the TIF District, including the Clyo Road extension and other improvements necessary for development of the parcels in the TIF District. The resolution further provides for service payments in lieu of taxes for owners who make private improvements in the TIF district after the date of the resolution. 75% of the assessed value of the improvements is exempted from real property taxation, and the owners are to make semi-annual service payments to the Greene County Treasurer. The service payments, in turn, are to be deposited into a Tax Increment Equivalent Fund, which is to be used to pay the cost of the public improvements in the TIF District. The service payments are scheduled to last ten years, or until the public improvements are paid in full from the fund, but in no case for more than ten years. Exhibit 12, Sugarcreek Township Resolution No. 2006-04-20-01.

In late June and early July 2006, Greene County granted the annexation petitions for the northern and southern parcels, respectively. Centerville then accepted the annexation of the parcels in October 2006. Prior to the time that Centerville accepted the annexations, Sugarcreek filed an action for declaratory judgment in the Greene County

Common Pleas Court. Sugarcreek sought a declaration that Centerville could not establish a TIF plan for the land it intended to annex. Subsequently, Sugarcreek filed an amended complaint, alleging that Centerville's resolutions accepting the annexed land were defective and *per se* invalid. Sugarcreek also alleged that the resolutions violated Centerville's charter and Ohio Sunshine laws.

Centerville filed both a motion and supplemental motions for summary judgment. In its original motion, Centerville contended that no case or controversy existed because Centerville had not passed a TIF ordinance. Centerville also alleged that the Pre-Annexation Agreement was amended by a October 2006 Memorandum of Understanding (MOA) that expanded the types of financing options that could be used to finance future public improvements. In a supplemental motion, Centerville contended that Sugarcreek lacked standing to contest the annexation, because Sugarcreek had failed to avail itself of statutory remedies under the annexation statutes.

Sugarcreek also filed a motion for partial summary judgment with regard to Centerville's ability to implement a TIF ordinance. In the motion, Sugarcreek contended that it was entitled to retain the property taxes on the annexed property pursuant to R.C. 709.023(H).

In November 2007, the case was removed from the trial court's active docket because Sugarcreek and Centerville had executed a memorandum of understanding regarding possible settlement of the case. Sugarcreek subsequently moved the court to reactivate the case in April 2008, because the parties had not been able to finalize an agreement. Mistakenly believing the case had been settled, the trial court dismissed the case with prejudice. The court then granted Sugarcreek's motion for relief from judgment

in September 2008, and vacated the dismissal.

After the case was reinstated, Centerville filed another supplemental motion for summary judgment, claiming that Sugarcreek had entered into an agreement for construction and funding of the Clio Road extension, and had admitted in the signed documents that the property had been annexed and was located in Centerville. In response, Sugarcreek noted that Centerville had taken affirmative steps to implement a TIF, and had, in fact, introduced TIF legislation related to the Dille Property in its City Council proceedings in January 2008.<sup>1</sup>

In January 2009, a magistrate held a summary judgment hearing, and heard oral argument, but no evidence. The magistrate then filed a decision, concluding that Sugarcreek's failure to object to the petition for annexation of the northern parcel constituted consent to the annexation under R.C. 709.023(D). The magistrate further held that Sugarcreek's objection to the petition for annexation of the southern parcel was not specific and failed to meet the conditions specified in R.C. 709.023(E)(1). In addition, the magistrate found that judicial appeal of a municipality's acceptance of annexation is outside the scope of an appeal filed under R.C. 709.023.

Regarding the TIF claims, the magistrate held that Sugarcreek had standing to bring a declaratory judgment as to its right to real property taxes for the annexed property. The magistrate also concluded that there was no evidence that the parties had executed an amendment to the Pre-Annexation Agreement, incorporating the changes in the October 2006 MOA, or that the MOA had nullified the commitment in the Pre-Annexation

---

<sup>1</sup>A motion to table the TIF resolution was passed on January 28, 2008. See Minutes of Centerville City Council Meeting for January 28, 2008.

Agreement for the City to present legislation creating TIF financing. The magistrate held that this financing would violate R.C. 709.023(H) by diverting real estate taxes from Sugarcreek to Centerville. Centerville, therefore, could not divert real estate property taxes for the annexed property from Sugarcreek to Centerville, either by service payments in lieu of taxes, or otherwise. The magistrate, therefore, granted the motion for summary judgment of Centerville, Dille Corp., and Dille Trust on the issue of annexation, and granted Sugarcreek's motion with respect to the TIF issue.<sup>2</sup> Both sides filed objections to the magistrate's decision.

The trial court in a judgment entry filed in March 2009, adopted the magistrate's decision. The trial court concluded that Sugarcreek had standing, because Centerville did not commit to an abandonment of TIF financing in the October 2006 MOA. The court further held that enacting a TIF plan in the annexed territory would violate R.C. 709.023(H). The trial court also concluded that the property had been properly annexed.

Centerville appeals from the summary judgment of the trial court rendered in favor of Sugarcreek on the issue of the enactment of a TIF. Sugarcreek has not appealed the summary judgment rendered in favor of Centerville on the issue of the annexation, itself.

II

Centerville's First Assignment of Error is as follows:

"THE TRIAL COURT ERRED IN FINDING THAT SUGARCREEK TOWNSHIP HAD STANDING TO ENFORCE THE TERMS OF A CONTRACT IT WAS NOT A PARTY TO

---

<sup>2</sup>Dille Corp. and Dille Trust had been added as parties to the litigation in July 2007, and had joined in Centerville's summary judgment motions.

AND THAT THE CONTRACTING PARTIES THEMSELVES AGREED AND INTENDED NOT TO ENFORCE CERTAIN PROVISIONS.”

Under this assignment of error, Centerville contends that the trial court erred in concluding that Sugarcreek has standing to bring this action. Centerville argues that Sugarcreek is not a party to the Pre-Annexation Agreement, and has no right to enforce its terms. In addition, Centerville contends that the parties to the agreement waived enforcement of the TIF requirement when they entered into the October 2006 MOA.

Our review of a summary judgment is “de novo, which means that we apply the same standards as the trial court.” *GNFH, Inc. v. W. Am. Ins. Co.*, 172 Ohio App.3d 127, 133, 2007-Ohio-2722, at ¶16. The standard used by trial courts is that summary judgment under Civ. R. 56 may be granted “if there are no genuine issues of material fact remaining to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor.” *Smith v. Five Rivers MetroParks* (1999), 134 Ohio App.3d 754, 760.

The parties in the case before us do not dispute the material facts, although they do dispute the meaning of some of the facts as they apply to the issue of standing. For example, Centerville contends that the MOA removed any obligation to enact TIF legislation. Conversely, Sugarcreek contends that the MOA does nothing to modify or rescind Centerville’s agreement that it shall present TIF legislation. Sugarcreek also contends that there is no evidence that Centerville ever amended the Pre-Annexation Agreement.

The issue of standing "is a threshold question for the court to decide in order for it to proceed to adjudicate the action." *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, 1998-Ohio-275. The issue of lack of standing "challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court." *Id.* To decide whether the requirement has been satisfied that an action be brought by the real party in interest, "courts must look to the substantive law creating the right being sued upon to see if the action has been instituted by the party possessing the substantive right to relief." *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 25.

Sugarcreek contends that it has standing under the declaratory judgment provision in R.C. 2721.03, which states, in pertinent part, that:

"[A]ny person interested under a deed, will, written contract, or other writing constituting a contract or any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in section 119.01 of the Revised Code, municipal ordinance, township resolution, contract, or franchise may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it."

"A grant of declaratory judgment is proper when (1) a real controversy exists between adverse parties, (2) the controversy is justiciable, and (3) speedy relief is needed to preserve rights that otherwise may be impaired." *Clark Cty. Solid Waste Mgt. Dist. v. Danis Clarkco Landfill Co.* (1996), 109 Ohio App.3d 19, 40, citing *Fairview Gen. Hosp. v. Fletcher* (1992), 63 Ohio St.3d 146, 148-149.

After reviewing the record, we conclude that Sugarcreek has standing to bring this action on two grounds. First, Sugarcreek has an interest in having the Pre-Annexation Agreement construed. Second, Sugarcreek's status is affected by R.C. 709.023(H), and Sugarcreek is entitled to have the statute construed and to obtain a declaration of its rights under the statute.

In *Canton v. Imperial Bowling Lanes, Inc.* (1968), 16 Ohio St.2d 47, the Supreme Court of Ohio held that a city had standing under R.C. 2721.03 to bring a declaratory judgment action to determine whether a liquor permit holder could sell intoxicating liquor in a part of a "dry" township that had been annexed to the city, which was "wet." *Id.* at 48-51. The court held that a justiciable controversy existed, because the city's legal relations, as "enforcer" of the law, were affected by various statutes involved in the question of whether sales of liquor in the annexed territory were now lawful. *Id.* at 51.

Similarly, in *Village of Silver Lake v. Metro Transit Auth.*, Summit App. No. 22199, 2005-Ohio-2157, a village brought a declaratory judgment action, attempting to obtain a declaration that a regional transit authority had no statutory authority to operate a dinner excursion train on a secondary railroad line that ran along the village's border. *Id.* at ¶2. On appeal, the village contended that it had standing because it was interested in the contract between the transit authority and a third party, and because its rights were affected by statutory authority addressing the power and authority of rapid transit authority. *Id.* at ¶20. The village also claimed injury based on violation of its zoning code and an alleged decrease in property values of homes affected by operation of the excursion train. *Id.*

The Ninth District Court of Appeals concluded that the village did not have standing to seek a declaration that the proposed commercial use of the railway line was improper, because the village had never zoned the area where the line was located. *Id.* at ¶21. The court did find, however, that the village had standing because of the potential decrease in property values if the transit authority pursued operation of the excursion train in excess of its statutory authority to do so. *Id.* at ¶22.

Likewise, in *Board of Trustees of Sylvania Twp. v. Board of Commrs. of Lucas County*, Lucas App. No. L-01-1447, 2002-Ohio-3815, the Sixth District Court of Appeals found that a township had standing to challenge annexation covenants signed by property owners in the township, as well as a prior sewerage agreement signed by the City of Sylvania and Lucas Township. The Sixth District concluded that a “real controversy” existed because the area over which the township had jurisdiction would be reduced if annexation were allowed to proceed. *Id.* at ¶5 and 18-19.

In the case before us, Sugarcreek contends that it is entitled to all property tax revenues from the annexed properties, pursuant to R.C. 709.023(H). Centerville conversely claims that R.C. 709.023(H) cannot be construed in the manner that Sugarcreek contends. Centerville contends that it is statutorily entitled to both collect and exempt property tax revenues in the annexed area. A real controversy exists as to the construction of R.C. 709.023(H), as well as other statutes raised by Centerville, and Sugarcreek will suffer an injury if it is deprived of property taxes from the annexed areas. Therefore, Sugarcreek has standing to pursue this matter.

Sugarcreek also has an interest in the construction of the Pre-Annexation Agreement, and a justiciable controversy exists in that regard. Under Section 1(c) of the

Agreement, if the annexation is approved, Centerville must process the annexation "as provided by law subject to the terms of this agreement." Pre-Annexation Agreement, p. 2. Section 5 of the Agreement further requires Centerville to present legislation to create a TIF Ordinance to allow the City to collect the allowable maximum of payments in lieu of taxes from the new development. Finally, the Agreement provided that its warranties, representations, and covenants "shall not terminate for a period of twenty (20) years." Section 19, p.7.

Centerville claims that the Pre-Annexation Agreement was amended by an October 6, 2006 MOA (October 2006 MOA). In this document, Centerville, Dille Corp., Dille Trust, and Bear Creek agreed to allow the MOA to "serve as an agreement to enter into an Amendment to the Pre-Annexation Agreement." October 2006 MOA, attached to Reply in Support of Defendant City of Centerville's Motion for Summary Judgment. Paragraph 5 of the MOA states that:

"The parties agree to provide or review alternative financing options for the public road improvements in addition to TIF financing, including consideration of special assessments. The agreement will add a paragraph (d) that states 'That the City and developer may set up or utilize special assessment financing to guarantee service payments in accordance with the utilization of the TIF or, as an alternative or supplement to the TIF or will provide traditional CRA financing.'" Id. at p. 2.

The magistrate and trial court noted that this agreement does not either nullify or rescind the commitment to present TIF legislation to City Council or to implement a TIF plan for the annexed territory. We agree, for several reasons.

In the first place, Centerville failed to submit evidence that the City Manager was authorized to sign the MOA. The testimony of both Centerville's Economic Development Director, and a City Council Member, James Singer, indicates that Council passed three resolutions during a public meeting, authorizing the City Manager to enter into the Pre-Annexation Agreement in April 2006. These resolutions have not been made part of the record, and there is also no indication that the resolutions authorized the City Manager to enter into future agreements, following the Pre-Annexation Agreements that were signed in April 2006.

Furthermore, there is neither testimony nor evidence of record indicating that resolutions were passed by City Council during a public meeting, authorizing the City Manager to enter into the October 2006 MOA. The October 2006 MOA is attached as Exhibit 77 to the deposition of City Manager, Greg Horn. Horn indicated in his deposition that he had signed the MOA. However, he never stated that Council had authorized him to sign the agreement, nor did he say that Council had passed a resolution authorizing him to enter into the MOA.<sup>3</sup>

Furthermore, even if Horn had been given authority to enter into the October 2006 MOA, there is no evidence that the parties followed through by amending the Pre-

---

<sup>3</sup>By our discussion, we are not concluding that City Council did not authorize its manager to enter into the MOA; there is simply no evidence of that fact in the record. Compare Exhibit E attached to Sugarcreek's Motion to Reactivate, which was filed on April 4, 2008. Exhibit E is a copy of Resolution No. 52-09, which was enacted by the Centerville City Council on November 5, 2007. This Resolution authorized the City Manager to enter into a Memorandum of Understanding with Sugarcreek Township regarding the Dille Property, in order to settle the lawsuit between the parties. It is possible that a similar resolution was enacted, giving the City Manager the ability to enter into the October 2006 MOA, but no resolution matching this description is part of the trial court record.

Annexation Agreement. And, as was noted by the trial court, the MOA did not rescind the requirement of introducing TIF legislation.

More important, however, is the fact that the alternatives listed in the October 2006 MOA – special assessments and CRA financing – both involve tax abatement or exemption, and would impact Sugarcreek's tax revenues in the annexation area. Horn testified in his deposition that a "special assessment financing to guarantee service payments" is:

"Similar to what we did with the Yankee Trace development where the owner petitioned for special assessment financing, and we were able to do that through a tax exempt structure and spread it out over several years to help assist with financing of public improvements." Horn deposition, p. 69-70. Horn indicated that special assessments are included on the property tax bill as a "special item." *Id.* at 72.<sup>4</sup>

Horn also testified that a "traditional CRA" is a "Community Reinvestment Area." *Id.* at 72. Regarding how a Community Reinvestment Area works, the following exchange occurred during Horn's deposition:

---

<sup>4</sup>Under R.C. Chapter 727, municipalities have the power to levy and collect "special assessments" for the costs of improvements that specially benefit property. See, e.g., R.C. 727.01. Special assessments are typically considered to be different from general taxes, because they cannot be levied on property without notice to the owner and cannot exceed the special benefit. *Hammond v. Winder* (1919), 100 Ohio St. 433, 444-445. " 'A special assessment is not a tax as such. It is an assessment against real property based on the proposition that, due to a public improvement of some nature, such real property has received a benefit.' " *Cleveland Clinic Found. v. Wilkins*, 103 Ohio St.3d 382, 384,2004-Ohio-5468, at ¶10. This distinction does not exist in the present situation, however, because Horn stated that the property tax would be abated in exchange for the "special assessment." If Centerville cannot directly enact a TIF ordinance that would interfere with Sugarcreek's collection of property tax, it cannot do so indirectly, by means of an ordinance authorizing a "special assessment" that would be paid in exchange for tax abatement.

"A. That is a method under Ohio law that allows for abatement of taxes.

"Q. So it becomes, basically a – it forgives taxes that are otherwise due, or what?

"A. I guess 'forgives' would be acceptable terminology. It is, again, an abatement.

"Q. How would that work on a project like this one?

"A. It would provide an alternative revenue source for public infrastructure.

"Q. \* \* \* Can you maybe explain that a little bit more?

"A. It is an incentive to a developer to allow them to be in a position to financially take on major infrastructure costs.

"Q. So instead of the city floating bonds for the infrastructure work to be done, the developer pays for those improvements himself and then, in exchange for that, gets an abatement on the property – on a portion of the property taxes?

"A. It could be done that way. It doesn't necessarily mean that the city wouldn't float bonds. It could be a supplement or in conjunction with." *Id.* at 72-73.

Accordingly, even if the Pre-Annexation Agreement had been modified by the October 2006 MOA, Sugarcreek's ability to collect property tax revenues in the annexation areas would have been impacted. Any property tax exempted by Centerville would impact Sugarcreek, because Sugarcreek contends that it is entitled to all the property tax revenue in the annexation area.

Based on the preceding discussion, we conclude that Sugarcreek had standing on two separate grounds to maintain a declaratory judgment action under R.C. 2721.03.

Centerville's First Assignment of Error is overruled.

III

Centerville's Second Assignment of Error is as follows:

"THE TRIAL COURT ERRED IN FINDING TAX INCREMENT FINANCING (TIF) CLAIMS MADE BY SUGARCREEK TOWNSHIP EITHER PRESENTED A REAL CASE IN CONTROVERSY OR WERE RIPE FOR DETERMINATION. (JUDGMENT ENTRY P. 6; MAGISTRATE'S DECISION P. 71)."

Under this assignment of error, Centerville contends that this matter is not ripe, and no real case or controversy exists, because Centerville has not yet enacted TIF legislation. The trial court concluded otherwise, finding that Centerville had already violated R.C. 709.023(H) by contracting to enact TIF legislation.

The Supreme Court of Ohio has indicated that

"The ripeness doctrine is motivated in part by the desire 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies \* \* \*.' \* \* \* As one writer has observed:

" 'The basic principle of ripeness may be derived from the conclusion that "judicial machinery should be conserved for problems which are real or present and imminent, not squandered on problems which are abstract or hypothetical or remote." \* \* \* [T]he prerequisite of ripeness is a limitation on jurisdiction that is nevertheless basically optimistic as regards the prospects of a day in court: the time for judicial relief is simply not yet arrived, even though the alleged action of the defendant foretells legal injury to the plaintiff.' " *State ex rel. Elyria Foundry Co. v. Indus. Comm.*, 82 Ohio St.3d 88, 89, 1998-Ohio-366 (internal citations omitted).

For the reasons stated above, this assignment of error is without merit. Any of the alternative methods for financing improvements specified in the agreements between Centerville and Bear Creek would negatively impact Sugarcreek's ability to collect property taxes in the annexation area. Accordingly, the dispute is not hypothetical or abstract, but presents a real case or controversy between the parties.

We also note that according to Centerville's evidence, Sugarcreek has entered into agreements for the construction and funding of Clyo Road, and has, therefore, incurred expense that must be repaid by properties in the annexation area, pursuant to Sugarcreek's TIF resolution. That resolution accounts for the maximum permissible amount (75% of the assessed value of improvements in the annexation area) that can be taken without approval of the local school districts. See R.C. 5709.73. The required TIF resolution in the Pre-Annexation Agreement covers the same amount, and would conflict with Sugarcreek's ability to collect property tax. Accordingly, for the reasons stated, the present controversy is neither hypothetical nor abstract.

Centerville's Second Assignment of Error is overruled.

IV

Centerville's Third Assignment of Error is as follows:

"THE TRIAL COURT ERRED IN FINDING THAT A MUNICIPALITY MAY NOT UTILIZE TAX INCREMENT FINANCING ON PROPERTY THAT HAS BEEN ANNEXED UTILIZING THE R.C. 709.23 EXPEDITED (TYPE 2) ANNEXATION PROCESS. (JUDGMENT ENTRY P. 6, 7, 8 AND 12; MAGISTRATE'S DECISION P. 70-71)."

Under this assignment of error, Centerville contends that the trial court erred in concluding that property annexed under a type-2 annexation can never be exempted from real property taxation in connection with municipal tax increment financing. Centerville contends that R.C. 709.023(H) is clear on its face and simply provides that municipalities may not conform a township's boundaries to those of the municipality after annexation. For purposes of argument, Centerville further contends that even if R.C. 709.023(H) is ambiguous, it does not alter the real property tax consequences or economic development incentives prescribed by Ohio law. Sugarcreek argues in response that R.C. 709.023(H) unambiguously provides that townships retain the right to property tax revenues following annexation, and that Centerville's commitment to adopt a TIF plan violates the statute.

In order to fully address these points, we will first consider general principles relating to property taxation and annexation, and will then discuss the statutes involved in this case.

#### A. General Principles of Property Taxation

All real property in Ohio is subject to taxation, except as expressly exempted. R.C. 5709.01(A). Real property is taxed in the district and county in which it is located. Each county is the unit for assessing real estate, and the county auditor assesses all real estate situated in the county. R.C. 5713.01.

Real estate is assessed and taxed based on its "true value," which is the fair market value or current market value. The value of property is determined by the county auditor, and the assessed value of real property is 35% of its "true value." R.C. 5713.03, and Ohio Adm. Code 5703-25-05(B). Under 5705.03(B)(1), if a subdivision is located in more than one county, the county auditor obtains current tax valuations for the portion of the

subdivision located in the other county.

Constitutionally, no real property may be taxed in excess of one percent of its true value in money for all state and local purposes, but a majority of electors in a taxing district may pass additional taxes outside this limitation, or additional taxes may be provided for by the charter of a municipal corporation. See Article XII, Section II of the Ohio Constitution.

Under R.C. 5705.02, the aggregate amount of taxes that may be levied on any taxable property in any subdivision or other taxing authority (which includes townships and municipalities) is ten mills on each dollar of tax valuation of such subdivision, except for taxes specifically authorized to be levied in excess thereof.

R.C. 5705.03 authorizes taxing authorities to levy taxes annually on real and personal property within the subdivision for the purpose of paying the current operating expenses of the subdivision and acquiring or constructing permanent improvements. This section also provides a procedure for submitting taxes outside the 10-mill limitation to the electorate. Special levies within the 10-mill limitation are allowed for construction and repair of roads, for libraries, and some other purposes, without vote of the people. R.C. 5705.06. Levies in excess of the 10-mill limitation are authorized by vote of the people. R.C. 5705.07. And, R.C. 5705.19 lists purposes for which taxes can be levied in excess of 10 mills, upon approval of a majority of the electorate.

All revenue derived from the general levy for current expenses within the 10-mill limitation, for any general levy for expense authorized in excess of the 10-mill limitation, and from sources other than the general property tax, are paid into the general fund. R.C. 5705.10. Townships, like municipalities, are taxing authorities. See R.C. 5705.01(A) and (C). Townships also have authority to tax co-extensive with their borders. See, e.g., R.C.

5705.03, and *Roderer v. Board of Trustees of Miami Twp.* (1983), 14 Ohio App.3d 155, 158.

Municipalities have the same power to tax within their boundaries.

#### B. General Principles of Annexation

Annexation is governed by R.C. Chapter 709. R.C. 709.02 to R.C. 709.11 govern petitions for annexation by a majority of owners of real estate that is contiguous to a municipal corporation. Prior to the enactment of Am. Sub. S.B. 5 (Senate Bill 5) in 2001, the requirement was that the land be "adjacent."

Before Senate Bill 5 was enacted in 2001, there were no special procedures for annexation occurring with the consent of 100% of the property owners in the area to be annexed – the law simply indicated that a majority of owners of adjacent real estate could petition the board of county commissioners to be annexed. A public hearing then had to be held, after which the board could grant the petition if it found, among other things, that the annexed area was not unreasonably large, and that the general good of the territory would be served by the annexation. This gave the board some discretion over annexation. See R.C. 709.02(1979); R.C. 709.033(1989); and *In re Annexation of 118.7 Acres in Miami Twp. to City of Moraine* (1990), 52 Ohio St.3d 124, 131-132.

Senate Bill 5 retained this procedure. Currently, in majority-owner petitions, the board of commissioners must still decide if the proposed area is "not unreasonably large," and that, on balance, the general good of the territory proposed to be annexed will be served. R.C. 709.033(A). Therefore, the board still has some discretion with regard to majority-owner annexations.

After an annexation is approved by the board and is accepted by the municipality, the annexed territory is a part of the municipal corporation, and the inhabitants have the rights and privileges of inhabitants and are subject to the power of the corporation. R.C. 709.10.

Prior to the enactment of Senate Bill 5, another method of annexation existed. Municipal corporations could petition to annex contiguous property owned only by the municipal corporation, a county, or the state. These procedures have analogs in the law after Senate Bill 5, and are not particularly relevant. See R.C. 709.13 to 709.16.

The legislature enacted Senate Bill 5 in 2001, and substantially altered existing annexation statutes. The new annexation statutes add three special procedures for expedited annexation. These procedures eliminate discretion by requiring the board of commissioners to approve annexation if the petition complies with certain technical requirements.

The annexation involved in the present case is the second of the three new annexation procedures, and is referred to as an "expedited type-2 annexation." *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 112 Ohio St.3d 262, 264, 2006-Ohio-6411, at ¶7. The statute pertaining to this type of procedure is R.C. 709.023, and is not analogous to any statutes existing prior to 2001.

R.C. 709.023 is used when the land annexed is not to be excluded from the township under R.C. 503.07. R.C. 503.07 existed prior to the enactment of Senate Bill 5, and allows municipalities to petition the county commissioners to change township lines, so that the boundary lines are identical, in whole or in part, with the limits of the municipal corporation.

Prior to the passage of R.C. 503.07 in 1961, there were two methods of changing township boundaries – by petition of township residents, or by a city’s petition. *State ex rel. Dublin v. Delaware Cty. Bd. of Commrs.* (1991), 62 Ohio St.3d 55, 58. Granting the petition of a city or township residents was originally discretionary with the board of county commissioners. In 1961, granting a city’s petition was made mandatory, pursuant to R.C. 503.07. However, the commissioners still retained discretion over the petitions of township residents. *Id.*

The Ohio Supreme Court held in *State ex rel. Dublin*, that:

“Pursuant to R.C. 503.07, a board of county commissioners must comply with a municipal petition for a change of township boundaries in order to make those boundaries conform, in whole or in part, to the limits of the municipality.” *Id.* at syllabus.

*State ex rel. Dublin* involved the City of Dublin, whose boundaries included land in three counties and four townships, and none of the townships was wholly located in the city. *Id.* at 56. The city wanted the borders of the largest township enlarged to encompass the parts of the other townships that were within city boundaries. The Supreme Court of Ohio held that the commissioners had no discretion – that they were required to change the township boundaries upon the city’s application, due to the changes in the statute (R.C. 503.07), which governs municipal requests to conform boundaries. The Supreme Court of Ohio also held that the boundaries of a township can extend into an adjoining county. *Id.* at 60-61.

The relevance of this is that if the annexation in the present case were not a type-2 annexation, Centerville could have petitioned the Greene County Board of Commissioners, under R.C. 503.07, to conform the boundaries of the annexed property in Sugarcreek

Township to those of Centerville.

In situations where a municipality chooses not to petition the commissioners to conform the boundaries under R.C. 503.07, the "annexed township territory continues to be a component part of the township in which it was situated prior to municipal annexation." 1984 Ohio Atty. Gen. Ops. 051, 1984 WL 196643, \*3. A prior Attorney General Opinion, rendered in 1977, had indicated that the procedure in R.C. 503.07 should be followed as a matter of course each time a municipality annexes part of a township, due to possible inequities where residents may find themselves taxed by both the municipality and by the township.

If a municipality fails to take action under R.C. 503.07, the property becomes part of the municipal corporation, but also remains part of the township. The taxpayers in the annexed area reside both in the city and in the township, and are obligated to pay both taxes levied by the township and taxes levied by the city. 2005 Ohio Atty. Gen. Ops. 024, pp. 9-10. Of course, these taxes are subject to the 10-mill limitation on real property taxation, unless a majority of the voters have authorized additional taxes.

Centerville concedes at page 16 of its brief that Ohio law has long allowed municipal corporations to eliminate overlapping jurisdictions within the corporation, by petitioning the board of county commissioners under R.C. 503.07 to remove the territory from the original township and conform its boundaries to those of the municipal corporation. Centerville fails to mention in its brief, however, that Ohio law has also required municipal corporations to pay townships real property tax on the annexed area. Before Senate Bill 5 was enacted in 2001, the payments extended only to situations where the area in question was 15% of more of the taxable value of the township. Senate Bill 5 eliminated this threshold value

requirement, and now requires payment whenever boundaries are conformed under R.C. 503.07. See R.C. 709.19.

C. Changes in Annexation Law After the 2001 Amendments in Senate Bill 5.

The legislature made a number of changes to R.C. 709.19 when it enacted Senate Bill 5. Prior to the enactment of Senate Bill 5, R.C. 709.19 provided for three schedules of payment that would be made to townships where territory was annexed. But the statute only applied to situations where the annexed territory included at least 15%, but less than 100%, of the total taxable value of real, public utility, and tangible personal property subject to taxation in the township in the base year, which was the calendar year immediately preceding the annexation period. R.C. 709.19(B)(1)(1981). The 15% amount also had to occur within a certain period of time, which was a period referred to in the statute as one, two, or three, consecutive twelve-month periods. *Id.*

The schedules of payment depended on which annexation period applied. For example, the schedule allowed for 100% of the tax revenues to be paid back to the township for the first three years, where the annexation period was twelve consecutive months. Under this schedule, the payment of taxes to the township extended for seven years. See R.C. 709.19(B)(1981), and Legislative Service Commission Final Analysis, Am. Sub. S.B. 5, pp. 26-27. The duration of payments decreased where the annexation period was longer.

The payments were also required to be made whether or not township boundaries were conformed to those of the annexing municipal corporation, because R.C. 503.07 was not mentioned in R.C. 719.09 prior to the 2001 amendments.

R.C. 709.19 was repealed by Senate Bill 5, and new R.C. 709.19 was enacted. Under the new statute, payments to townships begin upon the exclusion of the annexed property from the township under R.C. 503.07. Thus, the payments are no longer dependent upon at least a 15% loss of township tax value. This indicates an intent to benefit townships, by allowing payment whenever any taxable property is excluded from the township.

The new statute also provides two schedules of payments, divided into categories of commercial and industrial real property, versus residential and retail property. The payments are somewhat less at the beginning (80%, as opposed to the prior schedule of 100%, for the first three years). However, the payments last longer and are larger at the end. For example, the new (and current) version of R.C. 709.19(C) provides that a township will receive 80% of the township taxes in the annexed area during years one through three, 65% in years four and five, 62.5% in years six and seven, 57.5% in years eight and nine, and 42.5% in years ten through twelve. This applies to "commercial and industrial, real, personal, and public utility property taxes \* \* \* as if no annexation had occurred." R.C. 709.19(C)(1)(a)-(e).

An even more significant change occurred as a result of the addition of the following language to R.C. 709.19(C)(2) in Senate Bill 5. As enacted in Senate Bill 5, R.C. 719.09(C)(2) states that:

"If there has been an exemption by the municipal corporation of commercial and industrial real, personal, or public utility property taxes pursuant to section 725.02, 1728.10, 3735.67, 5709.40, 5709.41, 5709.62, or 5709.88 of the Revised Code, *there shall be no reduction in the payments owed to the township due to that exemption. The municipal*

corporation shall make payments to the township under division (C)(1) of this section, calculated as if the exemption had not occurred.” (Emphasis added).

The statutes listed in R.C. 709.19(C)(2) include: urban renewal development funds (R.C. 725.02); community redevelopment tax exemptions (R.C. 1728.10); exemptions from tax in metropolitan housing reinvestment areas (R.C. 3735.67); tax exemptions for improvements for a public purpose (tax increment financing), and for municipal incentive districts (R.C. 5709.40(B) and (C), respectively); tax exemptions for lands owned by municipalities and leased (R.C. 5709.41); tax exemptions for municipal enterprise zones (R.C. 5709.62); and tax exemptions for incentive agreements for remediation of property (R.C. 5709.88).

Thus, after the 2001 amendments, a municipality must make the payments even if the municipality has exempted the annexed property from real estate taxes for purposes like community redevelopment funds, tax increment financing funds, or urban renewal debt retirement funds. Again, this shows an intent to benefit townships.

The tax increment financing (TIF) exemption that Centerville obligated itself to enact is authorized by one of the sections referred to in R.C. 709.19(C)(2). This section, R.C. 5709.40, permits municipalities to declare improvements to parcels of real property to be for a “public purpose.” R.C. 5709.40(B). Up to 75% of an improvement declared to be for a public purpose may be exempted from real property taxation for up to ten years, without approval of the board of education of the local school district. Longer exemption periods may be granted if the school board approves, or if the municipality agrees to pay the school district the amount of taxes that would have been paid if the improvement had not been exempted from taxation. In that event, the tax exemption can be granted for up to thirty

years. See R.C. 5709.40 (D)(1).

R.C. 5709.40(A)(4) defines an "Improvement" as "the increase in the assessed value of any real property that would first appear on the tax list and duplicate of real and public utility property after the effective date of an ordinance adopted" under R.C. 5709.40, were it not for the exemption granted by the ordinance. Accordingly, when a municipality enacts a TIF resolution, the TIF will cover any increases in the value of the property due to development.

Notably, R.C. 709.19, as enacted by Senate Bill 5, also includes the amount of the taxes on the value of real property, *as improved*, within the payments that a municipality is required to make to a township where the boundaries are conformed under R.C. 503.07. For example, R.C. 709.19(C)(1) states that "the municipal corporation that annexed the territory shall make the following payments to the township from which the territory was annexed with respect to *commercial and industrial real, personal, and public utility property taxes using the property valuation for the year that the payment is due \* \* \**" (Emphasis added). R.C. 709.19(D) similarly states that "The municipal corporation that annexed the territory shall make the following payments to the township from which the territory was annexed with respect to residential and retail real property taxes *using the property valuation for the year that the payment is due \* \* \**" (Emphasis added).

As the value of commercial, residential, and retail real property increases over time due to improvements to the property, a township would, therefore, be entitled to payments that include the increases in the taxable value of real property, and a municipal corporation cannot exclude these amounts from the payments it is required to make when annexation occurs and the boundaries are conformed to the municipality.

Accordingly, under existing law, if Centerville had been permitted to exclude the annexed area from Sugarcreek Township, Centerville would still have been obligated to pay Sugarcreek amounts ranging from 80% to 42.5% of the township taxes for commercial property in the annexation area, for twelve years. The payments for residential and retail real property taxes would be slightly different, as they range by statute from 80% to 27.5%, for twelve years. See R.C. 709.19(D)(1)-(4).

Centerville would also have been obligated to pay Sugarcreek based upon the improved value of the annexed property. As was noted, R.C. 709.19(C)(2) states that in situations where a municipality exempts real property from taxation, there shall be no reduction to the township due to the exemption, and the payments shall continue as if the exemption had not been granted. Therefore, if Centerville had excluded the annexed area from Sugarcreek, and had exempted improvements in the area from taxation, Centerville would still be obligated to pay Sugarcreek the amount of real property taxes owed on the real property, *including improvements, and without reduction in the amount*, and would have to continue the payments as if the exemption had not been granted.

While a municipality could argue that this is unfair, we have previously rejected a similar claim. In *Roderer*, 14 Ohio App.3d 155, a municipality contended that R.C. 709.19 impermissibly intruded upon its home rule powers. We disagreed, noting that:

“The enactment of the annexation ordinances was voluntary, and was accomplished with full knowledge that any tax monies received from the annexed territory might be subject to a future sharing requirement with the township from which the territory was being annexed. Moraine concedes that the legislature could have constitutionally enacted a statute which made a redistribution of tax revenues a condition precedent to annexation.

We see no distinction in making such redistribution a condition subsequent if the fifteen percent threshold is reached. If any of these municipalities was unwilling to assume the burden of the known potential condition subsequent, the same could have been avoided by failing to enact the annexation ordinance." Id. at 157.<sup>5</sup>

By indicating that a municipal corporation must pay the real property taxes to the township when it excludes the property from the township and conforms boundaries under R.C. 503.07, the legislature is applying the same reasoning that we did in *Roderer*. The effect of the annexation statutes after Senate Bill 5 is that if a city annexes the property of a township and then excludes the property from the township under R.C. 507.03, the city must still pay the township the property taxes, even on improvements, and cannot reduce the payments. In view of these facts, what should logically occur if a municipal corporation annexes property in a township pursuant to a type-2 annexation procedure, thereby leaving the property in the township?

D. The Effect of Annexation in a Type-2 Annexation, or Other Special Procedure under Senate Bill 5, Where the Property Remains in the Township.

Again, annexation is governed by R.C. Chapter 709. After an annexation is approved by the board of county commissioners and is accepted by a municipality, the annexed territory is a part of the municipal corporation, and the inhabitants have the rights

---

<sup>5</sup>At the time of our decision in 1983, tax-sharing payments under R.C. 709.19 were subject to a threshold requirement that fifteen percent of the total taxable value of property subject to taxation in the township be reached, either by the annexation at issue or by the sum total of annexations by other municipalities. 14 Ohio App.3d at 157. As we noted, this provision has since been eliminated, and there is no threshold limit.

and privileges of inhabitants, and are subject to the power of the corporation. R.C. 709.10. However, if the municipality does not conform the township boundaries under R.C. 503.07, the inhabitants are also residents of the township, with voting rights. The residents are also subject to taxation in both the municipal corporation and in the township. 2005 Ohio Atty. Gen. Ops. 024, pp. 9-10.

The legislature enacted Senate Bill 5 in 2001, and substantially altered existing annexation statutes. Under prior law, there were no special procedures that could be applied where 100% of the property owners consented to an annexation. The statutes provided that a majority of owners of adjacent real estate could petition the board of county commissioners to be annexed and a public hearing had to be held, after which the board could grant the petition if, among other things, the annexed area was not unreasonably large. This gave the board discretion over the annexation. *In re Annexation of 118.7 Acres in Miami Twp.* (1990), 52 Ohio St.3d at 131-132. The special procedures, however, eliminate discretion by requiring the commissioners to approve annexation if the petition complies with certain technical requirements. *State ex rel. Butler Twp. Bd. of Trustees*, 2006-Ohio-6411, at ¶10, n.3, and *State ex rel. Butler Tp. Bd. of Trustees v. Montgomery County Bd. of County Commrs.*, Montgomery App. No. 22664, 2008-Ohio-6542, at ¶25.

Expedited type-2 annexations are governed by R.C. 709.023, which states, in pertinent part, that:

“(A) A petition filed under section 709.021 of the Revised Code that requests to follow this section is for the special procedure of annexing land into a municipal corporation when, subject to division (H) of this section, the land also is not to be excluded from the township under section 503.07 of the Revised Code. The owners who sign this petition by their

signature expressly waive their right to appeal in law or equity from the board of county commissioners' entry of any resolution under this section, waive any rights they may have to sue on any issue relating to a municipal corporation requiring a buffer as provided in this section, and waive any rights to seek a variance that would relieve or exempt them from that buffer requirement."

R.C. 709.023(B) requires notice to be given to various entities, including the fiscal officer of each township that has territory included within the proposed annexation area. The municipal corporation into which the area is to be annexed is required to adopt an ordinance indicating what services will be provided to the area upon annexation. R.C. 709.023(C). However, the statute does not require specific services to be provided. The municipality is also required to provide a buffer separating the annexed territory from adjacent land in the township, if the municipal zoning is incompatible with uses permitted by township zoning. *Id.*

The township is permitted to object to the annexation petition, but its objection is limited solely to the petition's failure to meet the conditions specified in R.C. 709.023(E). These conditions relate to items like whether the borders of the annexed area and municipality are "contiguous," and whether the persons who signed the petition are the owners of the real estate located in the proposed annexation area. R.C. 709.023(D). Failure to timely file an ordinance or resolution objecting to the annexation constitutes consent to the annexation. *Id.* If objections are filed, the board of commissioners reviews the petition to decide if the petition meets with the requirements of R.C. 709.023(E). If the petition meets the requirements, the board must enter a resolution granting the annexation. There is no appeal from the grant or denial of the resolution, but any party may seek a writ

of mandamus to compel the board to perform its duties. R.C. 709.023(F) and (G).<sup>6</sup>

R.C. 709.023(H) provides that:

“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.”

Sugarcreek contends that R.C. 709.023(H) unambiguously authorizes it to collect all taxes due from real property in the annexation area, without restriction. Centerville contends that R.C. 709.023(H) is unambiguous and merely reflects that a municipality may not conform township boundaries after annexation is approved. Alternatively, Centerville contends that if R.C. 709.023(H) is ambiguous, it must be reconciled with existing authority, which allows municipalities to enact TIFs following annexation.

---

<sup>6</sup>We have previously held that townships are not “parties” under R.C. 709.023(F) and (G) for purposes of filing mandamus actions to compel the commissioners to perform their duties. See *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery County Bd. of County Commrs.*, Montgomery App. No. 22664, 2008-Ohio-6542, at ¶27. We also concluded in *Butler Twp. Bd. of Trustees* that a township lacks standing to file a declaratory judgment action contesting an expedited type-2 annexation. *Id.* at ¶29. The Supreme Court of Ohio has accepted an appeal in that case, and the appeal is currently pending. See *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 121 Ohio St.3d 1449, 2009-Ohio-1820. *State ex rel. Butler Twp. Bd. of Trustees* is not relevant to the case before us, since Sugarcreek did not appeal the dismissal of its challenge to the annexation petitions. Furthermore, one of our primary reasons for rejecting the township's appeal rights in *Butler Township Bd. of Trustees* is that “in \*\*\* type II \*\*\* annexation proceedings, the land annexed is not withdrawn from the township, and the township *suffers no economic detriment by the approval of the annexation.*” 2008-Ohio-6542, at ¶26 (emphasis added).

R.C. 709.023(H) is not quite as narrow as Centerville contends. R.C. 709.023(H) does not merely indicate that boundaries may not be conformed; it also clearly states that the annexed property "remains subject to the township's real property taxes."

The phrase used in R.C. 709.023(H) is that "[n]otwithstanding anything to the contrary in section 503.07 of the Revised Code, \* \* \* territory annexed into a municipal corporation pursuant to this section *shall not at any time be excluded from the township under section 503.07 of the Revised Code and, thus, remains subject to the township's real property taxes.*" (Emphasis added). 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.

Under R.C. 709.023(H), the territory remains in the township, similar to situations in which a municipality has annexed township property, but has failed to exclude the property from township borders under R.C. 503.07. Under existing interpretations of the Ohio Attorney General and Ohio case law, residents of the annexed territory would be residents of both the township and municipality, would be entitled to vote in both city and township elections, and would be subject to taxation by both taxing authorities. See 2005 Ohio Atty. Gen. Ops. 2005-024, pp. 9-10 (discussing situations where township property is annexed and the city has not asked the commissioners under R.C. 503.07 to conform the township boundaries to those of the city). Therefore, under the law in effect prior to Senate Bill 5, the annexed property would still have been subject to township taxation if it remained in the township.

The Legislative Service Commission's Final Analysis of Senate Bill 5 does not discuss R.C. 709.023(H) in any detail. The Final Analysis simply states that:

“Notwithstanding anything to the contrary in the provision of continuing law pertaining to the conforming of township boundaries \* \* \*, unless otherwise provided in the annexation agreement or in a cooperative economic development agreement, territory annexed into a municipal corporation pursuant to this special procedure must not at any time be excluded from the township, and remains subject to the township's real property taxes (sec. 709.023(H)).” Id. at p. 18.

Admittedly, R.C. 709.023(H) does not say that the property is also subject to municipal tax, but under existing law, that would not be necessary, since each parcel of land in Ohio is subject to taxation by every taxing unit within which it is located. R.C. 5705.01(A) and (H); R.C. 5705.93; and 2005 Ohio Atty. Gen. Ops. 2005-043, p. 6.

Because R.C. 709.023(H) fails to state that the annexed property is not subject to municipal taxes, it does not appear to have been intended to alter existing law. Had the legislature intended to remove a municipality's existing ability to tax real property located within its borders, the legislature would have said so. This does not mean, however, that Sugarcreek is restricted to taxing only the unimproved value of the property, nor does it mean that Centerville can enact a TIF or other tax abatement ordinance that interferes with Sugarcreek's collection of property tax revenue on the unimproved and improved portions of the annexed property.

Under the law prior to, and after the enactment of, Senate Bill 5, revenues from real property taxation must be shared by the jurisdictions that have taxing authority over the property.

As was noted, Ohio law allows up to 10 mills of property tax to be levied without voter approval. This millage, which is called “inside millage,” is allocated among various taxing

authorities. 2005 Ohio Attorney. Ops. 2005-043, p. 19. Therefore, even before annexation, Sugarcreek would not have been entitled to the total amount of the inside millage on the property within the township, if other "taxing authorities" also had the ability to levy taxes. For example, local school districts are taxing authorities under R.C. 5705.01(A), and receive money from the unvoted or inside millage within their district. See, e.g., *Board of Educ. of Strongsville City School Dist. v. Lorain County Budget Comm.* (1988), 38 Ohio St.3d 50 (discussing dispute between school district and township over allocation of inside millage obtained from taxation of property located in the township).

Furthermore, reduction of taxes obtained from levies may be required in situations involving overlapping political subdivisions. R.C. 5705.31 provides for: "minimum levies within the 10-mill limitation for the current expense and debt service of each subdivision or taxing unit, based on the average inside millage levies in effect during the last five years before the 10-mill limitation went into effect (that is, during the years 1929 through 1933) \* \* \* Certain levies are given priority, and specific provisions govern the minimum levy for a school district." 2005 Ohio Attorney. Ops. 2005-043, p. 20 (citations omitted).

Because of these competing interests, tax levies paid to cities and townships that overlapped could have been reduced under R.C. 5705.31, prior to the enactment of Senate Bill 5 in 2001.

"The general rule prior to [the effective date of Senate Bill 5] \* \* \*, was that the allocation of the inside millage was made in accordance with R.C. 5705.31 in the territory having the most taxing units eligible to share in that millage, and (subject to express statutory exceptions) the rate so determined for each taxing unit was then levied uniformly throughout that taxing unit, in accordance with the requirement of Ohio Const. art. XII, § 2

that land and improvements be taxed 'by uniform rule.' As was stated in 1993 Op. Att'y Gen. No. 93-019:

"It is evident that, because of the financial needs of various taxing units, the amount of inside millage sought may exceed the amount of inside millage available. The county budget commission is given statutory responsibility for approving tax levies and for fixing the amounts that various taxing units may levy within the ten-mill limitation. Certain levies are required to be approved, and some taxing units are guaranteed minimum levies within the ten-mill limitation. The county budget commission must, however, also make adjustments and reductions, as appropriate, in order to comply with the ten-mill limitation on unvoted taxes. See R.C. 5705.31-.32,.34; 1979 Op. Att'y Gen. No. 79-063; 1956 Op. Att'y Gen. No. 7421, p. 813. Reduction of various levies may be necessary in the case of overlapping political subdivisions to assure that the ten-mill limitation is given effect throughout the state. See, e.g. *Cambridge City School District v. Guernsey County Budget Commission*, 11 Ohio App. 2d 77, 228 N.E.2d 874 (Guernsey County 1967), aff'd, 13 Ohio St. 2d 77, 234 N.E.2d 512 (1968); Op. No. 79-063; 1956 Op. No. 7421.'" 2005 Ohio Attorney. Gen. Ops. 2005-043, pp. 20-21 (bracketed material added).

Unfortunately, because of the requirement of uniform taxation within districts, if the inside millage in part of a township or municipality had to be reduced because it overlapped another political subdivision, the millage in the entire township or municipality had to be correspondingly reduced. *Id.* at pp. 21-22. Therefore, there might be parts of the township and municipality where the entire 10-mill limitation could not be levied. *Id.* at 21. In order to address this issue, the General Assembly enacted R.C. 5705.315 in 2001, as part of Senate Bill 5. R.C. 5705.315 states that:

"With respect to annexations granted on or after the effective date of this section and during any tax year or years within which any territory annexed to a municipal corporation is part of a township, the minimum levy for the municipal corporation and township under section 5705.31 of the Revised Code shall not be diminished, except that in the annexed territory and only during those tax year or years, and in order to preserve the minimum levies of overlapping subdivisions under section 5705.31 of the Revised Code so that the full amount of taxes within the ten-mill limitation may be levied to the extent possible, the minimum levy of the municipal corporation or township shall be the lowest of the following amounts:

"(A) An amount that when added to the minimum levies of the other overlapping subdivisions equals ten mills;

"(B) An amount equal to the minimum levy of the municipal corporation or township, provided the total minimum levy does not exceed ten mills.

"The municipal corporation and the township may enter into an agreement to determine the municipal corporation's and the township's minimum levy under this section. If it cannot be determined what minimum levy is available to each and no agreement has been entered into by the municipal corporation and township, the municipal corporation and township shall each receive one-half of the millage available for use within the portion of the territory annexed to the municipal corporation that remains part of the township."

The Ohio Attorney General has interpreted this provision to mean that: "with respect to any annexation granted on or after October 26, 2001, during any tax year within which territory annexed to a municipality is part of a township, both the municipality and township retain the minimum levies calculated pursuant to R.C. 5705.31, except in the territory in

which the subdivisions overlap. In that territory, the minimum levies are reduced as prescribed, in order to come within the 10-mill limitation. The municipality and township may enter into an agreement regarding their respective minimums within the 10-mill limitation. If there is no agreement, the municipality and township 'shall each receive one-half of the millage available for use within the portion of the territory annexed to the municipal corporation that remains part of the township.' " 2005 Ohio Attorney. Gen. Ops. 2005-043, p. 23.

If the municipal corporation and township enter into an annexation agreement to reallocate their shares of the minimum levies, the county auditor is required to allocate, to the extent possible, the minimum levy according to their agreement. R.C. 3705.31(D).

Notably, R.C. 5705.31 and R.C. 5705.315 do not provide that the township is entitled to no more than its share of the levies on the taxable value of the real property prior to improvement. Furthermore, the Attorney General's interpretation is consistent with the Final Analysis for Senate Bill 5, which contains the following discussion:

"Division of inside millage in annexed territory

"The act contains special provisions related to the allocation in the annual tax budget process of the minimum levies within the ten-mill limitation for the current expense and debt service of an annexing municipal corporation and a township whose territory is annexed. These special provisions apply only (1) in the annexed territory, (2) for those tax years in which annexed territory remains part of a township after annexation, and (3) for annexations that are granted on or after the act's effective date. (Sec. 5705.315.)

"Under these circumstances, the minimum levy under the Tax Levy Law as pertains to the annexed territory is an amount that, when added to the minimum levies of the other

overlapping subdivisions, equals ten mills or, if the amount would be lower, an amount equal to the minimum levy of the municipal corporation or township. \* \* \* This formula is stated to be for the purpose of preserving the minimum levies of overlapping subdivisions so that the full amount of taxes within the 10-mill limitation may be levied to the extent possible. (Sec. 5705.315.)

“Once determined, the minimum levy amount pertaining to the annexed territory then must be divided between the municipal corporation and the township. The amount to go to each is to be determined either by an agreement between them or, if no agreement can be reached and the amount to go to each cannot be determined otherwise, by dividing the available millage determined for the annexed territory so that the municipal corporation and the township each receive one-half. (Sec. 5705.315.) \* \* \* ” Legislative Service Commission Final Analysis, Am. Sub. S.B. 5, p. 34 (footnotes omitted).

The annexation laws thus provide compensation for townships in two different scenarios. Where a municipality annexes land and conforms the boundaries under R.C. 503.07, the municipality is required to pay the township gradually decreasing proportions of the property tax revenues for twelve years. Where land is annexed using the expedited type-2 annexation procedure, the land is not excluded from the township, and remains subject to township real property taxation. In the latter event, the township and annexing municipality share the real property tax revenues on the inside millage.

E. The Effect of the Statutes Pertaining to Municipal  
and Township Tax Increment Financing  
(1) Municipal Tax Increment Financing

R.C. 5709.40(B) allows municipalities to declare improvements to certain parcels of real property to be a "public purpose," and to exempt not more than 75% of the improvement from taxation for up to 10 years. The percentage may exceed more than 75%, for a period up to 30 years, if the ordinance declaring the improvements to be a public purpose also states that the local school district shall be paid the amount of taxes that would have been paid if the parcel had not been exempted from taxation. R.C. 5709.40(D)(1). The school district can also consent to the increased time period and amount of exempted assets. R.C. 5709.40(D)(2). Even where the relevant period is only 10 years, the school district must still be notified. R.C. 5709.83(A).

Under R.C. 5709.42(A), the municipal corporation may require owners of any structure located on the parcel to make annual service payments in lieu of taxes. These payments are collected and distributed at the same time and in the same manner as real property payments. The municipal corporation must also establish a public improvement tax increment fund into which the service payments are deposited. R.C. 5709.43(A).

Under R.C. 5709.40(A)(4), an "improvement" is defined as:

"The increase in the assessed value of any real property that would first appear on the tax list and duplicate of real and public utility property after the effective date of an ordinance adopted under this section were it not for the exemption granted by that ordinance."

Thus, under the municipal TIF statute, Centerville could enact a TIF resolution for the annexed property, and exempt up to 75% of the assessed value of improvements on the property from real property taxation, for ten years. If Centerville obtained the approval of the local school districts, or agreed to pay the districts the amount of property tax they would

have received anyway, Centerville could exempt up to 100% of the assessed value for up to thirty years. Under either scenario, this would deprive Sugarcreek of its statutory share of the inside millage on the property. Although Sugarcreek would still receive its proportionate share of the inside millage on the unimproved portions of the annexed real property, it would not receive any share of the tax revenue from the improvements to the property.

## (2) Township Tax Increment Financing

Like municipalities, townships are also permitted to designate TIF districts in public improvement areas, and to exempt real property in the area from taxation, contingent upon the property owners' service payments in lieu of tax. See R.C. 5709.73. The provisions for township TIFs are similar to those for municipalities, including the fact that school districts must approve the exemption of percentages of improvements that exceed 75%. R.C. 5709.73(B) and (D).

R.C. 5709.73(B) provides that:

"A board of township trustees may, by unanimous vote, adopt a resolution that declares to be a public purpose any public infrastructure improvements made that are necessary for the development of certain parcels of land located in the unincorporated area of the township. Except with the approval under division (D) of this section of the board of education of each city, local, or exempted village school district within which the improvements are located, the resolution may exempt from real property taxation not more than seventy-five per cent of further improvements to a parcel of land that directly benefits from the public infrastructure improvements, for a period of not more than ten years. The

resolution shall specify the percentage of the further improvements to be exempted and the life of the exemption.”

“Further improvements” are defined as: “the increase in the assessed value of real property that would first appear on the tax list and duplicate of real and public utility property after the effective date of a resolution adopted under this section were it not for the exemption granted by that resolution. For purposes of division (B) of this section, ‘improvements’ do not include any property used or to be used for residential purposes.”

Thus, a township is permitted to create its own TIF district and the improvements that can be exempted include increases in the assessed value of real property after the date of the resolution creating the TIF. The TIF statutes, therefore, anticipate that the township is entitled to revenues from the increased value of the improved property.

Sugarcreek enacted a TIF resolution in April 2006. Consistent with R.C. 5709.73, the resolution created a TIF district that encompasses some of the annexed area, and exempts 75% of the assessed value of improvements in the area from real property taxation for a period of ten years. The property owners are to make semi-annual service payments in lieu of taxes, which will be deposited in a Tax Increment Equivalent Fund, and will be used to pay the cost of the public improvements in the TIF District. Exhibit 12, Sugarcreek Township Resolution No. 2006-04-20-01.

#### F. How to Reconcile All the Statutes Involved in this Case.

The only way to reconcile all the statutes in this case is to conclude that 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. The residents in the annexation

area are considered residents of both areas and are entitled to all the rights associated with residency, including voting privileges.

Both Centerville and Sugarcreek are entitled to retain their minimum levies on the real property in the annexation area, calculated pursuant to R.C. 5705.31. However, their minimum levies must be reduced in the manner prescribed, to come within the 10-mill limitation on inside millage. Sugarcreek and Centerville may enter into an agreement regarding their respective minimums within the 10-mill limitation, but if there is no agreement, and it cannot be decided what minimum levy is available to each, Sugarcreek and Centerville shall each receive one-half of the inside millage available for use within the portion of the territory annexed to Centerville that remains within Sugarcreek Township. R.C. 3705.315(B).

If Sugarcreek and Centerville enter into an annexation agreement to reallocate their shares of the minimum levies, the county auditor must allocate, to the extent possible, the minimum levy according to their agreement. R.C. 3705.31(D).

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. However, 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.<sup>7</sup>

---

<sup>7</sup>Centerville has not raised the validity of Sugarcreek's TIF, which was enacted before the property was annexed. However, the conclusion appears inescapable that neither Sugarcreek nor Centerville can validly enact a TIF that interferes with the other entity's minimum levy under R.C. 5709.31 and 5709.315. This could be an alternative basis for finding standing, because Sugarcreek has already enacted the TIF. However, Centerville did not raise this as a counterclaim, nor did it ask the trial court to declare Sugarcreek's TIF invalid. Sugarcreek did raise as an issue below, that Centerville was

In view of the preceding discussion, the trial court erred in concluding that Centerville could never pass TIF legislation that would divert any of the property taxes from Sugarcreek. The court was correct in concluding that 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. Since Sugarcreek has already enacted a TIF plan that exempts 75% of the improvements on some of the annexation property, Centerville's proposed TIF, exempting 75% of the property from taxation, would violate R.C. 709.023(H).

However, the trial court failed to recognize that Centerville is also entitled to its share of the minimum levies on the property under R.C. 5709.31 and R.C. 5709.315, and can, therefore, enact TIF legislation to the extent that it does not interfere with Sugarcreek's right to collect its share of the minimum levies on the property.

Accordingly, Centerville's Third Assignment of Error is sustained in part, and overruled in part. This cause will be remanded to the trial court for further proceedings consistent with this opinion.

---

not entitled to impose a TIF plan on territory that is already part a TIF District created by Sugarcreek. However, the magistrate indicated that he did not need to address this issue, in view of his conclusion that Sugarcreek was entitled to all the property tax and that Centerville was not entitled to impose a TIF that would divert any part of the tax.

Notably, R.C. 5709.73(B) refers to a township's ability to enact TIFs for development of parcels in the "unincorporated area of the township." This would seem to restrict Sugarcreek's ability to enact further TIFs in the annexation area, because even though the property remains in the township pursuant to R.C. 709.023(H), the property might not be considered to be in an "unincorporated area" of the township after annexation. Thus, when Sugarcreek's TIF expires in ten years, Sugarcreek may not be able to enact a further TIF plan, assuming the laws remain the same. This may be why Sugarcreek passed the TIF resolution before the land was annexed. However, whether this is the appropriate interpretation of the statute is currently unclear and there is no explanation in the legislative history of Senate Bill 5.

V

Centerville's First and Second Assignments of Error having been overruled, and the Third Assignment of Error having been sustained in part, and overruled in part, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

.....

GRADY and FROELICH, JJ., concur.

Copies mailed to:

- Scott D. Phillips
- Joseph W. Walker
- Richard C. Brahm
- Catherine A. Cuninghame
- Hon. Stephen Wolaver

FILED

2009 MAR 18 AM 11:22

TERRI A. MAZUR, CLERK  
COMMON PLEAS COURT  
GREENE COUNTY, OHIO

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO  
GENERAL DIVISION (CIVIL)

SUGARCREEK TOWNSHIP,

Plaintiff

CASE NO. 2006 CV 0784

JUDGE WOLAVER  
MAGISTRATE REYNOLDS

-vs-

CITY OF CENTERVILLE,  
ET AL.,  
Defendants

JUDGMENT ENTRY  
ADOPTING  
MAGISTRATE'S DECISION  
ON PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
AND ON DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT

## FINAL APPEALABLE ORDER

I. Background:

This matter is before the Court for independent review, pursuant to Civ.R. 53(D)(4)(d), as to objected matters set forth in objections to the Magistrate's Decision filed on February 17, 2009.

Plaintiff, Sugarcreek Township, and Defendant, City of Centerville, timely filed objections on March 3, 2009. On March 11, 2009, Intervening Defendants, Dille Laboratories Corporation and Charles A. Dille Trust, timely filed their Joinder in the City of Centerville's Objections that had been filed on March 3, 2009.

09-03-3057

Sugarcreek Township objected to the Magistrate's Decision on the annexation issues, but did not object to the Magistrate's Decision on the TIF issues. The City of Centerville, joined by Dille Laboratories Corporation and Charles A. Dille Trust, objected to the Magistrate's Decision on the TIF issues, but did not object to the Magistrate's Decision on the annexation issues.

In addressing Centerville's Objections, the Court will implicitly address the same objections of Dille Laboratories Corporation and the Charles A. Dille Trust.

II. Magistrate's Decision:

In the Magistrate's Decision, the Magistrate concluded that:

(1) The Annexations of the 173.181 acres and of the 94.982 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.

(2) Pursuant to R.C. § 709.023(H), that territory annexed into Centerville shall not at any time be excluded from the township under Section 503.07 of the Revised Code and, thus, remains subject to Sugarcreek Township's real property taxes.

The Magistrate GRANTED the Motion for Partial Summary Judgment of Sugarcreek Township as to the TIF issue. The Magistrate DENIED the City of Centerville's Motion for Summary Judgment (joined in by Dille Laboratories Corporation, Dille Trust and Bear Creek Capital, LLC) on the TIF issue.

The Magistrate GRANTED the Motion for Summary Judgment of the City of Centerville, joined in by Intervening Defendants Dille Trust, Dille Laboratories Corporation, and Bear Creek Capital, LLC, on the annexation issue.

The Magistrate GRANTED Summary Judgment in favor of the City of Centerville and Intervening Defendants Dille Trust, Dille Laboratories Corporation, and Bear Creek Capital, LLC, against Sugarcreek Township, on Counts I, II, III, IV, and VI of Sugarcreek Township's Second Amended Complaint.

09-03-2058

The Magistrate GRANTED Summary Judgment in favor of Sugarcreek Township against the City of Centerville on Count V of the Second Amended Complaint.

The Magistrate DENIED the Declaratory Judgment requested by Sugarcreek Township that the resolutions of the Greene County Board of Commissioners that granted the annexation petitions for the 173.181 acres and the 94.987 acres were defective and invalid (Count I), that the City of Centerville's Resolution on October 9, 2006 was invalid because it violated Section 4.10(b) of the City of Centerville Municipal Charter (Count II), that the City of Centerville's resolution on October 9, 2006 was invalid because it violated Section 4.09 of the City of Centerville Municipal Charter and R.C. § 121.22(F) (Count III), that both of the City of Centerville's Resolutions accepting the annexed territories of 173.181 acres and 94.987 acres, respectively, were invalid because they should have been enacted as ordinances and not resolutions and thereby violated the Centerville Charter (Count IV), that Sugarcreek Township is entitled to injunctive relief restraining Centerville from taking any action relating to the annexed land until the Court has an opportunity to rule on the merits of the Complaint (Count VI).

The Magistrate GRANTED the Declaratory Judgment requested by Sugarcreek Township in Count V of the Second Amended Complaint, that the City of Centerville may not implement a TIF on the annexed land, including both the 173.181 acres and the 94.987 acres.

The Magistrate decided that each Party is to bear its own costs.

### III. Court's Review of Objections to a Magistrate's Decision:

#### 1. Procedure

The procedure for a trial court to review a Magistrate's Decision is set forth in Civ.R. 53(D)(4)(a) through (e):

(4) *Action of court on magistrate's decision and on any objections to magistrate's decision; entry of judgment or interim order by court.* (a) *Action of court required.* A magistrate's decision is not effective unless adopted by the court. (b) *Action on magistrate's decision.* Whether or not objections are timely

09-03-3059

filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate. (c) *If no objections are filed.* If no timely objections are filed, the court may adopt a magistrate's decision, unless it determines that there is an error of law or other defect evident on the face of the magistrate's decision. (d) *Action on objections.* If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate. (e) *Entry of judgment or interim order by court.* A court that adopts, rejects, or modifies a magistrate's decision shall also enter a judgment or interim order.

2. Ohio Court of Appeals, Second Appellate District's Opinions on the Trial Court's Review of Objections to a Magistrate's Decision:

a. The trial Court must conduct an independent review:

"In reviewing the magistrate's decision, however, the trial court must conduct an independent, de novo, review of the magistrate's factual and legal conclusions:

A magistrate functions as an arm of the trial court, which is in no way bound to follow or accept the findings or recommendations of its magistrate. *Seagraves v. Seagraves* (August 25, 1995), Montgomery App. Nos. 15047 and 15069, unreported. In accordance with Civ.R. 53, the trial court must conduct an independent de novo review of the facts and conclusions contained in the magistrate's report and recommendations and enter its own judgment. *Dayton v. Whiting* (March 29, 1996), Montgomery App. No. 15432, unreported. The trial court may adopt the magistrate's findings, conclusions, and recommendations, but the court's discretion in that regard is not limited. Therefore, the court cannot abuse its discretion by rejecting some or all of its magistrate's findings."

69-03-3060

*Seagraves, supra.*

“The roles of a magistrate and the trial court are different. The function of a magistrate is to aid the court in the expedition of the court's business, not to act as a separate or substitute judicial officer. *Whiting, supra.*”

*Breece v. Breece*, 1999 WL 999759, (Ohio App. 2 Dist.,1999)

b. Sufficiency of review:

“We conclude that an order is sufficient for the purposes of Civ.R. 53(E)(4) if it announces that, upon independent review, the trial court has decided to adopt the magistrate's decision.”<sup>1</sup>

#### IV. Court's Review

The Court has independently reviewed the Magistrate's Decision filed on February 17, 2009, and each of the objected matters. The Court finds that no party has objected to the facts found in the “Undisputed Facts” in the Magistrate's Decision.

Applying the law to those undisputed facts, the Court determines that the Magistrate properly determined the factual issues and appropriately applied the law to Centerville's Motion for Summary Judgment and to Sugarcreek Township's (“Sugarcreek's”) Motion for Partial Summary Judgment.

Upon the Court's independent review, the Court **OVERRULES** every objection of Centerville (joined in by Dille Laboratories Corporation and the Charles A. Dille Trust), and every objection of Sugarcreek and **ADOPTS** the Magistrate's Decision filed on February 17, 2009 (copy attached) as the **ORDER** of the Court.

#### Centerville's Objections

Centerville objected to the Magistrate's Decision on the TIF issue.

The Court concludes that R.C. §709.023(H) mandates that the territory annexed by Centerville from Sugarcreek “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.”

---

<sup>1</sup> *Dayton Area School E.F.C.U. v. Nath*, 1998 WL 906397, (Ohio App. 2 Dist.,1998)

09-03-3061

Hence, Centerville is prohibited by law from implementing a Tax Increment Financing Plan that would in any way divert real property taxes on the annexed territory from Sugarcreek. Centerville, however, has committed in the Pre-Annexation Agreement to implement such a TIF Plan for the annexed territory.

Centerville argues that Sugarcreek did not have standing to raise the TIF issue, and that the TIF issue is not ripe for determination, because the Centerville Council has not enacted legislation and has no legislation pending to enact a Tax Increment Financing Plan on the annexed territory.

The Court concludes that the TIF issue, subject of Sugarcreek's Motion for Summary Judgment, is ripe for determination and for declaratory judgment, not on the basis of enacted or pending legislation to create a TIF on the annexed territory, but based on Centerville's commitment in the Pre-Annexation Agreement to enact a TIF that would divert real estate taxes for the annexed territory from Sugarcreek Township.

The Court also concludes that Sugarcreek has standing to request the Court's declaratory judgment that Centerville's commitment in the Pre-Annexation Agreement to create a TIF to enable Centerville to collect up to the maximum amount of payments *in lieu of taxes* which may be generated from the new development, would violate R.C. § 709.023(H) by diverting real property taxes for the annexed territory from Sugarcreek to Centerville. (emphasis supplied)

Centerville argues at page 5 of its objections that "The parties [City of Centerville, Dille Laboratories Corp. and Bear Creek Capital, LLC] set out their written intention not to enforce the TIF requirement [in the Pre-Annexation Agreement] in the Memorandum of Understanding executed on October 6, 2006, (Exhibit 77 to deposition of Greg Horn) ("MOU"). But the MOU does not express such an intention, and does not rescind, but leaves in place, Centerville's commitment to implement a TIF Plan for the annexed territory, that would divert real estate taxes from the Township.

09-031-3062

Paragraph 5 of the MOU, signed by the three signatories to the Pre-Annexation Agreement, states, “The parties agree to provide or review alternative financing options for the public road improvements in addition to TIF financing or in place of TIF financing, including considerations of special assessments....”

The Court concludes that by the plain language of the Memorandum of Understanding, its signatories did not annul, rescind, or cancel their commitment in the Pre-Annexation Agreement, paragraph 5(a), for the City of Centerville to present to the City Council legislation to create TIF financing. The Parties to the Pre-Annexation Agreement and the MOU, agreed to review alternatives to TIF financing, but did not commit to abandon TIF financing.

Such TIF financing by Centerville would divert real estate taxes from Sugarcreek Township to the City of Centerville, in violation of R.C. 709.023(H). The Court concludes that Centerville’s commitment in the Pre-Annexation Agreement, that would result in Centerville’s TIF for the annexed land, would divert real property taxes from Sugarcreek in violation of R.C. § 709.023(H).

The Court also concludes that R.C. § 5705.31(D) and other statutes referenced by Centerville for the first time in its objections to the Magistrate’s Decision, are subject to the specific, strict legislative mandate of R.C. § 709.023(H) that the real property taxes for the annexed territory from Sugarcreek Township to the City of Centerville must remain with the Township.

Accordingly, the Court **OVERRULES** every objection of Centerville to the Magistrate’s Decision.

The Court **DECLARES** that Centerville’s commitment in the Pre-Annexation Agreement to enact a TIF Plan for the annexed territory is in violation of R.C. § 709.023(H). The fact that the promised legislation enacting a TIF for the annexed land would also be in violation of R.C. § 709.023(H), does not negate the present violation, or the real and justiciable controversy, created by Centerville’s commitment in the Pre-Annexation Agreement to enact such TIF legislation in violation of R.C. § 709.023(H). That controversy

09-03-13 09:58

is appropriate for speedy relief from the Court that will resolve the controversy. Accordingly, Sugarcreek Township is entitled to declaratory judgment relief on the TIF issue.

The Court ORDERS by declaratory judgment that the territory annexed into Centerville pursuant to R.C. Section 709.023 shall not at any time be excluded from Sugarcreek Township under Section 503.07 of the Revised Code and, thus, the annexed territory remains subject to Sugarcreek Township's real property taxes, and may not be the subject of a Centerville TIF Plan that would in any way divert those real property taxes.

The Court OVERRULES all the objections filed by the City of Centerville, joined by Dille Laboratories Corporation and the Charles A. Dille Trust, to the Magistrate's decision filed on February 17, 2009.

Sugarcreek Township's Objections

Sugarcreek objected to the Magistrate's Decision on the annexation issues.

The Court has reviewed the arguments of Sugarcreek Township as to alleged defects in the annexation petition procedure before the Greene County Board of Commissioners, and as to Centerville's procedures for acceptance of the annexations. Upon its independent review, the Court concludes that the Magistrate properly determined the factual issues and appropriately applied the law to the issues involving the alleged defects in the owners' petition procedure and in Centerville's acceptance procedure.

In addition, the Court independently concludes that all of the annexation issues in this Case, as to the petition procedure under R.C. § 709.023 and related Sections, and Centerville's acceptance procedure, are resolved as a matter of law by the Opinion of the Court of Appeals of Ohio (2<sup>nd</sup> App. Dist.) in *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery County Bd. of County Com'rs* (2008), 2008-Ohio-6542, 2008 WL5196445, (Ohio App.2 Dist.)

The Court follows the precedent of the 2<sup>nd</sup> District Court of Appeals of Ohio, in *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery County Bd. of County Com'rs, supra*, to conclude as a matter of law that a judicial appeal by a Township of a §709.04 acceptance by a Municipal Corporation is "outside of that scheme" for a §709.023 annexation. Therefore Sugarcreek Township has no

09-03-3064

standing to bring a declaratory judgment action to this Court to challenge the acceptance of territory by the annexing municipal corporation, City of Centerville.

In the case of *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery County Bd. of County Com'rs, supra*, the Court of Appeals adopted the rationale of the 5<sup>th</sup> District Court of Appeals that reasoned that “[B]ecause township are creatures of statute and they have no inherent powers, and because “ ‘...[W]here the law provides a statutory scheme for review of an issue, injunction or declaratory action does not lie outside of that scheme....[T]herefore [A]ll of the trustees’ rights and claims are limited to the statutory scheme for annexation contained in Title VII of the Revised Code.’” The 5<sup>th</sup> District case relied upon by the 2<sup>nd</sup> District Court of Appeals of Ohio was *Washington Twp. Bd. of Trustees v. Mansfield City Council*, Richland App. Nos. 03CA85 and 03CA97, 2004-Ohio-4299, 2004 WL1813916(Ohio App. 5 Dist.).

The Case of *Washington Township Board of Trustees v. Mansfield City Council, supra*, involved a Section 709.023 annexation and a township’s judicial challenge to the legislative actions of Mansfield City Council. Just as Sugarcreek Township alleges in this case with respect to Centerville’s acceptance of the territory annexed from Sugarcreek Township, Washington Township alleged that Mansfield’s legislative action accepting annexing a parcel of property from Washington Township into Mansfield, was invalid. Washington Township sought a Declaratory Judgment to that effect.

“Finally, consistent herewith, we determine that the township lacks standing to file a declaratory judgment action herein as well. This very issue was litigated in *Washington Twp. Bd. of Trustees v. Mansfield City Council*, Richland App. Nos. 03 CA 85 and 03 CA 97, 2004-Ohio-4299. We agree with the analysis and disposition of this issue therein. The Fifth District Court of Appeals reasoned that because townships are creatures of statute and they have no inherent powers, and because “ ‘ \* \* \* [W]here the law provides a statutory scheme for review of an issue, injunction or declaratory action does not lie outside of that scheme. \* \* \* [Therefore] [A]ll of the trustees’ rights and claims are limited to the statutory scheme for annexation contained in Title VI I of the Revised Code.’ “ *Id.* at ¶ 34,

09-03-3065

quoting *Violet Twp. Bd. of Twp. Trustees v. City of Pickerington*, Fairfield App. No. 02-CA-41, 2003-Ohio-845.”

*State ex rel. Butler Tp. Bd. of Trustees v. Montgomery County Bd. of County Com'rs, supra.*

The Court concludes, independently, as a matter of law, based upon the undisputed facts of this Case, that Sugarcreek Township has no standing to bring a declaratory judgment action as to any of the alleged defects in the petitions that were granted by the Greene County Board of Commissioners, or as to alleged flaws in the City of Centerville’s acceptance process under R.C. § 709.04. Such challenges that Sugarcreek Township has brought before this Court are outside the statutory scheme of R.C. §709.023.

The Court OVERRULES all the objections filed by Sugarcreek Township to the Magistrate’s decision filed on February 17, 2009.

V. Order of Adoption and Judgment Entry

Accordingly, the Court:

A. ADOPTS as the Order of the Court the Magistrate’s Decision filed on February 17, 2009 (Copy Attached);

B. CONCLUDES that:

(1) The Annexations of the 173.181 acres and of the 94.982 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.

(2) Pursuant to R.C. § 709.023(H), territory annexed into Centerville shall not at any time be excluded from the township under Section 503.07 of the Revised Code and, thus, remains subject to Sugarcreek Township's real property taxes.

C. GRANTS the Motion for Partial Summary Judgment of Sugarcreek Township as to the TIF/real property tax issue.

09-03-3066

D. DENIES the City of Centerville's Motion for Summary Judgment (joined in by Dille Laboratories Corporation, Dille Trust and Bear Creek Capital, LLC) on the TIF/real property tax issue.

E. GRANTS the Motion for Summary Judgment of the City of Centerville, joined in by Intervening Defendants Dille Trust, Dille Laboratories Corporation, and Bear Creek Capital, LLC, on the annexation issues.

F. GRANTS Summary Judgment in favor of the City of Centerville and Intervening Defendants Dille Trust, Dille Laboratories Corporation, and Bear Creek Capital, LLC, against Sugarcreek Township, on Counts I, II, III, IV, and VI of Sugarcreek Township's Second Amended Complaint.

G. GRANTS Summary Judgment in favor of Sugarcreek Township against the City of Centerville on Count V of the Second Amended Complaint.

H. DENIES the Declaratory Judgment requested by Sugarcreek Township -that the resolutions of the Greene County Board of Commissioners that granted the annexation petitions for the 173.181 acres and the 94.987 acres were defective and invalid (Count I),

-that the City of Centerville's Resolution on October 9, 2006 was invalid because it violated Section 4.10(b) of the City of Centerville Municipal Charter (Count II),

-that the City of Centerville's Resolution on October 9, 2006 was invalid because it violated Section 4.09 of the City of Centerville Municipal Charter and R.C. § 121.22(F) (Count III),

-that both of the City of Centerville's Resolutions accepting the annexed territories of 173.181 acres and 94.987 acres, respectively, were invalid because they should have been enacted as ordinances and not resolutions and thereby violated the Centerville Charter (Count IV),

-that Sugarcreek Township is entitled to injunctive relief restraining Centerville from taking any action relating to the annexed land until the Court has an opportunity to rule on the merits of the Complaint (Count VI).

I. GRANTS the Declaratory Judgment requested by Sugarcreek Township in Count V of the Second Amended Complaint, and

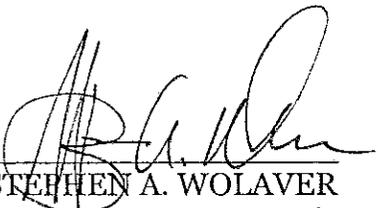
09-03-3067

J. DECLARES that the City of 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.

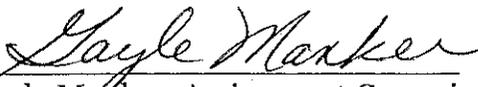
K. ORDERS that each Party shall bear its own costs.

This is a Final Appealable Order. There is no just cause for delay.

IT IS SO ORDERED

  
\_\_\_\_\_  
JUDGE STEPHEN A. WOLAVER  
3/17/9

CERTIFICATE OF SERVICE: A copy hereof was served upon:  
SCOTT D. PHILLIPS, ESQ., and JOSEPH W. WALKER, ESQ., 2200 PNC Center 201  
E. Fifth Street, Cincinnati, OH 45202 via facsimile (513) 870-0999  
RICHARD C. BRAHM, ESQ., 145 E. Rich Street, Columbus, OH 43215 via facsimile  
(614) 228-1472  
SCOTT A. LIBERMAN, ESQ., 1700 One Dayton Centre, One South Main Street,  
Dayton, OH 45402 via facsimile (937) 223-5100  
JOSEPH L. TRAUTH JR., ESQ, SEAN S. SUDER, ESQ., and TRENTON B.  
DOUTHETT, ESQ., One East Fourth Street, Suite 1400, Cincinnati, OH 45202 via  
facsimile (513) 579-5764  
BARRY W. MANCZ, ESQ. and JOHN M. CLOUD, ESQ., 2160 Kettering Tower,  
Dayton, OH 45423 via facsimile (937) 223-1649  
by faxing to them on the date of filing.

  
\_\_\_\_\_  
Gayle Marker, Assignment Commissioner

091-031-3068

2009 FEB 17 PM 3:01

TERRI A. MAZUR, CLERK  
COMMON PLEAS COURT  
GREENE COUNTY, OHIO

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO  
GENERAL DIVISION (CIVIL)

SUGARCREEK TOWNSHIP,

CASE NO. 2006 CV 0784

Plaintiff,

JUDGE STEPHEN A. WOLAVER  
MAGISTRATE GEORGE B. REYNOLDS

v.

CITY OF CENTERVILLE, et al.,  
Defendants.

MAGISTRATE'S DECISION ON  
SUGARCREEK TOWNSHIP'S MOTION  
FOR PARTIAL SUMMARY JUDGMENT  
AND ON CITY OF CENTERVILLE'S  
MOTION FOR SUMMARY JUDGMENT

---

I. Background:

The Parties to this Case were involved in mediation from March 2007 through September 2008 with concurrent litigation activity. A Case docket entry on November 7, 2007 indicated that the case was fully settled in mediation. The litigation activity was substantially suspended at that time. But the settlement failed.

On September 16, 2008, the Court Mediator informed the Court that the Parties could not perform their Memorandum of Understanding and that the Parties asked the Court to dispense with further mediation in the Case.

On September 24, 2008, the Court granted Plaintiff's Motion for Relief from Judgment filed on May 8, 2008 that had ordered that the case had been settled based upon the Parties' Memorandum of Understanding. As a result, the Court and the Parties dispensed with any further mediation activities.

On November 14, 2008, the parties requested a status conference to establish an oral argument date for pending motions for summary judgment. On November 18, 2008, the Court

09-03-3069

referred the motions for summary judgment to the Magistrate and ORDERED oral hearing on the motions to be held on January 12, 2009.

### Ruling

For the reasons stated herein, the Magistrate GRANTS the Motion for Partial Summary Judgment of Sugarcreek Township on the TIF issue and GRANTS the Motion for Summary Judgment of the City of Centerville, joined in by Dille Laboratories Corporation, Dille Trust and Bear Creek Capital, LLC, on the annexation issue.

The Magistrate DENIES the City of Centerville's Motion for Summary Judgment (joined in by Dille Laboratories Corporation, Dille Trust and Bear Creek Capital, LLC ) on the TIF issue.

### Case Scheduling Order and hearing on Motions for Summary Judgment

On December 9, 2008, the Court filed a Case Scheduling Order. The Order renewed the Court's November 18, 2008 Order of Referral of the Motions for Summary Judgment to the Magistrate. The Court ORDERED Oral Argument on the Motions, to be held on January 12, 2009 at 1:30 p.m. before the Magistrate. The hearing was held as scheduled.

At the hearing on January 12, 2009, Scott D. Phillips, Esq., and Joseph W. Walker, Esq., appeared on behalf of Plaintiff Sugarcreek Township. Richard C. Brahm, Esq. appeared on behalf of Defendant City of Centerville. Also present on behalf of the City of Centerville was Scott A. Liberman, Esq. John M. Cloud, Esq., appeared on behalf of the Dille Trust and the Dille Laboratories Corporation. Trenton B. Douthett, Esq., appeared on behalf of Bear Creek Capital, LLC.

### Sugarcreek Township's Complaints

Sugarcreek Township filed its Complaint for Declaratory Judgment on September 11, 2006. A Tax Increment Financing ("TIF") Plan issue was the only issue raised in the Complaint. Subsequently, Sugarcreek Township, with leave of Court, filed a First Amended Complaint for Declaratory Judgment and Injunctive Relief on May 18, 2007, and a Second Amended Complaint on September 21, 2007.

In the First Amended Complaint, Sugarcreek Township alleged causes of action not only for Declaratory Judgment on the TIF issue but also for Declaratory Judgment that the Resolutions by which the Greene County Board of Commissioners granted the annexation

petition of the owners of the land that the City of Centerville annexed from Sugarcreek Township, were “defected and invalid.” In the First Amended Complaint Sugarcreek Township also sought, in Count III, “Injunctive Relief restraining Centerville from taking any action relating to the Annexed Land, including but not limited to zoning, construction, development, demolition, or any other type of alteration or modification of the Annexed Land, including both roadways and structures, until this Court has an opportunity to rule on the merits of the Complaint.”

In Plaintiff’s Second Amended Complaint for Declaratory Judgment and Injunctive Relief filed on September 21, 2007, Plaintiff Sugarcreek Township sought Declaratory Judgment from the Court not only as to the TIF issues (Count V), but also as to the Board of Commissioners’ Resolutions granting annexation as previously pleaded in the First Amended Complaint (Count IV), and, in addition, Declaratory Judgment in Counts II and III that the City of Centerville’s Resolution on October 9, 2006 was invalid because it violated Section 4.10 (b) of the Centerville Charter “in that it was passed at a meeting that was improperly called.” In Count III, Plaintiff sought Declaratory Relief that the October 9, 2006 resolution was invalid because it was “passed at a meeting that was held without sufficient notice of purpose.”

Sugarcreek Township’s claim for Declaratory Judgment in Count I of the Second Amended Complaint was that the Greene County Board of Commissioners’ Resolutions for the annexation of two parcels were defective and invalid because the petitioners who executed and submitted the annexation petitions, Dille Trust and Dille Laboratories Corporation, did not constitute all the owners of the annexed land. Count I also alleged that without the participation of the other alleged owners, Greene County and the State of Ohio, the annexed land does not share at least a 5% contiguous and adjacent boundary with the City of Centerville as required by R.C. 709.021 and R.C. 709.023.

Centerville’s Motion for Summary Judgment

This matter is before the Magistrate on the Motion for Summary Judgment filed by the Defendant, City of Centerville, on August 8, 2007. On August 8, 2007, Centerville also filed Affidavits in support of its Motion for Summary Judgment.

09-03-3071

In the Motion for Summary Judgment, Centerville seeks a Summary Declaratory Judgment on both the issue of the annexation under O.R.C. S 709.023 and the issue of the TIF. On August 17, 2007, Centerville filed its Supplemental Motion for Summary Judgment.

On October 5, 2007, following Plaintiff's, Sugarcreek Township's, filing of its Second Amended Complaint on September 21, 2007, Centerville filed its Supplemental Motion for Summary Judgment as to Counts II, III, and IV of Plaintiff's Second Amended Complaint. On October 5, 2007, Centerville also filed its Clarification of Procedural Posture of Motions and Notice of Filing of Second Supplemental Motion for Summary Judgment.

On October 8, 2007, Plaintiff Sugarcreek Township filed its Memorandum in Opposition to Defendant City of Centerville's Motion for Summary Judgment. On October 18, 2007, Centerville filed its Reply in Support of its Motion for Summary Judgment.

Effective November 5, 2007, with leave of Court, Sugarcreek Township filed a "Sur-Reply" in Opposition to Centerville's Motion for Summary Judgment (file-stamped October 31, 2007).

On October 19, 2007, Defendants Dille Laboratories Corporation and Charles A. Dille Trust dated 1-16-1998, joined in the City of Centerville's original Motion for Summary Judgment, Supplemental Motion for Summary Judgment, and Second Supplemental Motion for Summary Judgment. On October 19, 2007, Defendant Bear Creek Capital, LLC joined in Defendant City of Centerville's original Motion for Summary Judgment, Supplemental Motion for Summary Judgment, and Second Supplemental Motion for Summary Judgment.

On December 5, 2008, Defendant City of Centerville filed a Supplemental Affidavit in support of its Motions for Summary Judgment.

On January 2, 2009, Defendant City of Centerville filed a "Notice of Additional Authority." Centerville brought to the Court's attention the December 12, 2008 decision of the 2<sup>nd</sup> District Court of Appeals of Ohio, *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 2008-Ohio-6542, which Defendant stated "is controlling authority on the annexation issues in this case."

Sugarcreek Township's Motion for Partial Summary Judgment

This matter is also before the Magistrate upon the Court's Order of Referral filed on September 24, 2008, for hearing and decision on Plaintiff's, Sugarcreek Township's Motion for

09-03-30712

Partial Summary Judgment on the Tax Increment Financing (“TIF”) Plan issue of the Second Amended Complaint filed on September 21, 2007. That issue was the only issue raised in Sugarcreek Township’s Complaint for Declaratory Judgment filed on September 11, 2006. Subsequently, Sugarcreek Township, with leave of Court, filed a First Amended Complaint for Declaratory Judgment and Injunctive Relief on May 18, 2007, and a Second Amended Complaint on September 21, 2007 that included Counts in addition to the TIF Count.

Plaintiff Sugarcreek Township seeks Summary Declaratory Judgment only on the TIF issue raised in its original Complaint. In that original Complaint for Declaratory Judgment filed on September 11, 2006, Sugarcreek Township sought a Declaratory Judgment from the Court that Defendant City of Centerville may not establish a Tax Increment Financing Plan (“TIF”) for land that it intended to annex from Sugarcreek Township because that land is already subject to a TIF enacted by Sugarcreek Township. Plaintiff also argued that O.R.C. § 709.023 (H) plainly states that Sugarcreek Township is entitled to all real property taxes from the annexed land that the City of Centerville has acted to annex from Sugarcreek Township. Sugarcreek Township argues that Centerville’s attempt to create a TIF would divert real property taxes and, therefore, would be unlawful. Sugarcreek Township argues that it has standing to bring its action pursuant to O.R.C. § 503.01. Sugarcreek Township alleges that the City of Centerville is a municipal corporation within the meaning of O.R.C. § 701.05 and may be named as a Defendant.

After Sugarcreek Township filed its First Amended Complaint and Second Amended Complaint with leave of Court, Sugarcreek Township did not file a supplemental Motion for Summary Judgment with respect to the new Counts Sugarcreek Township raised in the Amended Complaints.

On October 19, 2007, Defendants Dille Laboratories Corporation and Charles A. Dille Trust dated 1-16-1998 filed a Memorandum in Opposition to Plaintiff Sugarcreek Township’s “Partial Motion for Summary Judgment.” On October 22, 2007, Defendant City of Centerville filed its Memorandum in Opposition to Plaintiff’s, Sugarcreek Township’s, Motion for Partial Summary Judgment. On November 2, 2007, Plaintiff, Sugarcreek Township, filed a “Reply Brief” in support of its Motion for Partial Summary Judgment.

Summary

Centerville’s Motion for Summary Judgment

099 032 3073

Because of the evolving, expanding nature of Plaintiff's, Sugarcreek Township's, Complaint, First Amended Complaint, and Second Amended Complaint; and Centerville's related motions; in deciding the City of Centerville's "Motions for Summary Judgment, the Magistrate must consider Defendant's, City of Centerville's, Motion for Summary Judgment on the First Amended Complaint, Supplemental Motion for Summary Judgment on the First Amended Complaint, and Supplemental Motion for Summary Judgment as to Counts II, III, IV of Plaintiff's Second Amended Complaint, Sugarcreek Township's Memorandum in Opposition to Centerville's Motion for Summary Judgment filed after Centerville's Supplemental Motion for Summary Judgment, and Centerville's Reply following the Sugarcreek opposition, and Sugarcreek Township's "Sur-Reply" following the Centerville "Reply." The Magistrate will also consider Centerville's Supplemental Affidavit in Support of its Motions for Summary Judgment and its Notice of Additional Authority.

Centerville's Motions and Sugarcreek's Memoranda in Opposition are cumulative and, taken together, either seek or oppose Summary Judgment on all Counts of the Second Amended Complaint filed on September 21, 2007. The City of Centerville's Motions for Summary Judgment on all Counts of the Second Amended Complaint were joined in by intervening Defendants Dille Laboratories Corporation, Dille Trust, and Bear Creek Capital, LLC.

Sugarcreek Township's Motion for Partial Summary Judgment

Similarly, in deciding Sugarcreek's "Partial Motion for Summary Judgment," the Magistrate will consider Sugarcreek Township's Motion for Partial Summary Judgment on the TIF issue, Centerville's Opposition to that Motion, Dille Laboratories Corporation's and Charles A. Dille Trust dated 1-16-1998's, Opposition to Sugarcreek Township's "Partial Motion for Summary Judgment," and Sugarcreek Township's "Reply Brief" in support of its "Partial Motion for Summary Judgment" on the TIF issue.

II. Undisputed Facts:

A. Annexation:

This Case involves two petitions for annexation filed with, and granted by, the Greene County Board of Commissioners pursuant to O.R.C. § 709.023, *et seq.*, for annexation of land

09-03-3074

from Sugarcreek Township, Greene County, Ohio to the City of Centerville, Montgomery County, Ohio.

Petition for annexation of 173.181 acres

The first petition for annexation was filed with the Greene County Commissioners on May 24, 2006. The petition is entitled, "Petition for Annexation of 173.181 Acres, more or less, in Sugarcreek Township, Greene County, Ohio, to the City of Centerville, Ohio utilizing the special procedure of section R.C. Section 709.023 et seq." The owners who signed the first petition were Roger Pfister, Trustee under a living trust agreement executed by Charles A. Dille, Jr.; Roger Pfister, President, Dille Laboratories, Corp.; John Creasey, authorized representative of Sugarcreek Crossing, LLC; and John Creasey, authorized representative of Sugarcreek Crossing Permanent, LLC. Governmental entities, State of Ohio and Greene County, Ohio did not sign the petition. (James Affidavit, July 20, 2007, Exhibit 1)

In bold-faced print, the petitioning owners expressly waived their right to appeal in law or equity from the Greene County Board of County Commissioners' entry of any resolution under § 709.023 but reserved the right to seek a writ of mandamus to compel the board of county commissioners to perform its duties under Section 709.023. (James Affidavit, Exhibit 1) The right of "any party" to seek a writ of mandamus is statutorily conferred by O.R.C. Section 709.023(G).

Attached to the petition was a legal description of the territory to be annexed to the City of Centerville. (James Affidavit, Exhibit 1) In the petition for annexation, the owners recited that the annexation would not create an unincorporated area of the Township that would be completely surrounded by the territory proposed by annexation. The owners also stated that, "there is no annexation agreement between the municipality and township pursuant to O.R.C. Section 709.192 applicable to this annexation nor an applicable corporative economic development agreement (C.E.D.A.) pursuant to R.C. Section 701.07."

On May 24, 2006, Lisa Mock, Clerk, Greene County Board of Commissioners forwarded a copy of the annexation petition for the 173.181 acres to Robert N. Geyer, P.E., P.S., Greene County Engineer, Stephen T. Anderson, Executive Director, Regional Planning and Coordinating Commission of Greene County and to Stephen K. Haller, Greene County Prosecuting Attorney. On May 25, 2006 Mr. Geyer responded to Ms. Mock with his memo, subject: Annexation of

09-03-3075

173.135 acres, more or less to the City of Centerville. Mr. Geyer stated, "We have reviewed the above referenced petitions for annexation and find they meet the requirements for annexation. For the 94.987 acres the parcels are contiguous and the legal description and the plat meet the requirements. This involves five (5) parcels which includes right-of-way on Wilmington Pike dedicated to the County from Sugarcreek Plaza. The 173.181 acres remains as previously submitted."

On June 8, 2006, Stephen T. Anderson responded to Ms. Mock, stating, "I have reviewed the revised parcels inside and adjacent to and/or across the road from the territory to be annexed list, received on June 8, 2006 and I find that it meets the requirements of our review." (James Affidavit, Exhibit 1)

In her memorandum dated May 24, 2006 to Mr. Geyer, Mr. Anderson, and Mr. Haller, Ms. Mock, Clerk of the Greene County Board of Commissioners stated, "The Board will enter upon the journal the petition at the next regular meeting of the Board, Thursday, May 25, 2006, to begin the process for an 'Expedited Type 2' annexation."

In the petition for annexation, the petitioners appointed William Covell as agent as required by O.R.C. § 709.02. Mr. Covell filed an affidavit with the Clerk of the Board of Commissioners of Greene County attesting to his sending on May 24, 2006, i.e., within five days of the filing of the petition, to all the owners within the territory sought to be annexed and to all owners adjacent to the territory proposed to be annexed or adjacent to a road that is adjacent to that territory and located directly across the road from that territory, "Notice to owners and adjacent owners" of the filing of the petition for annexation with the required attachments. Mr. Covell also filed an affidavit with the Greene County Board of Commissioners attesting that he filed on May 25, 2006 with the Clerk of the City of Centerville, a copy of the petition for annexation as filed with the Board of Commissioners. Mr. Covell also sent a copy of the petition by certified mail to the Sugarcreek Township Fiscal Officer. The copy of the petition for annexation was received by the Sugarcreek Township Fiscal Officer on May 25, 2006. Mr. Covell's affidavit attesting to his service of the notice of filing of the petition for annexation on the Clerk of the City of Centerville and on the Fiscal Officer of Sugarcreek Township was filed with the Greene County Commissioners on June 2, 2006. (James Affidavit, Exhibit 1)

Centerville Service and Buffer resolutions for 173.181 acres

09-03-3076

The City Council, City of Centerville, Ohio, passed Resolution No. 26-06 on June 5, 2006, in which the Municipality of Centerville resolved that upon annexation to the City of Centerville, Ohio of the 173.181 acres, the City of Centerville would provide full-time police protection, police crime prevention, street maintenance, snow and ice removal, new street construction, traffic control, traffic signalization if necessary, engineering services, code enforcement, waste collection, cultural arts, zoning, building inspection and planning services. Such Resolution was mandated by O.R.C. § 709.023(C) as part of the 709.023 process. The Resolution was timely filed on June 6, 2006 with the Greene County Board of Commissioners, i.e., within the statutorily mandated twenty (20) days after the date that the petition for annexation of 173.181 acres was filed, May 24, 2006. (James Affidavit, Exhibit 1)

Similarly on June 5, 2006, the City Council, City of Centerville, Ohio, passed Resolution No. 27-06 in which the City of Centerville resolved to provide a buffer, as appropriate, under the circumstances described in the second paragraph of O.R.C. S 709.023(C). Resolution No. 27-06 appears to have been timely filed together with Resolution No. 26-06, on July 6, 2006, with the Greene County Board of Commissioners. (James Affidavit, Exhibit 1)

Neither Centerville nor Sugarcreek Township filed an ordinance or a resolution objecting to the proposed annexation of 173.181 acres

Neither Sugarcreek Township, nor the City of Centerville filed an ordinance or a resolution with the County Board of Commissioners objecting to or consenting to the petitioner's petition for annexation of the 173.181 acres.

Based on that fact, the Magistrate concludes as a matter of law, pursuant to O.R.C. § 709.023(D), that the Township's and the Municipal Corporation's failure to timely file an ordinance or resolution consenting or objecting to the proposed annexation was deemed to constitute consent by the Township and by the Municipal Corporation to the annexation of the 173.181 acres.

The Greene County Board of Commissioners Grants the Petition for Annexation of 173.181 acres.

On June 20, 2006, the Greene County Board of Commissioners granted the petition for annexation of the 173.181 acres in Sugarcreek Township to the City of Centerville.

09-09-3077

The Greene County Board of Commissioners in the Board's Resolution No. 06-6-20-11 stated, *inter alia*, that:

-William Covell, as Agent for petitioners, filed a petition on May 24, 2006 to annex the petitioners' property consisting of 173.181 acres in Sugarcreek Township to the City of Centerville.

-On May 25, 2006 the Board entered the petition upon its journal.

-"An annexation petition from the above-mentioned property owners was filed with the Board of Commissioners on April 5, 2006 and entered upon the Board's journal on April 11, 2006, by Resolution No. 06-4-11-8 requesting annexation of 173.135 acres, more or less, from Sugarcreek Township to the City of Centerville; and, whereas on April 27, 2006, the Sugarcreek Township Trustees, by Resolution 2006-04-26-02, filed an objection to the annexation petition stating the petition failed to meet the conditions specified in R.C. 709.023(E)(6) and that same petition should be denied and that the Board of Commissioners reviewed the petition and on May 18, 2006 by Resolution No. 06-5-18-6, the Board of Commissioners denied the annexation petition stating the City of Centerville had not demonstrated "an ability to provide the area proposed to be annexed with all of the services that are now provided or will be provided to Centerville properties and its residents...."

-"the above-mentioned property owners re-filed the same petition with the inclusion of a small parcel of property owned by the State of Ohio, increasing the acreage from 173.135 to 173.181 and the Sugarcreek Township Trustees did not file an objection to the annexation petition of 173.181, more or less.

The Board resolved that the Board of Greene County Commissioners "grants the petition for annexation of 173.181 acres, more or less, from Sugarcreek Township to the City of Centerville...."

Centerville accepts the annexation of 173.181 acres

On October 9, 2006 by Resolution No. 47-06 the City of Centerville resolved that the annexation of the 173.181 acres was accepted. (James Affidavit, Exhibit 2)

In her affidavit attached to Centerville's Motion for Summary Judgment, Clerk of the Centerville Council, Ms. Debra James, stated that,

09-03-3078

-On June 23, 2006, she received from the Clerk of the Greene County Board of Commissioners, a copy of the record of the Commissioners' proceedings on the petition for annexation of the 173.181 acres in Sugarcreek Township. Included in that record was the Resolution No. 06-6-20-11 of the Board of Commissioners of Greene County, whereby the Board of Commissioners granted the petition for annexation of the 173.181 acres.

-On September 18, 2006 she laid the Greene County Commissioners' Resolution No. 06-6-20-11 before the Council of the City of Centerville.

-September 18, 2006 was the next regular session of the Council of the City of Centerville, sixty days after she received the 173.181 acre annexation record from the Greene County Commissioners' Clerk.

-“The City of Centerville accepted the annexation of 173.181 acres in Sugarcreek Township, Greene County, Ohio on October 9, 2006 in Resolution No. 47-06. A true and accurate certified copy of Resolution No. 47-06 is attached to this Affidavit as Exhibit 2.”

Petition for annexation of 94.987 acres

The petition for annexation of 94.987 acres and related documents are included at Exhibit 3 to the Debra James Affidavit, attached to the August 8, 2007 City of Centerville's Motion for Summary Judgment.

On May 26, 2006, Petitioner Dille Laboratories Corp. filed a “Petition for Annexation of 94.987 acres, more or less, in Sugarcreek Township, Greene County, Ohio to the City of Centerville, Ohio utilizing the special procedure of section R.C. Section 709.023 et seq.”

On May 31, 2006 petitioner's Agent, Franklin E. Eck, Jr., filed with the Greene County Board of Commissioners, his affidavit attesting that he sent a notice to owners and adjacent owners of the filing of the petition for annexation together with the required attachments.

On May 31, 2006 petitioner's Agent, Franklin E. Eck, Jr., filed with the Greene County Board of Commissioners, his affidavit attesting to service of notice of filing of petition on the Municipal Clerk of the City of Centerville and on the Township Fiscal Officer of Sugarcreek Township, a copy of the petition for annexation and its attachments and the documents accompanying the petition as filed.

On June 27, 2006, the Greene County Board of Commissioners received a memorandum from Stephen T. Anderson, Executive Director, Regional Planning and Coordinating

09-03-3079

Commission of Greene County in which Mr. Anderson stated, "I have reviewed the revised parcels inside and adjacent to and/or across the road from the territory to be annexed list, received on June 26, 2006 and I find that it meets the requirements of our review."

Robert N. Geyer, P.E., P.S., Greene County Engineer's memorandum dated May 25, 2006 received by the Greene County Commissioners on May 26, 2006, in its subject referencing only the annexation of 173.135 acres, also stated, "for the 94.987 acres the parcels are contiguous and the legal description and the plat meet the requirements." (James Affidavit, Exhibit 1)

Centerville Service and Buffer Resolutions for 94.987 acres

On June 6, 2006, Debra A. James, Clerk of Council of the City of Centerville, filed with the Greene County Board of Commissioners, a copy of Resolution No. 28-06, a service resolution in support of the proposed annexation property containing 94.987 acres. The services that Centerville resolved to provide to the territory proposed for annexation were the same services as Centerville agreed to provide for the annexation of the 173.181 acres, by City of Centerville Resolution No. 26-06, listed above for that annexation.

On June 6, 2006, Debra A. James filed with the Greene County Board of Commissioners, a Resolution of the City of Centerville, County of Montgomery, State of Ohio regarding Zoning, Buffers in a proposed annexation of property containing 94.987 acres.

Sugarcreek Township files a resolution objecting to the annexation

Sugarcreek Township filed Resolution 2006-06-14-03 on June 19, 2006 with the Greene County Board of Commissioners providing notice that on June 19, 2006 Sugarcreek Township delivered to the Greene County Commissioners, Sugarcreek Township's Resolution Objecting to Petition of Annexation from Sugarcreek Township, pertaining to the 94.987 acres in Sugarcreek Township. In Sugarcreek Township's Resolution 2006-06-14-03, the Board of Trustees stated that the Board "believes it is in the best interest of the Township and its residents to object to the subject petition for the annexation of Township territory." The Township Trustees further stated, "be it resolved...that: the Board of Trustees hereby objects to the said proposed annexation petition and requests that the petition be denied on the ground that the petition fails to meet the conditions specified in R.C. 709.023(E)(1)." As a prefatory observation in its Resolution, the

06-03-3080

Board of Trustees stated, "it appears to the Board of Trustees that the petition does not comply with R.C. 709.023 and fails to meet the conditions for approval specified in R.C. 709.023(E)."

The Greene County Board of Commissioners Grants the Petition for Annexation of 94.987 acres.

By Resolution No. 06-7-6-27, the Greene County Board of Commissioners resolved that the petition for annexation of the 94.987 acres from Sugarcreek Township to the City of Centerville be granted. In its Resolution, the Board of Commissioners stated that Sugarcreek Township Trustees by Resolution No. 2006-06-14-03 on June 19, 2006, filed an objection to the annexation petition for the 94.987 acres stating that the petition failed to meet the conditions specified in R.C. 709.023 and that the petition should be denied. The Board of Commissioners also stated that the Board reviewed the petition for annexation on July 6, 2006 at an open meeting and that the only objection raised by the Township was found to be procedural in nature. The Board of Commissioners found that the petitioner, Roger Pfister, President of Dille Laboratories Corp. had a rational explanation for the alleged defect. Nowhere in the record, including the depositions filed in the Case, is there a description of the specific, "procedural," objection by Sugarcreek Township.

Centerville accepts the annexation of 94.987 acres

By Resolution No. 48-06 on October 16, 2006, the Council of the City of Centerville resolved that the annexation of the 94.987 acres to the City of Centerville from Sugarcreek Township was accepted. (James Affidavit, Exhibit 3)

In her Affidavit in support of the City of Centerville's Motion for Summary Judgment, Debra James, Centerville Clerk of Council, stated that,

-on July 20, 2006, she received from the Greene County Commissioners, a copy of the record of the Commissioners' proceedings on a petition filed on May 26, 2006 for the annexation of 94.987 acres in Sugarcreek, Township, Greene County, Ohio to the City of Centerville, Montgomery County, Ohio.

-October 16, 2006 was the next regular session of the Council of the City of Centerville, sixty (60) days after she received the 94.987 acre annexation record from the Greene County Board of Commissioners.

09-03-3081

-on that date, October 16, 2006, Ms. James laid Greene County Commissioners' Resolution No. 06-7-6-27 granting the 94.987 acres annexation, the accompanying petition and map or plat and the annexation record before the Council of the City of Centerville. Ms. James stated that "The City of Centerville accepted the annexation of 94.987 acres...on October 16, 2006 in Resolution No. 48-06."

As a conclusion of fact and law, the Magistrate concludes that Ms. James did not have to lay the petition granted by the Board of Commissioners, before the Centerville Council at the regular meeting on September 18, 2006. R.C. § 709.04 states in pertinent part, "At the next regular session of the legislative authority of the municipal corporation to which annexation is proposed, after the expiration of sixty days from the date of the delivery required by division (C)(1) of section...709.033 of the Revised Code, the auditor or clerk of the municipal corporation shall lay the resolution granting the petition...before the legislative authority." September 18, 2006 was the 60<sup>th</sup> day from the July 20, 2006 date of the Commissioners' delivery of the petition to the Centerville Council. Sixty days did not expire until the end of September 18, 2006, and the first day "after" such expiration was September 19, 2006. Therefore, Ms. James followed the statutorily required procedure for timely laying the petition before the Council at the next scheduled regular meeting on October 16, 2006, and not at the regular meeting on September 18, 2006.

**B. Tax Increment Financing ("TIF") Plan:**

Barry Tiffany, the Administrator for Sugarcreek Township, in his deposition on August 2, 2007 testified that Exhibit 12 to his deposition was a copy of the Resolution of the Sugarcreek Township Board of Trustees that created a Tax Increment Financing Plan in Sugarcreek Township. (Tiffany Exhibit p.35, LL.14-21)

Exhibit 12 is Sugarcreek Township Board of Trustees' Resolution No. 2006-04-20-01, "Declaring Improvements to Parcels of Real Property located in Sugarcreek Township, Ohio to be a public purpose under Section 5709.73(B) of the Ohio Revised Code, exempting such improvements from real property taxation, authorizing the execution of a service agreement and such other documents as may be necessary, establishing a Tax Increment Equivalent Fund." Exhibit A to the Board Resolution identified the parcel numbers of real property located within

06-03-3082

Sugarcreek Township, Greene County, Ohio that would be in the Sugarcreek Township TIF district.

According to the Debra James Affidavit, Exhibit 3, none of the parcel numbers included in the 94.987 acre annexation was included in the Sugarcreek Township TIF district identified in Exhibit 12 to the Tiffany deposition.

According to Exhibit 1 to the Debra James 7/20/07 Affidavit, pertaining to the 173.181 acres territory in the annexed land, that territory includes six of the parcel numbers included in Exhibit A to Exhibit 12 to the Tiffany deposition. Those six parcel numbers that are in both the legal description for the 173.181 acres to be annexed and are in the Sugarcreek Township TIF district are: L32000100020000100, L32000100020000200, L32000100020000800, L320001000200007900, L320001000200007800, and L320001000200007700.

Hence, some, but not all, of the real property included in the 173.181 acres annexed from the Sugarcreek Township to the City of Centerville was included in the Sugarcreek Township TIF District established by Sugarcreek Township Board of Trustees' Resolution adopted on April 20, 2006.

The date of the adoption of that TIF Resolution by the Sugarcreek Township Board of Trustees, April 20, 2006, was subsequent to the date the petition was filed with the Board of Commissioners on April 5, 2006 requesting annexation of 173.135 acres from Sugarcreek Township to the City of Centerville. But the date the TIF resolution was adopted, April 20, 2006, was prior to the date of May 18, 2006, the date that the Greene County Board of Commissioners denied the petition for Annexation of 171.135 acres in the Board's Resolution No. 06-5-18-6, and prior to the June 20, 2006 date on which the Greene County Board of Commissioners granted the petition for the annexation of 173.181 acres. (James 7/20/07 Affidavit, Exhibit 1, Greene County Board of Commissioners Resolution No. 06-6-20-11 granting Petition for Annexation of 173.181 acres.)

Subsequent to denying the application for annexation of 173.135 acres on May 18, 2006, on June 20, 2006, the Greene County Board of Commissioners passed Resolution No. 06-6-20-11 that granted the petition for the annexation of 173.181 acres, slightly more than the 173.135 acres previously petitioned for annexation by the Dille Living Trust, the Dille Laboratories Corp., Sugarcreek Crossing, LLC, and Sugarcreek Crossing Permanent, LLC. Petitioners had

09-03-3083

filed the petitions for the annexation of the 173.181 acres, with the Greene County Board of Commissioners, on April 5, 2006.

Centerville City council applied its zoning to the 173.181 acres and the 94.987 acres that were annexed by rezoning Ordinance No. 22-06 adopted November 20, 2006, Ordinance No. 23-06 adopted November 20, 2006, and Ordinance No. 1-07 adopted May 21, 2007. (See James Affidavit executed July 20, 2007, Exhibits 5, 6 and 7.)

Pre-Annexation Agreement:

Attached to Sugarcreek Township's Complaint for Declaratory Judgment is the "Pre-Annexation Agreement" entered into on April 5, 2006 by the City of Centerville, Dille Laboratories Corp., and Bear Creek Capital, LLC. Paragraph 5(a), Financing Improvements states,

"Coincident with the City's [Centerville's] approving the final plans for development of any portion of the Property that has been annexed to the City, the City shall as soon as practical take steps to present to the City Council legislation to create Tax Increment Financing (the "TIF Ordinance") to enable the City to collect up to the maximum amount of *payments in lieu of taxes* (emphasis added) which may be generated from the new development without approval from a school district. The payments made in lieu of taxes will be applied by the City to recoup and apply to the costs associated with the construction of the necessary public improvements. Pursuant to the TIF Ordinance, the City and Developer [Bear Creek Capital, LLC] shall enter into a public infrastructure agreement (the "Infrastructure Agreement"), pursuant to which the City and Developer agree to erect, construct, and maintain Public Improvements on the Property...."

In his deposition, Gregory B. Horn, City Manager for the City of Centerville, on July 16, 2007, testified that he is the Chief Administrative Officer responsible for the day-to-day activities of the City. Exhibit 77 to his deposition was a Memorandum of Understanding dated October 6, 2006, between the City of Centerville and Ohio Municipal Corporation, Dille Laboratories Corp., and Bear Creek Capital, LLC, an Ohio Limited Liability Company.

The three signatories to the October 6, 2006 Memorandum of Understanding were the same three entities that executed the April 5, 2006 Pre-Annexation Agreement attached as an Exhibit to the Sugarcreek Township's Complaint for Declaratory Judgment filed on September

09-03-3084

11, 2006. In that Memorandum of Understanding, as it pertained to TIF Financing, the Parties stated, "The parties agree to provide or review alternative financing options for the public road improvements in addition to TIF Financing or in place of TIF Financing, including consideration of the special assessments. The agreement will add a paragraph (d) that states 'That the City and the developer may set up or utilize special assessment financing to guarantee service payments in accordance with utilization of the TIF or, as an alternative or supplement to the TIF or will provide traditional CRA Financing.'"

The parties concluded the Memorandum of Understanding stating,

"...[A]ll parties agree to execute an Amendment to the Pre-Annexation Agreement incorporating the substance of the above changes."

There is no evidence that the parties to the Pre-Annexation Agreement and the Memorandum of Understanding have ever executed an Amendment to the Pre-Annexation Agreement, incorporating the changes in the Memorandum of Understanding.

### III. Conclusions of Law

#### A. Summary Judgment:

Summary judgment is proper when (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion is made, that conclusion is adverse to that party. *Harless v. Willis Day Warehousing Co., Inc.* (1978), 54 Ohio St.2d 64, 65-66, 375 N.E.2d 46.

"[A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." *Dresher v. Burt* (1976), 75 Ohio St.3d 280, 293, 662 N.E.2d 264.

If the moving party has satisfied this initial burden, the nonmoving party has a reciprocal burden under Civ.R. 56(E) to set forth facts showing there is a genuine issue for trial. *Id.* at 293, 662 N.E.2d 264.

The nonmoving party is entitled to have the evidence construed most strongly in his favor. *Zivich v. Mentor Soccer Club, Inc.*, (1998), 82 Ohio St. 3d 367, 369-370, 696 N.E.2d 201.

The burden of establishing that the material facts are not in dispute and that no genuine issue of facts exists is on the party moving for summary judgment. *Hamlin v. McAlpin Co.* (1964), 175 Ohio St. 517, 519-520, 196 N.E.2d 781.

When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleading, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E). A material fact is one which would affect the outcome of the suit under the applicable substantive law. *Needham v. Provident Bank* (1996), 110 Ohio App.3d 817, 826, 675 N.E.2d 514, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505.

B. Rule of Construction: Words in Statutes should not be considered to be redundant

“We begin by noting, a “basic rule of statutory construction requires that ‘words in statutes should not be construed to be redundant, nor should any words be ignored.’ (Internal citation omitted). Statutory language ‘must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.’ “ *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. Of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, ¶ 26.”  
*State ex rel. Overholser Builders, L.L.C. v. Clark Cty. Bd. of Commrs.*, 2008 WL 5104738, 6 (Ohio App. 2 Dist.) (Ohio App. 2 Dist.,2008)

C. A benchmark of Ohio Annexation Law: Property Owners Should have to Right to Choose the Political Subdivision to Which their Property will be Annexed.

“Finally, North Canton reminds us Ohio has long recognized one of the bench marks of annexation law is that property owners should have the right to choose the political subdivision to which their properties will be annexed. North Canton cites *Middletown v. McGee* (1988), 39 Ohio St.3d 286, as authority for the proposition that, in enacting the statutes governing

09-03-3086

annexation, one of the intentions of the legislature was to give the property owner freedom of choice as to which governmental subdivision his property will be located. However, it appears clear in the statutory scheme before us, the intention of the legislature was to exclude entities such as railroads from participation in certain types of annexation procedures.”

*N. Canton v. Canton*, 2005 WL 3547940, 2 (Ohio App. 5 Dist.) (Ohio App. 5 Dist., 2005)

D. O.R.C. § 709.021 provides three special procedures for annexations where all of the owners of real estate in the unincorporated territory of a township proposed for annexation sign the petition for annexation. One of the three special procedures is set forth in O.R.C. § 709.023.

O.R.C. § 709.021

“(A) When a petition signed by all of the owners of real estate in the unincorporated territory of a township proposed for annexation requests the annexation of that territory to a municipal corporation contiguous to that territory under one of the special procedures provided for annexation in sections 709.022, 709.023, and 709.024 of the Revised Code, the annexation proceedings shall be conducted under those sections to the exclusion of any other provisions of this chapter unless otherwise provided in this section or the special procedure section chosen.

“(B) Application for annexation shall be made by a petition filed with the clerk of the board of county commissioners of the county in which the territory is located, and the procedures contained in divisions (C), (D), and (E) of section 709.02 of the Revised Code shall be followed, except that all owners, not just a majority of owners, shall sign the petition. To be valid, each petition circulated for the special procedure in section 709.022 or 709.023 of the Revised Code shall contain the notice provided for in division (B) of section 709.022 or division (A) of section 709.023 of the Revised Code, whichever is applicable.

“(C) Except as otherwise provided in this section, only this section and sections 709.014, 709.015, 709.04, 709.10, 709.11, 709.12, 709.192, 709.20, and 709.21 of the Revised Code apply to the granting of an annexation described in this section.

09-03-3087

“(D) As used in sections 709.022 and 709.024 of the Revised Code, “party” or “parties” means the municipal corporation to which annexation is proposed, each township any portion of which is included within the territory proposed for annexation, and the agent for the petitioners.”

E. The Expedited Type II, Annexation Statute Applicable to this Case: O.R.C. §§ 709.023 Special procedure of annexing of land into municipal corporation when land is not to be excluded from township

“(A) A petition filed under section 709.021 of the Revised Code that requests to follow this section is for the special procedure of annexing land into a municipal corporation when, subject to division (H) of this section, the land also is not to be excluded from the township under section 503.07 of the Revised Code. The owners who sign this petition by their signature expressly waive their right to appeal in law or equity from the board of county commissioners' entry of any resolution under this section, waive any rights they may have to sue on any issue relating to a municipal corporation requiring a buffer as provided in this section, and waive any rights to seek a variance that would relieve or exempt them from that buffer requirement.

“The petition circulated to collect signatures for the special procedure in this section shall contain in boldface capital letters immediately above the heading of the place for signatures on each part of the petition the following: “WHOEVER SIGNS THIS PETITION EXPRESSLY WAIVES THEIR RIGHT TO APPEAL IN LAW OR EQUITY FROM THE BOARD OF COUNTY COMMISSIONERS' ENTRY OF ANY RESOLUTION PERTAINING TO THIS SPECIAL ANNEXATION PROCEDURE, ALTHOUGH A WRIT OF MANDAMUS MAY BE SOUGHT TO COMPEL THE BOARD TO PERFORM ITS DUTIES REQUIRED BY LAW FOR THIS SPECIAL ANNEXATION PROCEDURE.”

“(B) Upon the filing of the petition in the office of the clerk of the board of county commissioners, the clerk shall cause the petition to be entered upon the board's journal at its next regular session. This entry shall be the first official act of the board on the petition. Within five days after the filing of the petition, the agent for the petitioners shall notify in the manner and form specified in this division the clerk of the legislative authority of the municipal corporation to which annexation is proposed, the fiscal officer of each township any portion of which is

09-03-3088

included within the territory proposed for annexation, the clerk of the board of county commissioners of each county in which the territory proposed for annexation is located other than the county in which the petition is filed, and the owners of property adjacent to the territory proposed for annexation or adjacent to a road that is adjacent to that territory and located directly across that road from that territory. The notice shall refer to the time and date when the petition was filed and the county in which it was filed and shall have attached or shall be accompanied by a copy of the petition and any attachments or documents accompanying the petition as filed.

“Notice to a property owner is sufficient if sent by regular United States mail to the tax mailing address listed on the county auditor's records. Notice to the appropriate government officer shall be given by certified mail, return receipt requested, or by causing the notice to be personally served on the officer, with proof of service by affidavit of the person who delivered the notice. Proof of service of the notice on each appropriate government officer shall be filed with the board of county commissioners with which the petition was filed.

“(C) Within twenty days after the date that the petition is filed, the legislative authority of the municipal corporation to which annexation is proposed shall adopt an ordinance or resolution stating what services the municipal corporation will provide, and an approximate date by which it will provide them, to the territory proposed for annexation, upon annexation. The municipal corporation is entitled in its sole discretion to provide to the territory proposed for annexation, upon annexation, services in addition to the services described in that ordinance or resolution.

“If the territory proposed for annexation is subject to zoning regulations adopted under either Chapter 303. or 519. of the Revised Code at the time the petition is filed, the legislative authority of the municipal corporation also shall adopt an ordinance or resolution stating that, if the territory is annexed and becomes subject to zoning by the municipal corporation and that municipal zoning permits uses in the annexed territory that the municipal corporation determines are clearly incompatible with the uses permitted under current county or township zoning regulations in the adjacent land remaining within the township from which the territory was annexed, the legislative authority of the municipal corporation will require, in the zoning ordinance permitting the incompatible uses, the owner of the annexed territory to provide a buffer separating the use of the annexed territory and the adjacent land remaining within the township. For the purposes of this section, “buffer” includes open space, landscaping, fences,

09-03-3089

walls, and other structured elements; streets and street rights-of-way; and bicycle and pedestrian paths and sidewalks.

“The clerk of the legislative authority of the municipal corporation to which annexation is proposed shall file the ordinances or resolutions adopted under this division with the board of county commissioners within twenty days following the date that the petition is filed. The board shall make these ordinances or resolutions available for public inspection.

“(D) Within twenty-five days after the date that the petition is filed, the legislative authority of the municipal corporation to which annexation is proposed and each township any portion of which is included within the territory proposed for annexation may adopt and file with the board of county commissioners an ordinance or resolution consenting or objecting to the proposed annexation. An objection to the proposed annexation shall be based solely upon the petition's failure to meet the conditions specified in division (E) of this section.

“If the municipal corporation and each of those townships timely files an ordinance or resolution consenting to the proposed annexation, the board at its next regular session shall enter upon its journal a resolution granting the proposed annexation. If, instead, the municipal corporation or any of those townships files an ordinance or resolution that objects to the proposed annexation, the board of county commissioners shall proceed as provided in division (E) of this section. Failure of the municipal corporation or any of those townships to timely file an ordinance or resolution consenting or objecting to the proposed annexation shall be deemed to constitute consent by that municipal corporation or township to the proposed annexation.

“(E) Unless the petition is granted under division (D) of this section, not less than thirty or more than forty-five days after the date that the petition is filed, the board of county commissioners shall review it to determine if each of the following conditions has been met:

- (1) The petition meets all the requirements set forth in, and was filed in the manner provided in, section 709.021 of the Revised Code.
- (2) The persons who signed the petition are owners of the real estate located in the territory proposed for annexation and constitute all of the owners of real estate in that territory.
- (3) The territory proposed for annexation does not exceed five hundred acres.
- (4) The territory proposed for annexation shares a contiguous boundary with the municipal corporation to which annexation is proposed for a continuous length of at least five per cent of

09-03-3090

the perimeter of the territory proposed for annexation.

(5) The annexation will not create an unincorporated area of the township that is completely surrounded by the territory proposed for annexation.

(6) The municipal corporation to which annexation is proposed has agreed to provide to the territory proposed for annexation the services specified in the relevant ordinance or resolution adopted under division (C) of this section.

(7) If a street or highway will be divided or segmented by the boundary line between the township and the municipal corporation as to create a road maintenance problem, the municipal corporation to which annexation is proposed has agreed as a condition of the annexation to assume the maintenance of that street or highway or to otherwise correct the problem. As used in this section, "street" or "highway" has the same meaning as in section 4511.01 of the Revised Code.

"(F) Not less than thirty or more than forty-five days after the date that the petition is filed, if the petition is not granted under division (D) of this section, the board of county commissioners, if it finds that each of the conditions specified in division (E) of this section has been met, shall enter upon its journal a resolution granting the annexation. If the board of county commissioners finds that one or more of the conditions specified in division (E) of this section have not been met, it shall enter upon its journal a resolution that states which of those conditions the board finds have not been met and that denies the petition.

"(G) If a petition is granted under division (D) or (F) of this section, the clerk of the board of county commissioners shall proceed as provided in division (C)(1) of section 709.033 of the Revised Code, except that no recording or hearing exhibits would be involved. There is no appeal in law or equity from the board's entry of any resolution under this section, but any party may seek a writ of mandamus to compel the board of county commissioners to perform its duties under this section.

"(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

09-03-3091

Revised Code and, thus, remains subject to the township's real property taxes.

“(I) Any owner of land that remains within a township and that is adjacent to territory annexed pursuant to this section who is directly affected by the failure of the annexing municipal corporation to enforce compliance with any zoning ordinance it adopts under division (C) of this section requiring the owner of the annexed territory to provide a buffer zone, may commence in the court of common pleas a civil action against that owner to enforce compliance with that buffer requirement whenever the required buffer is not in place before any development of the annexed territory begins.”

F. Is a Township a “Party” under O.R.C. § 709.023(G)?

The Court of Appeals of Ohio (2 Dist.) has said “No:”

“While R.C. 709.023 expresses that any “party” may seek a writ of mandamus to compel the board of county commissioners to perform its duties under this section, it does not define party. Looking at R.C. 709.021(D), we find that the legislature has defined “party” as: “the municipal corporation to which annexation is proposed, each township any portion of which is included within the territory proposed for annexation, and the agent for the petitioners.” However, R.C. 709.021 specifically provides that that definition is only applicable to RC. 709.022 and 709.024. Surely, the omission of this definition from R.C. 709.023 was deemed significant by the General Assembly.

“Black's Law Dictionary, 6th Ed. defines “party” in the following terms: “[a] party is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or in equity, the party plaintiff or defendant, whether composed of one or more individuals and whether natural or legal persons; *all others who may be affected by the suit, indirectly or consequently, are persons interested but not parties.*” (emphasis supplied.) While an annexation proceeding is not, in strict legal terms, a legal suit, it is a legal proceeding brought by and in the name of the petitioners only, and before the board of county commissioners. And, while a board of township trustees or a municipal corporation may be interested persons, they are not, by general definition, “parties” to an annexation proceeding.”

\*

\*

09-03-3092

\*

“What is significant in trying to reconcile the appellate rights applicable to all three of these annexation proceedings, is that in all three, the statutory scheme sets forth specific requirements, and if those requirements are met, then the action by the board of county commissioners is merely ministerial and not discretionary.

\*

\*

\*

“Finally, in all three proceedings, it is contemplated that there is only very narrowly limited appeal, if any, from the board's action. In R.C. 709.022(B), it is provided that “[t]here is no appeal from the board's decision under this section in law or in equity.” In R.C. 709.023(G), it is provided that “[t]here is no appeal in law or equity from the board's entry of any resolution under this section, but any party may seek a writ of mandamus to compel the board of county commissioners to perform its duties under this section.” And, in R.C. 709.024(G), it is provided that “[a]n owner who signed the petition may appeal a decision of the board of county commissioners denying the proposed annexation under section 709.07 of the Revised Code. No other person has standing to appeal the board's decision in law or in equity. If the board grants the annexation, there shall be no appeal in law or in equity.”

“If we were to construe the Butler Township Trustees as a party to this expedited type II annexation, such as to give them standing to contest the granting of the application, we would be extending to them a greater right than they would have under either a type I or a type III expedited annexation, where the legislature has expressly chosen to define them as parties. And, if we were to find that the township has the right to file a declaratory judgment action, the township's rights would be greater than the affected property owners. In none of these expedited proceedings is it contemplated or provided that any person has the standing to contest the grant of an annexation petition that meets the statutory criteria.

*State ex rel. Butler Tp. Bd. of Trustees v. Montgomery County Bd. of County Com'rs*, L 5196445, 5 -6, 2008-Ohio-6542, (Ohio App. 2 Dist.,2008)

09-03-3093

G. A township does not have standing to bring a declaratory judgment action as to the Petition for annexation proceedings under O.R.C. § 709.023.

“Finally, consistent herewith, we determine that the township lacks standing to file a declaratory judgment action herein as well. This very issue was litigated in *Washington Twp. Bd. of Trustees v. Mansfield City Council*, Richland App. Nos. 03 CA 85 and 03 CA 97, 2004-Ohio-4299. We agree with the analysis and disposition of this issue therein. The Fifth District Court of Appeals reasoned that because townships are creatures of statute and they have no inherent powers, and because “ \* \* \* [W]here the law provides a statutory scheme for review of an issue, injunction or declaratory action does not lie outside of that scheme. \* \* \* [Therefore] [A]ll of the trustees' rights and claims are limited to the statutory scheme for annexation contained in Title VI I of the Revised Code.” “ Id. at ¶ 34, quoting *Violet Twp. Bd. of Twp. Trustees v. City of Pickerington*, Fairfield App. No. 02-CA-41, 2003-Ohio-845.”

*State ex rel. Butler Tp. Bd. of Trustees v. Montgomery County Bd. of County Com'rs*, L 5196445, 5 -6, 2008-Ohio-6542, (Ohio App. 2 Dist.,2008)

H. Declaratory Judgment

(1) “Whether to entertain a declaratory judgment action is normally confided to the sound discretion of the trial court.” *Smith v. Columbus Mun. Civ. Serv. Comm.* (1952), 158 Ohio St. 401, 402-403, 49 O.O. 277, 278, 109 N.E.2d 507, 508. *Commercial Union Ins. Co. v. Wheeling Pittsburgh Corp.* 106 Ohio App.3d 477, 481, 666 N.E.2d 571, 573 (Ohio App. 2 Dist.,1995)

(2) Three Prerequisite Elements to Obtaining a Declaratory Judgment

“Interestingly, the three prerequisite elements to obtaining a declaratory judgment, i. e., (1) a real controversy between parties, (2) a controversy which is justiciable in character, and (3) a situation where speedy relief is necessary to preserve the rights of the parties, found to exist in *Burger Brewing Co.*, supra, are the elements of justiciability found lacking in *Zangerle*, supra, and *Fortner*, supra.[FN3] For a real controversy to exist, Justice William Brown, in *Burger Brewing Co.*, at page 97, 296 N.E. 261, explained that a violation of the regulation was not necessary as long as there was a controversy between parties having adverse legal interests, of sufficient immediacy or reality. To determine whether the controversy was of a justiciable

09-03-3094

character or ripe, the court adopted the following two-fold test enunciated by Justice Harlan in *Toilet Goods Assn. v. Gardner* (1967), 387 U.S. 158, 162, 87 S.Ct. 1520, 1523, 18 L.Ed.2d 697:

“ \* \* \* first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied \* \* \* ”*Williams v. City of Akron*, 54 Ohio St.2d 136, 144, 374 N.E.2d 1378, 1383 (Ohio 1978)

(3) 2721.01 “Person” defined

As used in this chapter [Declaratory Judgment], “person” means any person, partnership, joint-stock company, unincorporated association, society, municipal corporation, or other corporation.

(4) 2721.02 Force and effect of declaratory judgments

“(A) Subject to division (B) of this section, courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for under this chapter. The declaration may be either affirmative or negative in form and effect. The declaration has the effect of a final judgment or decree....”

(5) 2721.03 Construction and validity of instrument

“Subject to division (B) of section 2721.02 of the Revised Code, any person interested under a deed, will, written contract, or other writing constituting a contract or any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in section 119.01 of the Revised Code, municipal ordinance, township resolution, contract, or franchise may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it....”

(6) 2721.04 Contract

“Subject to division (B) of section 2721.02 of the Revised Code, a contract may be construed by a declaratory judgment or decree either before or after there has been a breach of

09-03-3095

the contract.”

(7) 2721.06 Powers not restricted

“Sections 2721.03 to 2721.05 of the Revised Code do not limit or restrict the exercise of the general powers conferred by division (A) of section 2721.02 of the Revised Code in any action or proceeding in which declaratory relief is sought under this chapter and in which a judgment or decree will terminate the controversy or remove an uncertainty.”

(8) 2721.10 Determination of issues of fact

“When an action or proceeding in which declaratory relief is sought under this chapter involves the determination of an issue of fact, that issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the action or proceeding is pending.”

I. Sugarcreek Township has standing to bring a Declaratory Judgment Action as to its rights to real property taxes for annexed territory

“Upon consideration of the foregoing, this court finds that the trial court did not err by finding that appellee, Sylvania Township, had standing to bring a declaratory judgment action pursuant to R.C. 2721.03 as to those annexation covenants at issue in the related Ralston case.” *Board of Trustees of Sylvania Tp. v. Board of Com'rs of Lucas County* 2002 WL 1729895, 4 (Ohio App. 6 Dist.) (Ohio App. 6 Dist., 2002)

“On discretionary appeal and motion to consolidate case with 2002-1485, Sylvania v. Ralston, Lucas App. No. L-01-1448, 2002-Ohio-3575. Appeal not accepted and motion denied.” *Sylvania Twp. Bd. of Trustees v. Lucas Cty. Bd. of Commrs*, (2002), 97 Ohio St.3d 1483, 2002-Ohio-6866.

J. R.C. Section 503.01 Incorporation of civil townships; corporate powers; real property acquisitions and appraisals

“Each civil township is a body politic and corporate, for the purpose of enjoying and exercising the rights and privileges conferred upon it by law. It may sue and be sued, plead and be impleaded, and receive and hold real estate by devise or deed, or receive and hold personal

09-03-3096

property for the benefit of the township for any useful purpose. The board of township trustees shall hold such property in trust for the township for the purpose specified in the devise, bequest, or deed of gift. Such board may also receive any conveyance of real estate to the township, when necessary to secure or pay a debt or claim due such township, and may sell and convey real estate so received. The proceeds of such sale shall be applied to the fund to which such debt or claim belonged. The board of township trustees may acquire real property within the unincorporated territory of the township in order to provide needed public improvements to the property pursuant to sections 5709.73 to 5709.75 of the Revised Code. The board of township trustees may enter into contracts with municipal corporations pursuant to section 715.70, 715.71, or 715.72 of the Revised Code, and with counties pursuant to division (D) of section 715.72 of the Revised Code, to create a joint economic development district.

“Whenever the board finds it necessary to determine the value of any real property the township owns or proposes to acquire by purchase, lease, or otherwise, the board may employ for reasonable compensation competent appraisers to advise it of the value of the property or expert witnesses to testify to the value in an appropriation proceeding.”

K. Delivery Required To Municipal Corporation If County Commissioners’ Resolution Granting Annexation Petition

R.C. § 709.033 (C)(1)

“If the board granted the petition for annexation, the clerk shall deliver a certified copy of the entire record of the annexation proceedings, including all resolutions of the board, signed by a majority of the members of the board, the petition, map, and all other papers on file, the recording of the proceedings, if a copy is available, and exhibits presented at the hearing relating to the annexation proceedings, to the auditor or clerk of the municipal corporation to which annexation is proposed.”

L. A Municipal Corporation’s Acceptance of Annexation

O.R.C. § 709.04 Acceptance or rejection of annexation by legislative authority

09-03-3097

“At the next regular session of the legislative authority of the municipal corporation to which annexation is proposed, after the expiration of sixty days from the date of the delivery required by division (C) of section 709.022 or division (C)(1) of section 709.033 of the Revised Code, the auditor or clerk of that municipal corporation shall lay the resolution of the board granting the petition and the accompanying map or plat and petition before the legislative authority. The legislative authority, by resolution or ordinance, then shall accept or reject the petition for annexation. If the legislative authority fails to pass an ordinance or resolution accepting the petition for annexation within a period of one hundred twenty days after those documents are laid before it by the auditor or clerk, the petition for annexation shall be considered rejected by the legislative authority.”

M. Sugarcreek Township does not have standing to bring a declaratory judgment action seeking a declaration that the Municipality, the City of Centerville, did not properly accept the annexation granted by the Greene county Board of Commissioners.

In an annexation proceeding governed by R.C. Section 709.023, et seq., the Second District Court of Appeals has also made it clear that a township does not have standing to bring a declaratory judgment action challenging the validity of a municipal corporation’s resolutions accepting annexations granted under the procedures of R.C. Section 709.023.

In the case of *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery County Bd. of County Com’rs* (2008), 2008-Ohio-6542, 2008 WL5196445, (Ohio App.2 Dist.), the Court of Appeals adopted the rationale of the 5<sup>th</sup> District Court of Appeals that reasoned that “[B]ecause township are creatures of statute and they have no inherent powers, and because “ ‘...[W]here the law provides a statutory scheme for review of an issue, injunction or declaratory action does not lie outside of that scheme....[T]herefore [A]ll of the trustees’ rights and claims are limited to the statutory scheme for annexation contained in Title VII of the Revised Code.’” The 5<sup>th</sup> District case relied upon by the 2<sup>nd</sup> District Court of Appeals of Ohio was *Washington Twp. Bd. of Trustees v. Mansfield City Council*, Richland App. Nos. 03CA85 and 03CA97, 2004-Ohio-4299, 2004 WL1813916(Ohio App. 5 Dist.).

The Case of *Washington Township Board of Trustees v. Mansfield City Council*, *supra*, involved a Section 709.023 annexation and a township’s judicial challenge to the legislative

09-03-3098

actions of Mansfield City Council. Washington Township alleged that Mansfield's legislative action accepting annexing a parcel of property from Washington Township into Mansfield, was invalid. Washington Township sought a Declaratory Judgment to that effect.

The 5<sup>th</sup> District Court of Appeals found that the statutory scheme for 709.023 annexations did not include a right of the township to challenge the acceptance procedure by the municipal corporation. The 2<sup>nd</sup> District Court of Appeals in *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery County Board of Com'rs, supra*, adopted the reasoning of the 5<sup>th</sup> District Court of Appeals that decided that the statutory scheme for annexation under 709.023 allowed only that court action expressly granted a township by 709.023, et seq.

N. R.C. § 121.22 Meetings of public bodies to be open; exceptions; notice

“(A) This section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law.

(B) As used in this section:

(1) “Public body” means any of the following:

(a) Any board, commission, committee, council, or similar decision-making body of a state agency, institution, or authority, and any legislative authority or board, commission, committee, council, agency, authority, or similar decision-making body of any county, township, municipal corporation, school district, or other political subdivision or local public institution;

\*

\*

\*

(2) “Meeting” means any prearranged discussion of the public business of the public body by a majority of its members.

09-03-3099

\*  
\*  
\*

(C) All meetings of any public body are declared to be public meetings open to the public at all times. A member of a public body shall be present in person at a meeting open to the public to be considered present or to vote at the meeting and for purposes of determining whether a quorum is present at the meeting.

The minutes of a regular or special meeting of any public body shall be promptly prepared, filed, and maintained and shall be open to public inspection. The minutes need only reflect the general subject matter of discussions in executive sessions authorized under division (G) or (J) of this section.

\*  
\*  
\*

(F) Every public body, by rule, shall establish a reasonable method whereby any person may determine the time and place of all regularly scheduled meetings and the time, place, and purpose of all special meetings. A public body shall not hold a special meeting unless it gives at least twenty-four hours' advance notice to the news media that have requested notification, except in the event of an emergency requiring immediate official action. In the event of an emergency, the member or members calling the meeting shall notify the news media that have requested notification immediately of the time, place, and purpose of the meeting.

The rule shall provide that any person, upon request and payment of a reasonable fee, may obtain reasonable advance notification of all meetings at which any specific type of public business is to be discussed. Provisions for advance notification may include, but are not limited to, mailing the agenda of meetings to all subscribers on a mailing list or mailing notices in self-addressed,

09-03-3100

stamped envelopes provided by the person.

\*

\*

\*

(H) A resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body. A resolution, rule, or formal action adopted in an open meeting that results from deliberations in a meeting not open to the public is invalid unless the deliberations were for a purpose specifically authorized in division (G) or (J) of this section and conducted at an executive session held in compliance with this section. A resolution, rule, or formal action adopted in an open meeting is invalid if the public body that adopted the resolution, rule, or formal action violated division (F) of this section.

(I)(1) Any person may bring an action to enforce this section. An action under division (I)(1) of this section shall be brought within two years after the date of the alleged violation or threatened violation. Upon proof of a violation or threatened violation of this section in an action brought by any person, the court of common pleas shall issue an injunction to compel the members of the public body to comply with its provisions.

\*

\*

\*

\*

R.C. § 121.22

09-03-3101

O. R.C. § 1.59 Definitions of specific terms

“As used in any statute, unless another definition is provided in that statute or a related statute:

\*  
\*  
\*

(C) “Person” includes an individual, corporation, business trust, estate, trust, partnership, and association.

\*  
\*  
\*  
\*

P. Tax Increment Financing (“TIF”) Plan  
Townships

R.C. §.5709.73 Township public improvements; exemption from taxation; financing; objections

“(A) As used in this section and section 5709.74 of the Revised Code:

(1) “Business day” means a day of the week excluding Saturday, Sunday, and a legal holiday as defined in section 1.14 of the Revised Code.

(2) “Further improvements” or “improvements” means the increase in the assessed value of real property that would first appear on the tax list and duplicate of real and public utility property after the effective date of a resolution adopted under this section were it not for the exemption granted by that resolution. For purposes of division (B) of this section, “improvements” do not include any property used or to be used for residential purposes.

(3) “Housing renovation” means a project carried out for residential purposes.

(4) “Incentive district” has the same meaning as in section 5709.40 of the Revised Code, except

that a blighted area is in the unincorporated area of a township.

(5) "Project" and "public infrastructure improvement" have the same meanings as in section 5709.40 of the Revised Code.

(B) A board of township trustees may, by unanimous vote, adopt a resolution that declares to be a public purpose any public infrastructure improvements made that are necessary for the development of certain parcels of land located in the unincorporated area of the township. Except with the approval under division (D) of this section of the board of education of each city, local, or exempted village school district within which the improvements are located, the resolution may exempt from real property taxation not more than seventy-five per cent of further improvements to a parcel of land that directly benefits from the public infrastructure improvements, for a period of not more than ten years. The resolution shall specify the percentage of the further improvements to be exempted and the life of the exemption.

(C)(1) A board of township trustees may adopt, by unanimous vote, a resolution creating an incentive district and declaring improvements to parcels within the district to be a public purpose and, except as provided in division (F) of this section, exempt from taxation as provided in this section, but no board of township trustees of a township that has a population that exceeds twenty-five thousand, as shown by the most recent federal decennial census, shall adopt a resolution that creates an incentive district if the sum of the taxable value of real property in the proposed district for the preceding tax year and the taxable value of all real property in the township that would have been taxable in the preceding year were it not for the fact that the property was in an existing incentive district and therefore exempt from taxation exceeds twenty-five per cent of the taxable value of real property in the township for the preceding tax year. The district shall be located within the unincorporated area of the township and shall not include any territory that is included within a district created under division (B) of section 5709.78 of the Revised Code. The resolution shall delineate the boundary of the district and specifically identify each parcel within the district. A district may not include any parcel that is or has been exempted from taxation under division (B) of this section or that is or has been within another district created under this division. A resolution may create more than one district, and more than one resolution may be adopted under division (C)(1) of this section.

(2) Not later than thirty days prior to adopting a resolution under division (C)(1) of this section,

09-03-3103

if the township intends to apply for exemptions from taxation under section 5709.911 of the Revised Code on behalf of owners of real property located within the proposed incentive district, the board shall conduct a public hearing on the proposed resolution. Not later than thirty days prior to the public hearing, the board shall give notice of the public hearing and the proposed resolution by first class mail to every real property owner whose property is located within the boundaries of the proposed incentive district that is the subject of the proposed resolution.

(3)(a) A resolution adopted under division (C)(1) of this section shall specify the life of the incentive district and the percentage of the improvements to be exempted, shall designate the public infrastructure improvements made, to be made, or in the process of being made, that benefit or serve, or, once made, will benefit or serve parcels in the district. The resolution also shall identify one or more specific projects being, or to be, undertaken in the district that place additional demand on the public infrastructure improvements designated in the resolution. The project identified may, but need not be, the project under division (C)(3)(b) of this section that places real property in use for commercial or industrial purposes.

A resolution adopted under division (C)(1) of this section on or after the effective date of this amendment shall not designate police or fire equipment as public infrastructure improvements, and no service payment provided for in section 5709.74 of the Revised Code and received by the township under the resolution shall be used for police or fire equipment.

(b) A resolution adopted under division (C)(1) of this section may authorize the use of service payments provided for in section 5709.74 of the Revised Code for the purpose of housing renovations within the incentive district, provided that the resolution also designates public infrastructure improvements that benefit or serve the district, and that a project within the district places real property in use for commercial or industrial purposes. Service payments may be used to finance or support loans, deferred loans, and grants to persons for the purpose of housing renovations within the district. The resolution shall designate the parcels within the district that are eligible for housing renovations. The resolution shall state separately the amount or the percentages of the expected aggregate service payments that are designated for each public infrastructure improvement and for the purpose of housing renovations.

(4) Except with the approval of the board of education of each city, local, or exempted village school district within the territory of which the incentive district is or will be located, and subject

4018-80-60  
090373104

to division (E) of this section, the life of an incentive district shall not exceed ten years, and the percentage of improvements to be exempted shall not exceed seventy-five per cent. With approval of the board of education, the life of a district may be not more than thirty years, and the percentage of improvements to be exempted may be not more than one hundred per cent. The approval of a board of education shall be obtained in the manner provided in division (D) of this section f [FN1].

(D) Improvements with respect to a parcel may be exempted from taxation under division (B) of this section, and improvements to parcels within an incentive district may be exempted from taxation under division (C) of this section, for up to ten years or, with the approval of the board of education of the city, local, or exempted village school district within which the parcel or district is located, for up to thirty years. The percentage of the improvements exempted from taxation may, with such approval, exceed seventy-five per cent, but shall not exceed one hundred per cent. Not later than forty-five business days prior to adopting a resolution under this section declaring improvements to be a public purpose that is subject to approval by a board of education under this division, the board of township trustees shall deliver to the board of education a notice stating its intent to adopt a resolution making that declaration. The notice regarding improvements with respect to a parcel under division (B) of this section shall identify the parcels for which improvements are to be exempted from taxation, provide an estimate of the true value in money of the improvements, specify the period for which the improvements would be exempted from taxation and the percentage of the improvements that would be exempted, and indicate the date on which the board of township trustees intends to adopt the resolution. The notice regarding improvements made under division (C) of this section to parcels within an incentive district shall delineate the boundaries of the district, specifically identify each parcel within the district, identify each anticipated improvement in the district, provide an estimate of the true value in money of each such improvement, specify the life of the district and the percentage of improvements that would be exempted, and indicate the date on which the board of township trustees intends to adopt the resolution. The board of education, by resolution adopted by a majority of the board, may approve the exemption for the period or for the exemption percentage specified in the notice; may disapprove the exemption for the number of years in excess of ten, may disapprove the exemption for the percentage of the improvements to be

09-03-3105

exempted in excess of seventy-five per cent, or both; or may approve the exemption on the condition that the board of township trustees and the board of education negotiate an agreement providing for compensation to the school district equal in value to a percentage of the amount of taxes exempted in the eleventh and subsequent years of the exemption period or, in the case of exemption percentages in excess of seventy-five per cent, compensation equal in value to a percentage of the taxes that would be payable on the portion of the improvements in excess of seventy-five per cent were that portion to be subject to taxation, or other mutually agreeable compensation.

The board of education shall certify its resolution to the board of township trustees not later than fourteen days prior to the date the board of township trustees intends to adopt the resolution as indicated in the notice. If the board of education and the board of township trustees negotiate a mutually acceptable compensation agreement, the resolution may declare the improvements a public purpose for the number of years specified in the resolution or, in the case of exemption percentages in excess of seventy-five per cent, for the exemption percentage specified in the resolution. In either case, if the board of education and the board of township trustees fail to negotiate a mutually acceptable compensation agreement, the resolution may declare the improvements a public purpose for not more than ten years, and shall not exempt more than seventy-five per cent of the improvements from taxation. If the board of education fails to certify a resolution to the board of township trustees within the time prescribed by this section, the board of township trustees thereupon may adopt the resolution and may declare the improvements a public purpose for up to thirty years or, in the case of exemption percentages proposed in excess of seventy-five per cent, for the exemption percentage specified in the resolution. The board of township trustees may adopt the resolution at any time after the board of education certifies its resolution approving the exemption to the board of township trustees, or, if the board of education approves the exemption on the condition that a mutually acceptable compensation agreement be negotiated, at any time after the compensation agreement is agreed to by the board of education and the board of township trustees.

If a board of education has adopted a resolution waiving its right to approve exemptions from taxation under this section and the resolution remains in effect, approval of such exemptions by the board of education is not required under division (D) of this section. If a board of education

09-03-2106

has adopted a resolution allowing a board of township trustees to deliver the notice required under division (D) of this section fewer than forty-five business days prior to adoption of the resolution by the board of township trustees, the board of township trustees shall deliver the notice to the board of education not later than the number of days prior to the adoption as prescribed by the board of education in its resolution. If a board of education adopts a resolution waiving its right to approve exemptions or shortening the notification period, the board of education shall certify a copy of the resolution to the board of township trustees. If the board of education rescinds the resolution, it shall certify notice of the rescission to the board of township trustees.

If the board of township trustees is not required by division (D) of this section to notify the board of education of the board of township trustees' intent to declare improvements to be a public purpose, the board of township trustees shall comply with the notice requirements imposed under section 5709.83 of the Revised Code before taking formal action to adopt the resolution making that declaration, unless the board of education has adopted a resolution under that section waiving its right to receive the notice.

(E)(1) If a proposed resolution under division (C)(1) of this section exempts improvements with respect to a parcel within an incentive district for more than ten years, or the percentage of the improvement exempted from taxation exceeds seventy-five per cent, not later than forty-five business days prior to adopting the resolution the board of township trustees shall deliver to the board of county commissioners of the county within which the incentive district is or will be located a notice that states its intent to adopt a resolution creating an incentive district. The notice shall include a copy of the proposed resolution, identify the parcels for which improvements are to be exempted from taxation, provide an estimate of the true value in money of the improvements, specify the period of time for which the improvements would be exempted from taxation, specify the percentage of the improvements that would be exempted from taxation, and indicate the date on which the board of township trustees intends to adopt the resolution.

(2) The board of county commissioners, by resolution adopted by a majority of the board, may object to the exemption for the number of years in excess of ten, may object to the exemption for the percentage of the improvement to be exempted in excess of seventy-five per cent, or both. If

09-03-3107

the board of county commissioners objects, the board may negotiate a mutually acceptable compensation agreement with the board of township trustees. In no case shall the compensation provided to the board of county commissioners exceed the property taxes foregone due to the exemption. If the board of county commissioners objects, and the board of county commissioners and board of township trustees fail to negotiate a mutually acceptable compensation agreement, the resolution adopted under division (C)(1) of this section shall provide to the board of county commissioners compensation in the eleventh and subsequent years of the exemption period equal in value to not more than fifty per cent of the taxes that would be payable to the county or, if the board of county commissioner's objection includes an objection to an exemption percentage in excess of seventy-five per cent, compensation equal in value to not more than fifty per cent of the taxes that would be payable to the county, on the portion of the improvement in excess of seventy-five per cent, were that portion to be subject to taxation. The board of county commissioners shall certify its resolution to the board of township trustees not later than thirty days after receipt of the notice.

(3) If the board of county commissioners does not object or fails to certify its resolution objecting to an exemption within thirty days after receipt of the notice, the board of township trustees may adopt its resolution, and no compensation shall be provided to the board of county commissioners. If the board of county commissioners timely certifies its resolution objecting to the trustees' resolution, the board of township trustees may adopt its resolution at any time after a mutually acceptable compensation agreement is agreed to by the board of county commissioners and the board of township trustees, or, if no compensation agreement is negotiated, at any time after the board of township trustees agrees in the proposed resolution to provide compensation to the board of county commissioners of fifty per cent of the taxes that would be payable to the county in the eleventh and subsequent years of the exemption period or on the portion of the improvement in excess of seventy-five per cent, were that portion to be subject to taxation.

(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 a resolution creating an incentive district under division (C)(1) of this

09-03-3108

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 5709.74 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 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 families;
- (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

09-03-3109

program.

(G) An exemption from taxation granted under this section commences with the tax year specified in the resolution so long as the year specified in the resolution commences after the effective date of the resolution. If the resolution specifies a year commencing before the effective date of the resolution or specifies no year whatsoever, the exemption commences with the tax year in which an exempted improvement first appears on the tax list and duplicate of real and public utility property and that commences after the effective date of the resolution. Except as otherwise provided in this division, the exemption ends on the date specified in the resolution as the date the improvement ceases to be a public purpose or the incentive district expires, or ends on the date on which the public infrastructure improvements and housing renovations are paid in full from the township public improvement tax increment equivalent fund established under section 5709.75 of the Revised Code, whichever occurs first. The exemption of an improvement with respect to a parcel or within an incentive district may end on a later date, as specified in the resolution, if the board of township trustees and the board of education of the city, local, or exempted village school district within which the parcel or district is located have entered into a compensation agreement under section 5709.82 of the Revised Code with respect to the improvement and the board of education has approved the term of the exemption under division (D) of this section, but in no case shall the improvement be exempted from taxation for more than thirty years. The board of township trustees may, by majority vote, adopt a resolution permitting the township to enter into such agreements as the board finds necessary or appropriate to provide for the construction or undertaking of public infrastructure improvements and housing renovations. Any exemption shall be claimed and allowed in the same or a similar manner as in the case of other real property exemptions. If an exemption status changes during a tax year, the procedure for the apportionment of the taxes for that year is the same as in the case of other changes in tax exemption status during the year.

(H) The board of township trustees may issue the notes of the township to finance all costs pertaining to the construction or undertaking of public infrastructure improvements and housing renovations made pursuant to this section. The notes shall be signed by the board and attested by the signature of the township fiscal officer, shall bear interest not to exceed the rate provided in section 9.95 of the Revised Code, and are not subject to Chapter 133. of the Revised Code. The

09-03-3110

resolution authorizing the issuance of the notes shall pledge the funds of the township public improvement tax increment equivalent fund established pursuant to section 5709.75 of the Revised Code to pay the interest on and principal of the notes. The notes, which may contain a clause permitting prepayment at the option of the board, shall be offered for sale on the open market or given to the vendor or contractor if no sale is made.

(I) The township, not later than fifteen days after the adoption of a resolution under this section, shall submit to the director of development a copy of the resolution. On or before the thirty-first day of March of each year, the township shall submit a status report to the director of development. The report shall indicate, in the manner prescribed by the director, the progress of the project during each year that the exemption remains in effect, including a summary of the receipts from service payments in lieu of taxes; expenditures of money from the fund created under section 5709.75 of the Revised Code; a description of the public infrastructure improvements and housing renovations financed with the expenditures; and a quantitative summary of changes in private investment resulting from each project.

(J) Nothing in this section shall be construed to prohibit a board of township trustees from declaring to be a public purpose improvements with respect to more than one parcel.

(K) A board of township trustees that adopted a resolution under this section prior to July 21, 1994, may amend that resolution to include any additional public infrastructure improvement. A board of township trustees that seeks by the amendment to utilize money from its township public improvement tax increment equivalent fund for land acquisition in aid of industry, commerce, distribution, or research, demolition on private property, or stormwater and flood remediation projects may do so provided that the board currently is a party to a hold-harmless agreement with the board of education of the city, local, or exempted village school district within the territory of which are located the parcels that are subject to an exemption. For the purposes of this division, a "hold-harmless agreement" means an agreement under which the board of township trustees agrees to compensate the school district for one hundred per cent of the tax revenue that the school district would have received from further improvements to parcels designated in the resolution were it not for the exemption granted by the resolution."

R.C. § 5709.73

09-03-3111

Q. Tax Increment Financing (“TIF”) Plan  
Municipal Corporations

R.C. § 5709.40 Improvements declared to be public purpose; objections

“(A) As used in this section:

- (1) “Blighted area” and “impacted city” have the same meanings as in section 1728.01 of the Revised Code.
- (2) “Business day” means a day of the week excluding Saturday, Sunday, and a legal holiday as defined under section 1.14 of the Revised Code.
- (3) “Housing renovation” means a project carried out for residential purposes.
- (4) “Improvement” means the increase in the assessed value of any real property that would first appear on the tax list and duplicate of real and public utility property after the effective date of an ordinance adopted under this section were it not for the exemption granted by that ordinance.
- (5) “Incentive district” means an area not more than three hundred acres in size enclosed by a continuous boundary in which a project is being, or will be, undertaken and having one or more of the following distress characteristics:
  - (a) At least fifty-one per cent of the residents of the district have incomes of less than eighty per cent of the median income of residents of the political subdivision in which the district is located, as determined in the same manner specified under section 119(b) of the “Housing and Community Development Act of 1974,” 88 Stat. 633, 42 U.S.C. 5318, as amended;
  - (b) The average rate of unemployment in the district during the most recent twelve-month period for which data are available is equal to at least one hundred fifty per cent of the average rate of unemployment for this state for the same period.
  - (c) At least twenty per cent of the people residing in the district live at or below the poverty level as defined in the federal Housing and Community Development Act of 1974, 42 U.S.C. 5301, as amended, and regulations adopted pursuant to that act.
  - (d) The district is a blighted area.
  - (e) The district is in a situational distress area as designated by the director of development under division (F) of section 122.23 of the Revised Code.

09-03-3112

(f) As certified by the engineer for the political subdivision, the public infrastructure serving the district is inadequate to meet the development needs of the district as evidenced by a written economic development plan or urban renewal plan for the district that has been adopted by the legislative authority of the subdivision.

(g) The district is comprised entirely of unimproved land that is located in a distressed area as defined in section 122.23 of the Revised Code.

(6) "Project" means development activities undertaken on one or more parcels, including, but not limited to, construction, expansion, and alteration of buildings or structures, demolition, remediation, and site development, and any building or structure that results from those activities.

(7) "Public infrastructure improvement" includes, but is not limited to, public roads and highways; water and sewer lines; environmental remediation; land acquisition, including acquisition in aid of industry, commerce, distribution, or research; demolition, including demolition on private property when determined to be necessary for economic development purposes; stormwater and flood remediation projects, including such projects on private property when determined to be necessary for public health, safety, and welfare; the provision of gas, electric, and communications service facilities; and the enhancement of public waterways through improvements that allow for greater public access.

(B) The legislative authority of a municipal corporation, by ordinance, may declare improvements to certain parcels of real property located in the municipal corporation to be a public purpose. Improvements with respect to a parcel that is used or to be used for residential purposes may be declared a public purpose under this division only if the parcel is located in a blighted area of an impacted city. Except with the approval under division (D) of this section of the board of education of each city, local, or exempted village school district within which the improvements are located, not more than seventy-five per cent of an improvement thus declared to be a public purpose may be exempted from real property taxation for a period of not more than ten years. The ordinance shall specify the percentage of the improvement to be exempted from taxation and the life of the exemption.

An ordinance adopted or amended under this division shall designate the specific public infrastructure improvements made, to be made, or in the process of being made by the municipal

09-03-3113

corporation that directly benefit, or that once made will directly benefit, the parcels for which improvements are declared to be a public purpose. The service payments provided for in section 5709.42 of the Revised Code shall be used to finance the public infrastructure improvements designated in the ordinance, for the purpose described in division (D)(1) of this section or as provided in section 5709.43 of the Revised Code.

(C)(1) The legislative authority of a municipal corporation may adopt an ordinance creating an incentive district and declaring improvements to parcels within the district to be a public purpose and, except as provided in division (F) of this section, exempt from taxation as provided in this section, but no legislative authority of a municipal corporation that has a population that exceeds twenty-five thousand, as shown by the most recent federal decennial census, shall adopt an ordinance that creates an incentive district if the sum of the taxable value of real property in the proposed district for the preceding tax year and the taxable value of all real property in the municipal corporation that would have been taxable in the preceding year were it not for the fact that the property was in an existing incentive district and therefore exempt from taxation exceeds twenty-five per cent of the taxable value of real property in the municipal corporation for the preceding tax year. The ordinance shall delineate the boundary of the district and specifically identify each parcel within the district. A district may not include any parcel that is or has been exempted from taxation under division (B) of this section or that is or has been within another district created under this division. An ordinance may create more than one such district, and more than one ordinance may be adopted under division (C)(1) of this section.

(2) Not later than thirty days prior to adopting an ordinance under division (C)(1) of this section, if the municipal corporation intends to apply for exemptions from taxation under section 5709.911 of the Revised Code on behalf of owners of real property located within the proposed incentive district, the legislative authority of a municipal corporation shall conduct a public hearing on the proposed ordinance. Not later than thirty days prior to the public hearing, the legislative authority shall give notice of the public hearing and the proposed ordinance by first class mail to every real property owner whose property is located within the boundaries of the proposed incentive district that is the subject of the proposed ordinance.

(3)(a) An ordinance adopted under division (C)(1) of this section shall specify the life of the incentive district and the percentage of the improvements to be exempted, shall designate the

09-03-3114

public infrastructure improvements made, to be made, or in the process of being made, that benefit or serve, or, once made, will benefit or serve parcels in the district. The ordinance also shall identify one or more specific projects being, or to be, undertaken in the district that place additional demand on the public infrastructure improvements designated in the ordinance. The project identified may, but need not be, the project under division (C)(3)(b) of this section that places real property in use for commercial or industrial purposes. Except as otherwise permitted under that division, the service payments provided for in section 5709.42 of the Revised Code shall be used to finance the designated public infrastructure improvements, for the purpose described in division (D)(1) or (E) of this section, or as provided in section 5709.43 of the Revised Code.

An ordinance adopted under division (C)(1) of this section on or after the effective date of this amendment shall not designate police or fire equipment as public infrastructure improvements, and no service payment provided for in section 5709.42 of the Revised Code and received by the municipal corporation under the ordinance shall be used for police or fire equipment.

(b) An ordinance adopted under division (C)(1) of this section may authorize the use of service payments provided for in section 5709.42 of the Revised Code for the purpose of housing renovations within the incentive district, provided that the ordinance also designates public infrastructure improvements that benefit or serve the district, and that a project within the district places real property in use for commercial or industrial purposes. Service payments may be used to finance or support loans, deferred loans, and grants to persons for the purpose of housing renovations within the district. The ordinance shall designate the parcels within the district that are eligible for housing renovation. The ordinance shall state separately the amounts or the percentages of the expected aggregate service payments that are designated for each public infrastructure improvement and for the general purpose of housing renovations.

(4) Except with the approval of the board of education of each city, local, or exempted village school district within the territory of which the incentive district is or will be located, and subject to division (E) of this section, the life of an incentive district shall not exceed ten years, and the percentage of improvements to be exempted shall not exceed seventy-five per cent. With approval of the board of education, the life of a district may be not more than thirty years, and the percentage of improvements to be exempted may be not more than one hundred per cent. The

09F03-3115

approval of a board of education shall be obtained in the manner provided in division (D) of this section.

(D)(1) If the ordinance declaring improvements to a parcel to be a public purpose or creating an incentive district specifies that payments in lieu of taxes provided for in section 5709.42 of the Revised Code shall be paid to the city, local, or exempted village school district in which the parcel or incentive district is located in the amount of the taxes that would have been payable to the school district if the improvements had not been exempted from taxation, the percentage of the improvement that may be exempted from taxation may exceed seventy-five per cent, and the exemption may be granted for up to thirty years, without the approval of the board of education as otherwise required under division (D)(2) of this section.

(2) Improvements with respect to a parcel may be exempted from taxation under division (B) of this section, and improvements to parcels within an incentive district may be exempted from taxation under division (C) of this section, for up to ten years or, with the approval under this paragraph of the board of education of the city, local, or exempted village school district within which the parcel or district is located, for up to thirty years. The percentage of the improvement exempted from taxation may, with such approval, exceed seventy-five per cent, but shall not exceed one hundred per cent. Not later than forty-five business days prior to adopting an ordinance under this section declaring improvements to be a public purpose that is subject to approval by a board of education under this division, the legislative authority shall deliver to the board of education a notice stating its intent to adopt an ordinance making that declaration. The notice regarding improvements with respect to a parcel under division (B) of this section shall identify the parcels for which improvements are to be exempted from taxation, provide an estimate of the true value in money of the improvements, specify the period for which the improvements would be exempted from taxation and the percentage of the improvement that would be exempted, and indicate the date on which the legislative authority intends to adopt the ordinance. The notice regarding improvements to parcels within an incentive district under division (C) of this section shall delineate the boundaries of the district, specifically identify each parcel within the district, identify each anticipated improvement in the district, provide an estimate of the true value in money of each such improvement, specify the life of the district and the percentage of improvements that would be exempted, and indicate the date on which the

09-03-3116

legislative authority intends to adopt the ordinance. The board of education, by resolution adopted by a majority of the board, may approve the exemption for the period or for the exemption percentage specified in the notice; may disapprove the exemption for the number of years in excess of ten, may disapprove the exemption for the percentage of the improvement to be exempted in excess of seventy-five per cent, or both; or may approve the exemption on the condition that the legislative authority and the board negotiate an agreement providing for compensation to the school district equal in value to a percentage of the amount of taxes exempted in the eleventh and subsequent years of the exemption period or, in the case of exemption percentages in excess of seventy-five per cent, compensation equal in value to a percentage of the taxes that would be payable on the portion of the improvement in excess of seventy-five per cent were that portion to be subject to taxation, or other mutually agreeable compensation.

(3) The board of education shall certify its resolution to the legislative authority not later than fourteen days prior to the date the legislative authority intends to adopt the ordinance as indicated in the notice. If the board of education and the legislative authority negotiate a mutually acceptable compensation agreement, the ordinance may declare the improvements a public purpose for the number of years specified in the ordinance or, in the case of exemption percentages in excess of seventy-five per cent, for the exemption percentage specified in the ordinance. In either case, if the board and the legislative authority fail to negotiate a mutually acceptable compensation agreement, the ordinance may declare the improvements a public purpose for not more than ten years, and shall not exempt more than seventy-five per cent of the improvements from taxation. If the board fails to certify a resolution to the legislative authority within the time prescribed by this division, the legislative authority thereupon may adopt the ordinance and may declare the improvements a public purpose for up to thirty years, or, in the case of exemption percentages proposed in excess of seventy-five per cent, for the exemption percentage specified in the ordinance. The legislative authority may adopt the ordinance at any time after the board of education certifies its resolution approving the exemption to the legislative authority, or, if the board approves the exemption on the condition that a mutually acceptable compensation agreement be negotiated, at any time after the compensation agreement is agreed to by the board and the legislative authority.

09-03-3117

(4) If a board of education has adopted a resolution waiving its right to approve exemptions from taxation under this section and the resolution remains in effect, approval of exemptions by the board is not required under division (D) of this section. If a board of education has adopted a resolution allowing a legislative authority to deliver the notice required under division (D) of this section fewer than forty-five business days prior to the legislative authority's adoption of the ordinance, the legislative authority shall deliver the notice to the board not later than the number of days prior to such adoption as prescribed by the board in its resolution. If a board of education adopts a resolution waiving its right to approve agreements or shortening the notification period, the board shall certify a copy of the resolution to the legislative authority. If the board of education rescinds such a resolution, it shall certify notice of the rescission to the legislative authority.

(5) If the legislative authority is not required by division (D) of this section to notify the board of education of the legislative authority's intent to declare improvements to be a public purpose, the legislative authority shall comply with the notice requirements imposed under section 5709.83 of the Revised Code, unless the board has adopted a resolution under that section waiving its right to receive such a notice.

(E)(1) If a proposed ordinance under division (C)(1) of this section exempts improvements with respect to a parcel within an incentive district for more than ten years, or the percentage of the improvement exempted from taxation exceeds seventy-five per cent, not later than forty-five business days prior to adopting the ordinance the legislative authority of the municipal corporation shall deliver to the board of county commissioners of the county within which the incentive district will be located a notice that states its intent to adopt an ordinance creating an incentive district. The notice shall include a copy of the proposed ordinance, identify the parcels for which improvements are to be exempted from taxation, provide an estimate of the true value in money of the improvements, specify the period of time for which the improvements would be exempted from taxation, specify the percentage of the improvements that would be exempted from taxation, and indicate the date on which the legislative authority intends to adopt the ordinance.

(2) The board of county commissioners, by resolution adopted by a majority of the board, may object to the exemption for the number of years in excess of ten, may object to the exemption for

09-03-3118

the percentage of the improvement to be exempted in excess of seventy-five per cent, or both. If the board of county commissioners objects, the board may negotiate a mutually acceptable compensation agreement with the legislative authority. In no case shall the compensation provided to the board exceed the property taxes foregone due to the exemption. If the board of county commissioners objects, and the board and legislative authority fail to negotiate a mutually acceptable compensation agreement, the ordinance adopted under division (C)(1) of this section shall provide to the board compensation in the eleventh and subsequent years of the exemption period equal in value to not more than fifty per cent of the taxes that would be payable to the county or, if the board's objection includes an objection to an exemption percentage in excess of seventy-five per cent, compensation equal in value to not more than fifty per cent of the taxes that would be payable to the county, on the portion of the improvement in excess of seventy-five per cent, were that portion to be subject to taxation. The board of county commissioners shall certify its resolution to the legislative authority not later than thirty days after receipt of the notice.

(3) If the board of county commissioners does not object or fails to certify its resolution objecting to an exemption within thirty days after receipt of the notice, the legislative authority may adopt the ordinance, and no compensation shall be provided to the board of county commissioners. If the board timely certifies its resolution objecting to the ordinance, the legislative authority may adopt the ordinance at any time after a mutually acceptable compensation agreement is agreed to by the board and the legislative authority, or, if no compensation agreement is negotiated, at any time after the legislative authority agrees in the proposed ordinance to provide compensation to the board of fifty per cent of the taxes that would be payable to the county in the eleventh and subsequent years of the exemption period or on the portion of the improvement in excess of seventy-five per cent, were that portion to be subject to taxation.

(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

09-03-3119

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 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.

(G) An exemption from taxation granted under this section commences with the tax year specified in the ordinance so long as the year specified in the ordinance commences after the effective date of the ordinance. If the ordinance specifies a year commencing before the effective date of the resolution or specifies no year whatsoever, the exemption commences with the tax year in which an exempted improvement first appears on the tax list and duplicate of real and public utility property and that commences after the effective date of the ordinance. Except as otherwise provided in this division, the exemption ends on the date specified in the ordinance as the date the improvement ceases to be a public purpose or the incentive district expires, or ends on the date on which the public infrastructure improvements and housing renovations are paid in full from the municipal public improvement tax increment equivalent fund established under division (A) of section 5709.43 of the Revised Code, whichever occurs first. The exemption of an improvement with respect to a parcel or within an incentive district may end on a later date, as specified in the ordinance, if the legislative authority and the board of education of the city, local, or exempted village school district within which the parcel or district is located have entered into a compensation agreement under section 5709.82 of the Revised Code with respect to the improvement, and the board of education has approved the term of the exemption under division (D)(2) of this section, but in no case shall the improvement be exempted from taxation for more than thirty years. Exemptions shall be claimed and allowed in the same manner as in the case of other real property exemptions. If an exemption status changes during a year, the procedure for the apportionment of the taxes for that year is the same as in the case of other changes in tax exemption status during the year.

(H) Additional municipal financing of public infrastructure improvements and housing renovations may be provided by any methods that the municipal corporation may otherwise use for financing such improvements or renovations. If the municipal corporation issues bonds or notes to finance the public infrastructure improvements and housing renovations and pledges money from the municipal public improvement tax increment equivalent fund to pay the interest on and principal of the bonds or notes, the bonds or notes are not subject to Chapter 133. of the Revised Code.

09-03-3121

(I) The municipal corporation, not later than fifteen days after the adoption of an ordinance under this section, shall submit to the director of development a copy of the ordinance. On or before the thirty-first day of March of each year, the municipal corporation shall submit a status report to the director of development. The report shall indicate, in the manner prescribed by the director, the progress of the project during each year that an exemption remains in effect, including a summary of the receipts from service payments in lieu of taxes; expenditures of money from the funds created under section 5709.43 of the Revised Code; a description of the public infrastructure improvements and housing renovations financed with such expenditures; and a quantitative summary of changes in employment and private investment resulting from each project.

(J) Nothing in this section shall be construed to prohibit a legislative authority from declaring to be a public purpose improvements with respect to more than one parcel.”

R.C. § 5709.40

IV. Discussion:

Before the Magistrate for decision are:

(1) the Defendant’s, City of Centerville’s, Motion for Summary Judgment on all Counts of the Second Amended Complaint (Annexation and TIF Issues), joined in by Intervening Defendants Dille Trust, Dille Laboratories Corporation, and Bear Creek Capital, LLC, and opposed by Plaintiff Sugarcreek Township; and,

(2) Sugarcreek Township’s Motion for Summary Judgment (i.e., a Cross-Motion for Summary Judgment) on the TIF issue.

Annexation Issues

The procedure for annexation applicable to this Case, is set forth in O.R.C. § 709.023 and related Sections of the Revised Code. § 709.023 provides an expedited procedure to be followed in an annexation of land to a municipal corporation from a township where the land is not excluded from the township. Pursuant to O.R.C. § 709.023(H), “...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.”

09-03-3122

O.R.C. § 709.021 sets forth the procedure to be followed for annexation where owners unanimously request annexation of territory to a municipal corporation contiguous to that territory under one of the special procedures provided for annexation in SS 709.022, 709.023, and 709.024 of the Revised Code. Section 709.021 mandates: “[T]hat annexation proceedings shall be conducted under those sections to the exclusion of any of provisions of this chapter unless otherwise provided in this section or the special procedure section chosen.”

O.R.C. § 709.023(G) provides instructions for the Clerk of the Board of County Commissioners, if a petition is granted under division (D) or division (F) of the section, to proceed as provided for in the division (C)(1) of S 709.033 of the Revised Code, except no recording or hearing exhibits would be involved.

By operation of the first sentence of Revised Code § 709.023(G), § 709.033(C)(1) creates a procedural and substantive link between the action by the Board of Commissioners in § 709.023(G) in granting a petition for annexation and the action by the council of a municipal corporation in accepting (or rejecting) territory for annexation pursuant to O.R.C. § 709.04.

The second sentence of § 709.023(G) states, “There is no appeal in law or equity from the board’s entry of any resolution under this section, but any party may seek a writ of mandamus to compel the board of county commissioners to perform its duties under this section.”

§ 709.021(D) defines the term “party” as used in §§ 709.022 and 709.024 to mean “The municipal corporation to which annexation is proposed, each township any portion of which is included within the territory proposed for annexation, and the agent for the petitioners.” Conspicuously absent from the Sections to which the term “party” as defined in 709.021(D) applies, is § 709.023. Hence, the term, “any party” used in Division 709.023(G) is undefined.

Nevertheless, O.R.C. § 709.023 is clear that no one may take an appeal in law or in equity from the Board’s [of County Commissioners’] entry of any resolution under § 709.023. Equally clear, is that the only judicial remedy available related to the Commissioner’s action or inaction under the Section 709.023, is that “any party may seek a writ of mandamus to compel the board of county commissioners to perform its duties under this section.”

Sugarcreek Township’s Second Amended Complaint seeks a Declaratory Judgment that the petitions for annexation of the 173.181 acres and the 94.987 acres, respectively, were invalid and unenforceable. In its Opposition to Centerville’s Motion for Summary Judgment on the

09-03-3123

annexation related Counts, Sugarcreek argues, not that the Board of County Commissioners did not properly perform the Board's duties under § 709.023, but that the Petitions for Annexation of the 173.181 acres and the 94.987 acres "were procedurally flawed."<sup>1</sup> Sugarcreek Township seeks a Declaratory Judgment from the Court that both Resolutions accepting the annexation petitions were invalid and unenforceable, and argues that genuine issues of material fact exist as to the annexation and that there were errors at law in the annexation that preclude summary judgment in favor of Centerville.

The alleged procedural flaws were:

Owners and Contiguity

- the annexation petitions failed to include all property "owners."
- the property proposed for annexation in the petitions for annexation does not share a 5% contiguous boundary with Centerville.

Ordinance vs. Resolution

Sugarcreek also argues<sup>2</sup> that a procedural flaw occurred after the Board of Commissioners granted the Petitions for annexation of the 173.181 and the 94.987 acres, and that the alleged flaw invalidated Centerville's acceptance of the two annexations. Sugarcreek argues that Centerville's Charter required Centerville to accept the annexations by Ordinance, and not by Resolution. Centerville accepted the annexations of the 173.181 acres and the 94.987 acres by Resolution.

Sugarcreek argues that additional procedural flaws occurred after the Board of Commissioners granted the petition for Annexation of 94.987 acres that invalidated Centerville's acceptance of the annexation of the 94.987 acres:

Centerville Council's Special meeting, October 9, 2006 was improperly called.

The October 9, 2006 Special Council meeting was improperly called, i.e., the meeting was allegedly not called by the Mayor of Centerville or by four or more members of the Council as required by Section 4.10 of the Municipal Charter;

Centerville Council failed to provide proper notice of the October 9, 2006 Special Meeting

<sup>1</sup> Sugarcreek's Opposition filed October 8, 2007, p. 3.

<sup>2</sup> Sugarcreek's Sur-Reply filed on Oct. 31, 2007, p. 3

09-03-3124

According to Sugarcreek Township, Centerville failed to provide proper notice to interested parties of the October 9, 2006 Special Council Meeting at which the council passed a Resolution accepting the annexation of the 94.987 acres. Sugarcreek alleges that Centerville thereby violated the Ohio Sunshine Law, and, that, therefore, the resolution accepting the annexation of 173.181 acres was “invalid” pursuant to R.C. §§ 121.22(F) and (H).

Magistrate’s conclusions of law as to alleged defects in annexation petitions:

As a matter of law, based upon the undisputed facts of this Case, the Magistrate concludes that:

Owners and Contiguity

(1) as to the alleged procedural flaws in the petitions themselves, despite its protestations to the contrary, Sugarcreek is, in effect, appealing to this Court for a declaratory judgment that the Board of Commissioners did not properly review the petitions for annexation to determine if the conditions under § 709.023(E) as to “all of the owners” (E)(2) and contiguity (E)(4) were met.

(2) The issues of whether all owners signed the petitions for the annexation of the 173.181 and 94.987 acres respectively, and whether the contiguity requirements were satisfied, were before the County Commissioners for review. O.R.C. § 709.023(E) assigned the Commissioners a statutory duty to review the petitions to determine if the following conditions had been met:

-the requirement that signatories of the petition be all of the owners of real estate in the territory to be annexed,

-that the territory proposed for annexation does not exceed 500 acres, and

-that the territory shares a contiguous boundary with the municipal corporation to which annexation is proposed for a continuous length of at least 5% of the perimeter of the territory proposed for annexation, and

-that the annexation will not create an unincorporated area of the township that is completely surrounded by the territory proposed for annexation, and that the municipal corporation to which annexation is proposed as agreed to provide to the territory proposed for annexation services pursuant to division (C) of Section 709.023, and

09-03-3125

-that if a street or highway will be divided or segmented by the boundary line between the township and the municipal corporation so as to create a road maintenance problem, the municipal corporation to which annexation is proposed has agreed as a condition to the annexation to assume the maintenance of that street or highway or to otherwise correct the problem.

(3) Hence, Sugarcreek's alleged defects in the petitions for annexation prior to the Board of Commissioners' granting the petition for annexation of both the 173.181 and the 94.987 acres were within the scope of the Commissioners' review under division (E) of § 709.023.

(4) By granting the Petitions, the Board determined that all owners signed the Petitions, and that the related contiguity requirements were satisfied.

(5) If Sugarcreek did not agree that the Board had properly performed its duties, at most, Sugarcreek could have petitioned a court for a writ of mandamus to compel the Board to perform its duties, arguing that it was within the term "any party" in § 709.023(G), notwithstanding the decision of the Court of Appeals of Ohio (2<sup>nd</sup> Dist.) in *State ex rel. Butler Tp. Bd. of Trustees v. Montgomery County Bd. of County Com'rs*, L 5196445, 5 -6, 2008-Ohio-6542 (Ohio App. 2 Dist., 2008).

(6) Not only did Sugarcreek not seek mandamus to compel the Board of County Commissioners to perform duties under § 709.023(E), but Sugarcreek is deemed to have consented to the annexation of the 173.181 acres for failure to file any objection under § 709.023(D).

(7) The Board of Commissioners in Resolution 06-6-20-11 that granted the petition to annex the 173.181 acres expressly relied on the Township's failure to file an objection to the annexation, in the Board's granting the Petition. Sugarcreek Township did not file an ordinance or resolution objecting to the proposed annexation of the 173.181 acres. The procedure whereby Sugarcreek Township could file an ordinance or resolution objecting to the petition for annexation is prescribed by Section 709.023(D).

That Section states in pertinent part, "Failure of the municipal corporations or any of those townships to timely file an ordinance or resolution consenting or objecting to the proposed annexation shall be deemed to constitute consent by that municipal corporation or township to the proposed annexation." The townships referred to in division (D) are "each township any

06-03-3126

portion of which is included within the territory proposed for annexation.” Therefore, the Board of Commissioners must have concluded, implicitly, at least, that as to the petition for annexation of the 173.181 acres, Sugarcreek Township consented to the proposed annexation.

(8) Because the Sugarcreek Township Trustees adopted and filed with the Board of Commissioners on June 19, 2006 by Resolution No. 2006-06-14-03, an objection to the Petition for annexation of the 94.987 acres, stating that the Petition failed to meet the conditions specified in R.C. § 709.023, Sugarcreek Township cannot be deemed to have consented to the annexation petition. But in granting the Petition to annex the 94.987 acres, the Board of Commissioners relied on Sugarcreek’s failure to file a substantive objection to the annexation.

Sugarcreek filed a general, non-specific objection with the Board alleging that the Petition failed to comply with the requirements of §709.023(E). At the Board’s open meeting on the Petition on July 6, 2006, Sugarcreek made a “procedural in nature” objection, for which the Petitioner had a “rational explanation.”<sup>3</sup> The filed depositions of Sugarcreek Township Administrator, Barry Tiffany, and of Sugarcreek Township Trustee, Ms. Nadine Daugherty, who were present at the meeting, shed no light on the nature of the Township’s objection.

(9) In any event, Sugarcreek did not pursue its alleged defect in the Petition for Annexation of 94.987 acres, with a petition for mandamus for a court to compel the Board to perform its duties under §709.023(E). And Sugarcreek has no right of appeal to this Court to challenge the Commissioners’ performance of their duties under §709.023(E).

(10) Accordingly, the Magistrate concludes that there is no merit to Sugarcreek’s alleged procedural flaws that the annexation petitions failed to include all property “owners,” and the property proposed for annexation does not share a 5% contiguous boundary with Centerville.

Notwithstanding that conclusion, since Sugarcreek Township has argued so emphatically that the governmental owners, the State of Ohio and the County of Greene were required by § 709.02(E) and § 709.023(E) to sign the Petitions for Annexation, the Magistrate will directly address Sugarcreek’s argument.

O.R.C. Section 709.023 requires that the petition meet all the requirements set forth in Section 709.021. Section 709.021(B) requires that an application for annexation follow the

---

<sup>3</sup> Greene County Board of Commissioners Resolution No. 06-7-6-27, granting Petition to Annex 94.987 acres, James 7/20/07 Affidavit, Exhibit 3.

09-03-3127

procedures in Section 709.02(E). O.R.C. Section 709.02(E) defines who is an “owner” as used in Section 709.023 applicable in this Case.

Harry G. Herbst, III prepared a legal description of the 173.181 acres that is part of Exhibit 2 to the James Affidavit attached to the City of Centerville’s Motion for Summary Judgment. Similarly, Harry G. Herbst, III prepared a legal description of the 94.987 acres to be annexed to the City of Centerville. That legal description is part of Exhibit 3 to the James Affidavit. Those legal descriptions were attached to the petitions for annexation that were approved by the Greene County Board of Commissioners.

In the legal description of the 173.181 acres, Mr. Herbst identifies parcel numbers and owners of 15 parcels. In the legal description for the 94.987 acres, Mr. Herbst identifies 6 parcels that comprise the 94.987 acres.

As to some of the parcels in the acreage to be annexed, political subdivisions such as Greene County and the State of Ohio own either a “right-of-way” or own a parcel in fee simple. For annexations pursuant to Section 709.023, such as the annexations in this Case, according to the first paragraph of R.C. Section 709.02(E), whether a political subdivision owns either less than a free hold estate in land, for example, a right-of-way, or owns a freehold estate in land, the political subdivision does not have to sign a petition for annexation. This conclusion flows from the plain meaning of § 709.02(E) and particularly from the difference between the word “means” and the phrase “shall not be considered” that appear in the first paragraph of § 709.02(E).

If the word “means” and the word “considered” had the identical meaning, the next to last sentence of that first paragraph starting with “For purposes....” would be in conflict with the first sentence of § 709.02(E). In the first sentence, the statement is made that an “owner” means the State or any political subdivision. If the phrase “shall not be considered” in the next to last sentence of that paragraph were interpreted to say the opposite, that the state or any political subdivision shall not mean an “owner,” the two sentences would be conflict. But the two sentences are not in conflict because “mean” and “considered” have different meanings.

By the first sentence of § 709.02(E), States and political subdivisions seized of a freehold estate in land are “owners” as the word “owner” is used in § 709.023. But the first sentence also clarifies the meaning of “a freehold estate in land” as used in the sentence. The first sentence

09-03-3128

states that “street, and highway rights-of-way held in fee, by easement, or by dedication and acceptance are not included within those meanings.”

(11) Therefore, the State or any political subdivision that owns only a street or highway right-of-way by fee, by easement or by dedication does not own a “freehold estate in land” for purposes of §§ 709.02(E) and 709.023, and is not included within the meaning of “owner” under the first sentence of §709.02(E) or § 709.023(E)(2).

(12) As to the State of Ohio and/or a political subdivision that is an “owner” seized of a freehold estate in land that is not a lesser estate such as a street or highway right-of-way held in fee or by easement or by dedication and acceptance, the State of Ohio and the political subdivisions are “owners” pursuant to the first sentence of § 709.02(E). However such “owners” “shall not be considered” owners “unless an authorized agent of the State or the political subdivision signs the petition.”

(13) In this Case, as to any right-of-way owned by the State of Ohio or Greene County, the State of Ohio is not included within the meaning of “owner.” As to parcels that the State of Ohio or Greene County owns in fee, Greene County and the State of Ohio are “owners” within the meaning of the term as defined in the first paragraph of 709.02(E), but shall not be considered as “owners” unless an authorized agent of the State of Ohio or the political subdivision, Greene County, has signed the petition for annexation. In this Case no agent for Greene County or for the State of Ohio signed the petitions for annexation of the 173.181 acres or the 94.987 acres.

(14) Accordingly, Sugarcreek Township’s argument fails, that the Petitions for Annexation were defective, and the annexations were invalid, because the State of Ohio and Greene County did not sign the Petitions. And, Sugarcreek Township’s related contiguity argument also fails because the State of Ohio and Greene County are either not owners or not considered owners for purposes of this annexation.

Acceptance of Annexation by the City of Centerville:

O.R.C. § 709.04 provides a procedure for acceptance of territory by an annexing municipal corporation. The Magistrate concludes as a matter of fact and law, for both the 173.181 acres and the 94.982 acres, the Affidavit of Debra James, Clerk of the Council of the

09-03-3129

City of Centerville evidences full compliance with the requirements of R.C. Section 709.04 for the acceptance of territory by annexing municipal corporations.

§ 709.04 is applicable to annexations under § 709.023 by operation of § 709.023(G). § 709.023(G) required the Clerk of the Greene County Board of Commissioners to proceed as provided in Division (C)(1) of § 709.033 of the Revised Code.

Section 709.033(C)(1) states, “if the board granted the petition for annexation, the clerk shall deliver a certified copy of the entire record of the annexation proceedings, including all resolutions of the board, signed by a majority of the members of the board, the petition, the map, and all other papers on file, the recording of the proceedings, if a copy is available and exhibits presented at the hearing relating to the annexation proceedings, to the auditor or clerk of the municipal corporation to which annexation is proposed.” § 709.023(G) states that “no recording or hearing exhibits would be involved” in a delivery upon the Board of Commissioners’ granting a petition for annexation under 709.023.

§ 709.04 requires the auditor or clerk of the municipal corporation, here the City of Centerville, “[to] lay the resolution of the board granting the petition and the accompanying map or plat and petition before the legislative authority. The legislative authority, by resolution or ordinance, then shall except or reject the petition for annexation. If the legislative authority fails to pass an ordinance or resolution excepting the petition for annexation within a period of 120 days after those documents are laid before it by the auditor or clerk, the petition for annexation shall be considered rejected by the legislative authority.”

In her affidavit attached to the Centerville Motion for Summary Judgment, Debra D. James, Centerville Clerk of Council, details the procedures she followed to comply with the requirements of Section 709.04. As to the petition for annexation of 173.181 acres, Ms. James indicates that she received the Commissioners’ proceedings on the petition for annexation filed on May 24, 2006, on June 23, 2006. In her affidavit she stated that September 18, 2006 was the next regular session of the Council of the City of Centerville 60 days after she received the 173.181 acre annexation record from the Clerk of the Board of Commissioners. She averred in her affidavit that on September 18, 2006 she “laid Greene County Commissioners’ Resolution No. 06-6-20-11 granting the 173.181 acre annexation and accompanying petition and map or plat and the annexation record before the Council of the City of Centerville. On October 9, 2006 in

09-03-3130

Resolution No. 47-06, the City of Centerville accepted the annexation of 173.181 acres in Sugarcreek Township. October 9, 2006 was within 120 days of September 18, 2006, the date on which Ms. James laid the annexation documents before the Council of the City of Centerville.

As to the 94.987 acres, in her affidavit, Ms. James stated that on July 20, 2006, she received from the Clerk of the Greene County Commissioners a copy of the record of the Commissioners' proceedings on a petition filed May 26, 2006 for the annexation of 94.987 acres in Sugarcreek Township, Greene County, Ohio. She stated that October 16, 2006 was the next regular session of the Council of the City of Centerville 60 days after she received the 94.987 annexation record from the Commissioners' Clerk. September 18, 2006 was the 60<sup>th</sup> day after Ms. James received the delivery of the documents pertaining to the annexation of 94.987 acres. Therefore, the Magistrate concludes as a matter of fact that "after the expiration of 60 days" did not occur until after September 18, 2006 on which a regular session of the Council of Centerville was held.

Ms. James averred in her affidavit that October 16, 2006 was the next regular session of the Council of Centerville after the expiration of the 60 days from the date of delivery to her of the 94.987 acre annexation Resolution and accompanying documents. On October 16, 2006 she laid Greene County Commissioners' Resolution No. 06-7-6-27 granting the 94.987 acre annexation, the accompanying petition and map or plat and the annexation record before the Council of the City of Centerville. She further averred that the City of Centerville accepted the annexation of 94.987 acres in Sugarcreek Township on October 16, 2006 in Resolution No. 48-06. October 16, 2006 was the date that she laid the documents before the Council and therefore the documents accepted the annexation of the 94.987 acres within the requisite 120 days specified in R.C. Section 709.04.

As to both the 173.181 acres and the 94.987 acres, Sugarcreek Township takes no issue with any of the steps taken by Ms. James subsequent to the acceptance of the annexation of the 173.181 acres and the 94.987 acres in Sugarcreek Township. Ms. James averred that she made three copies of the petition, map or plat accompanying the petition, the transcript of proceedings of the Board of County Commissioners as reflected in the County Resolution, the resolutions and ordinances in relation to the annexation with a certificate to each copy that it was correct. She stated that she signed such copies in her official capacity. She further averred that she sent a

09-09-3131

copy of the annexation petitions, the map or plat accompany the petitions, the record in Resolutions, to the Greene County Recorder and she stated that the documents were recorded by the City of Centerville on October 13, 2006 and October 20, 2006 as to the 173.181 acre annexation and the 94.987 acre annexation, respectively.

Ms. James averred that she sent copies of the petitions, the maps accompanying the petitions, the record and resolutions to the Ohio Secretary of State on October 17, 2006 and on October 19, 2006 as to the 173.181 acre annexation and the 94.987 acre annexation, respectively. Ms. James also averred that she sent a copy of the annexation petitions, maps, records and resolutions to the Greene County Auditor on October 13, 2006 and October 20, 2006 as to the 173.181 acre annexation and the 94.987 acre annexation, respectively. Ms. James also averred in her affidavit that the Centerville City Council applied its zoning to the 173.181 acres and the 94.987 acres.

Sugarcreek Township alleges defects in Centerville's Procedure for Acceptance of Annexation:

(1) 173.181 acres and 94.987 acres

Sugarcreek argues<sup>4</sup> that a procedural flaw occurred after the Board of Commissioners granted the Petition for annexation of the 173.181 and the 94.987 acres, and that this alleged flaw invalidated Centerville's acceptance of the two annexations. That alleged flaw, Sugarcreek argues, was that Centerville accepted the annexations of the 173.181 acres and the 94.987 acres by Resolutions. According to Sugarcreek Township, Centerville's Charter required Centerville to accept the annexations by Ordinance, and not by Resolution.

(2) 94.987 acres

Sugarcreek also argues that additional procedural flaws occurred after the Board of Commissioners granted the petition for Annexation of 94.987 acres that invalidated Centerville's acceptance of the annexation of the 94.987 acres:

-The October 9, 2006 Special Council meeting was improperly called, i.e., the meeting was allegedly not called by the Mayor of Centerville or by four or more members of the Council as required by Section 4.10 of the Municipal Charter;

---

<sup>4</sup> Sugarcreek's Sur-Reply filed on Oct. 31, 2007, p. 3

09-03-3132

-Centerville failed to provide proper notice to interested parties of the October 9, 2006 Special Council Meeting at which the council passed a Resolution accepting the annexation of the 94.987 acres. Centerville thereby violated the Ohio Sunshine Law.<sup>5</sup>

Magistrate's conclusions as to alleged defects in Centerville's acceptance of the annexations of the 173.181 acres and the 94.987 acres:

Ordinance vs. Resolution as to both the 173.181 acres and the 94.987 acres

In its Motion for Summary Judgment, Sugarcreek Township states that Centerville failed to properly accept the proposed annexations. Centerville states that the annexation of the property should have been accepted by ordinance and not by resolution. The Township argues that the proposed annexation was neither "special" nor "temporary" in nature. The Township states that as a result, the annexations should have been accepted by ordinances rather than by resolutions, in order to be valid.

The Magistrate finds that Section 5.01 of the Charter of the Municipality of the City of Centerville attached to Plaintiff's Second Amended Complaint for Declaratory Judgment and Injunctive Relief states in pertinent part, "Council action shall be by ordinance or resolution... ordinances shall prescribe permanent rules of conduct of government. Resolutions shall be orders of the Council of a special or temporary nature."

- (1) The Magistrate concludes as a matter of undisputed fact that the definition of "resolutions" as Orders of the Council of a special nature, by its plain meaning encompasses the Council's action to accept the annexation of territory. Such action is not encompassed by the plain meaning of the definition of "ordinances" that prescribe permanent rules of conduct of government. The Magistrate concludes as a matter of fact that acceptance of an annexation is not "prescribing of rules of conduct of government."
- (2) The Magistrate concludes as a matter of law that the Municipal Charter allowed Centerville to accept the annexations by Resolutions. The Centerville Charter states at Section 5.08, "Action by Council which is not required by this Charter to be taken by ordinance, may be taken by resolution. The Charter does not require actions to accept annexation to be taken by ordinance.

---

<sup>5</sup> O.R.C. § 121.22(F)

09-03-3133

- (3) In addition, the Magistrate concludes as a matter of law, that R.C. § 709.04 expressly allows for a Municipal Corporation to accept an annexation either by ordinance or by resolution.
- (4) As a result, the Magistrate overrules Sugarcreek Township's argument that the annexation of the property should have been by ordinance rather than by resolution to be valid.

October 9, 2009 Special Meeting

Sugarcreek Township also argues that the October 9, 2006 meeting of the Council of the City of Centerville was improperly called.

Section 4.10 of the Charter of the Municipality of Centerville, (copy attached to Second Amended Complaint) states in pertinent part, "The Council shall meet regularly at least once in every month at such times and places as the Council may prescribe by rule. Special meetings may be held on the call of the Mayor or of four (4) or more members and, whenever practicably, upon no less than twelve (12) hours notice to each notice. All meetings where official business is consummated shall be public except as otherwise provided by Ohio statute or by ordinance."

In his deposition, Mark Kingseed, Mayor of the City of Centerville was asked "So tell me, how did you call this meeting?" Mayor Kingseed's answer was, "I don't have any recollection of the October 9<sup>th</sup> meeting. So I don't know the answer to your question." (Kingseed Depos., page 54, LL. 15-19) Later Mayor Kingseed testified at page 55 of his deposition that he did not have any recollection of telling Ms. James to call a special meeting, that he was on medical leave and he did not recall whether he had any involvement at all in the October 9<sup>th</sup> meeting, and that he did not have any recollection of actually calling the meeting. He also testified that he had been released from the hospital by that time and was working part-time from home. In her deposition, Ms. James testified unequivocally that on Friday, October 6, 2006, the Mayor directed her to schedule the special council meeting on October 9, 2006. Ms. James testified, "Yes. I would not have done the paperwork if I hadn't had his ok." Ms. James also testified that the Mayor had to tell her on October 6, 2006 to schedule the meeting on October 9, 2006.

(5) The Magistrate concludes that the October 9, 2006 was properly called at the direction of the Mayor of the City of Centerville, Mark Kingseed. The testimony of Mayor

09-03-3134

Kingseed and Ms. James is not in conflict. The two did not disagree. What the Mayor was unable to recall, Ms. James recalled with certitude.

Notice under R.C. § 121.22(F)

Finally, in challenging the validity of Centerville's acceptance of the annexations of the 173.181 acres and the 94.987 acres, Sugarcreek Township argues that Centerville failed to provide sufficient public notice of the October 9, 2006 meeting at which the City Council of Centerville passed a Resolution accepting the annexation of the 173.181 acres.

Sugarcreek Township challenges the validity of the Resolutions of the City of Centerville accepting the annexation of territory in Sugarcreek Township as approved by the Resolutions of the Greene County Board of Commissioners. The Township argues that Centerville failed to comply with its Charter and failed to comply with the State of Ohio "Sunshine" law O.R.C. § 121.22(F).

Sugarcreek Township argues that the Township has standing to bring a declaratory judgment action asking the Court to declare that Centerville's acceptance of the annexations was invalid and void. The Township relies upon the Case of *Butler Tp. Bd. of Trustees v. Winemiller*, (2003) 2003-Ohio-1258, 2003 WL1193802 (Ohio App. 2 Dist.). However, *Winemiller*, did not involve a R.C. Section 709.023, Expedited Type 2 Annexation proceeding, and, therefore, the Magistrate concludes as a matter of law, that *Winemiller* is not applicable to this Case.

In an annexation proceeding governed by R.C. Section 709.023, et seq., the Second District Court of Appeals has made it clear that a township does not have standing to bring a declaratory judgment action challenging the validity of a municipal corporation's resolutions accepting annexations granted under the procedures of R.C. § 709.023. (See III. Law, Section M., pp. 30-31, *supra*)

The statutory scheme for annexation set forth in O.R.C. § 709.023, directs the Clerk of the Board of County Commissioners to proceed as provided in division (C)(1) of Section 709.033 of the Revised Code. § 709.04, acceptance of territory by an annexing municipal corporation, provides the mechanism for the municipal corporation to accept or to reject annexed territory. There is no procedure permitted in § 709.04, or in any other Section of R.C. §§ 709.01, et seq., for a township to seek judicial review of the municipal corporation's acceptance or rejection of an annexation under § 709.023.

09-03-3135

For certain annexations under R.C. §§ 709.01, *et seq.*, but not for annexations under 709.023, R.C. §709.07(A) allows for judicial appeal of a decision of a Board of Commissioners granting or denying a petition for annexation. R.C. §§ 709.07(B) and (C) may have applicability to a mandamus action under 709.023(G), but that is not an issue in this Case.

(6) The Magistrate follows the precedent of the 2<sup>nd</sup> District Court of Appeals of Ohio, in *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery County Bd. of County Com'rs, supra*, to conclude as a matter of law that a judicial appeal by a Township of a §709.04 acceptance by a Municipal Corporation is “outside of that scheme” for a §709.023 appeal. Therefore Sugarcreek Township has no standing to bring a declaratory judgment action to this Court to challenge the acceptance of territory by the annexing municipal corporation, City of Centerville.

Accordingly, the Magistrate will not consider the merits of the Township’s arguments that Centerville violated R.C. § 121.22(F) or any related implementing Charter provision.

In so deciding, the Magistrate recalls the oral argument of Sugarcreek Township that if Sugarcreek had no standing to bring a declaratory judgment action to challenge the procedure followed by a Municipal Corporation to accept an annexation, abuses could occur, without the possibility of recourse to judicial review. The Magistrate observes that in concluding that the Township has no standing, the Magistrate conclude only that; a township has no standing to challenge a R.C. § 709.04 acceptance or rejection of an annexation under R.C. § 709.023, by declaratory judgment or otherwise.

(7) In summary, the Magistrate concludes as a matter of law, based upon the undisputed facts of this Case, that Sugarcreek Township has no standing to bring a declaratory judgment action as to any of the alleged defects in the petitions that were granted by the Greene County Board of Commissioners, or as to alleged flaws in the City of Centerville’s acceptance process under R.C. § 709.04.

Accordingly, having decided the annexation issues on another ground, the Magistrate will not address the argument of Centerville that “Once annexations are accepted by the City, actions taken to set aside the annexations are moot.”<sup>6</sup>

---

<sup>6</sup> Centerville’s Motion for Summary Judgment, filed August 8, 2007, p. 7-8.

09-03-3136

Tax Increment Financing ("TIF") Plan:

O.R.C § 5709.40(C)(1) authorizes the legislative authority of a municipal corporation such as the City of Centerville to adopt an ordinance creating an incentive district and declaring improvements to parcels within the district to be a public purpose and, except as provided in division (F) of this section, exempt from taxation as provided in this section....

(C)(1) states in part, "The ordinance shall delineate the boundary of the district and specifically identify the parcel within the district. A district may not include any parcel that is or has been exempted from taxation under division (B) of this section or that is or has been within another district created under this division." The exemptions from taxation that are referred to in Section 5709.04 (C)(1) are "real property exemptions." O.R.C. Section 5709.40(G).

O.R.C. S 5709.73(B) states, "A board of township trustees may, by unanimous vote, adopt a resolution that declares to be a public purpose any public infrastructure improvements made that are necessary for the development of certain parcels of land located in the unincorporated area of the township..." R.C. Section 5709.73(C)(1) states, "a board of township trustees may adopt, by unanimous vote, a resolution creating an incentive district and declaring improvements to parcels within the district to be a public purpose and, accept as provided in division (F) of this section, exempt from taxation as provided in this section...."

On April 20, 2006, Sugarcreek Township adopted a TIF District that included property annexed to the City of Centerville from Sugarcreek Township. Sugarcreek Township's Trustees' Resolution No. 2006-04-20-01 created that Sugarcreek Township TIF District pursuant to § 5709.73 of the Ohio Revised Code. In that Resolution, pursuant to Section 5709.74 of the Ohio Revised Code, the owners of improvements that would benefit the Sugarcreek Township TIF District, would be required to make semi-annual service payments in lieu of taxes to the Greene County Treasurer on or before the final dates for payment of real property taxes. (See Exhibit G to Sugarcreek Township's Partial Motion for Summary Judgment filed on October 8, 2007)

In Section 5. of the Pre-Annexation Agreement entered into on April 5, 2006 by the City of Centerville, Dille Laboratories Corp., and Bear Creek Capital, LLC, the parties to the Agreement "recognize[d] that significant improvements may be needed to service the proposed development of the Property in the City, and, accordingly the parties agree[d] to undertake or participate in the following financing arrangements or mechanisms:

09-03-3137

“(a) Coincident with the City’s approving the final plans for development of any portion of the Property that has been annexed to the City, the City shall as soon as practical take steps to present to the City Council legislation to create tax increment financing (the “TIF Ordinance”) to enable the City to collect up to the maximum amount of *payments in lieu of taxes* (emphasis added) which may be generated from the new development without approval from a school district. The payments made in lieu of taxes will be applied by the City to recoup and apply to the costs associated with the construction of the necessary public improvements.” (See Exhibit A to Plaintiff Sugarcreek Township’s Motion for Summary Judgment filed on October 8, 2007)

In a subsequent Memorandum of Understanding executed on October 6, 2006, (Exhibit 77 to deposition of Greg Horn) the three signatories to the pre-annexation agreement signed the Memorandum of Understanding that provided in paragraph 5, “The parties agree to provide or review alternative financing options for the public road improvements in addition to TIF financing or in place of TIF financing, including considerations of special assessments....”

The Magistrate concludes that in the Memorandum of Understanding, its signatories did not nullify their commitment in the pre-annexation agreement, paragraph 5(a) for the City of Centerville to present to the City Council legislation to create TIF financing. Such financing would divert real estate taxes from Sugarcreek Township to the City of Centerville.

O.R.C. Section 709.023(H) expressly provides “[T]erritory 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 township’s real property taxes.”

The Magistrate concludes as a matter of law that, on the basis of § 709.023(H), Sugarcreek Township is entitled to all of the real property taxes for the 173.181 acres plus 94.987 acres. Therefore, such annexed property may not be subject to a TIF created by the City of Centerville that would in any way divert the real property taxes for the annexed territory from Sugarcreek Township to the City of Centerville, either by service payments in lieu of taxes or otherwise.

Having so concluded that the annexed property may not be subject to a TIF Plan by Centerville on the basis of R.C. § 709.023(H), there is no need for the Magistrate to consider

09-03-3138

Sugarcreek Township's argument that Centerville may not impose a TIF Plan on territory that is already part of a TIF District created by Sugarcreek Township's Resolution on April 20, 2006.

The Magistrate also concludes as a matter of law, that Sugarcreek Township has standing to bring an action for a Declaratory Judgment that Sugarcreek Township is entitled to the real property taxes under § 709.023(H) and that Centerville may not impose a TIF upon the annexed property that would divert the real property taxes from Sugarcreek Township.

In finding that Sugarcreek Township has standing to seek such a Declaratory Judgment, the Magistrate relies upon R.C. § 503.01 and R.C. § 2721.02. The Magistrate also finds that there is a real controversy between Sugarcreek Township and the City of Centerville as to entitlement to the real property taxes, that the controversy is justiciable, and that speedy relief is necessary to preserve the rights of the Parties. *Williams v. City of Akron*, 54 Ohio St.2d.136, 144, 374 N.E.2d. 1378, 1383 (Ohio 1978).

The Magistrate concludes as a matter of law, that the declaratory judgment sought by Sugarcreek Township with respect to the TIF is outside the statutory scheme for petitioning for annexation and for accepting annexation under the procedures in R.C. § 709.023, and related sections, including § 709.04. Therefore, such a declaratory judgment action is not barred by the Court of Appeals of Ohio (2 Dist.) decision in *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery County Bd. of County Com'rs, supra*, in which the Court decided that townships lack standing to bring declaratory judgment actions challenging the statutory annexation procedures set forth in R.C. § 709.023, and related sections.

The Supreme Court of Ohio declined to accept discretionary review of a decision of the Court of Appeals of Ohio (6<sup>th</sup> Dist.), that found that Sylvania Township had standing to bring a Declaratory Judgment action pursuant to R.C. § 2721.03, related to annexation covenants:

"Upon consideration of the foregoing, this court finds that the trial court did not err by finding that appellee, Sylvania Township, had standing to bring a declaratory judgment action pursuant to R.C. 2721.03 as to those annexation covenants at issue in the related *Ralston* case." *Board of Trustees of Sylvania Tp. v. Board of Com'rs of Lucas County* 2002 WL 1729895, 4 (Ohio App. 6 Dist.) (Ohio App. 6 Dist.,2002)

"On discretionary appeal and motion to consolidate case with 2002-1485, *Sylvania v. Ralston*, Lucas App. No. L-01-1448, 2002-Ohio-3575. Appeal not accepted and motion denied."

09-03-3139

*Sylvania Twp. Bd. of Trustees v. Lucas Cty. Bd. of Commrs*, (2002), 97 Ohio St.3d 1483, 2002-Ohio-6866.

V. Decision:

The Annexations of the 173.181 acres and of the 94.982 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.

Pursuant to R.C. § 709.023(H) that territory annexed into Centerville shall not at any time be excluded from the township under Section 503.07 of the Revised Code and, thus, remains subject to Sugarcreek Township's real property taxes.

Accordingly, the Magistrate GRANTS the Motion for Partial Summary Judgment of Sugarcreek Township as to the TIF issue. The Magistrate DENIES the City of Centerville's Motion for Summary Judgment (joined in by Dille Laboratories Corporation, Dille Trust and Bear Creek Capital, LLC) on the TIF issue.

The Magistrate GRANTS the Motion for Summary Judgment of the City of Centerville, joined in by Intervening Defendants Dille Trust, Dille Laboratories Corporation, and Bear Creek Capital, LLC, as to the annexation issue.

The Magistrate GRANTS Summary Judgment in favor of the City of Centerville and Intervening Defendants Dille Trust, Dille Laboratories Corporation, and Bear Creek Capital, LLC, against Sugarcreek Township, on Counts I, II, III, IV, and VI of Sugarcreek Township's Second Amended Complaint.

The Magistrate GRANTS Summary Judgment in favor of Sugarcreek Township against the City of Centerville on Count V of the Second Amended Complaint.

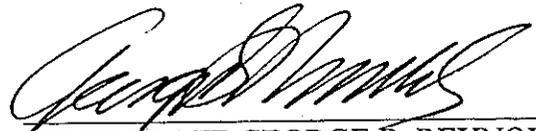
The Magistrate hereby DENIES the Declaratory Judgment requested by Sugarcreek Township that the resolutions of the Greene County Board of Commissioners that granted the annexation petitions for the 173.181 acres and the 94.987 acres were defective and invalid (Count I), that the City of Centerville's Resolution on October 9, 2006 was invalid because it violated Section 4.10(b) of the City of Centerville Municipal Charter (Count II), that the City of Centerville's resolution on October 9, 2006 was invalid because it violated Section 4.09 of the City of Centerville Municipal Charter and R.C. § 121.22(F) (Count III), that both of the City of Centerville's Resolutions accepting the annexed territories of 173.181 acres and 94.987 acres,

09-03-3140

respectively, were invalid because they should have been enacted as ordinances and not resolutions and thereby violated the Centerville Charter (Count IV), that Sugarcreek Township is entitled to injunctive relief restraining Centerville from taking any action relating to the annexed land until the Court has an opportunity to rule on the merits of the Complaint (Count VI).

The Magistrate hereby GRANTS the Declaratory Judgment requested by Sugarcreek Township in Count V of the Second Amended Complaint, that the City of Centerville may not implement a TIF on the annexed land, including both the 173.181 acres and the 94.987 acres.

Each Party is to bear its own costs.



MAGISTRATE GEORGE B. REYNOLDS

**PARTIES AND COUNSEL ARE REFERRED TO CIV. R. 53 FOR FILING OBJECTIONS TO A MAGISTRATE'S DECISION. THIS MAGISTRATE'S DECISION WILL NOT TAKE EFFECT UNLESS AND UNTIL ADOPTED AS THE ORDER OF THE COURT.**

**PARTIES AND COUNSEL ARE WARNED THAT CIV. R. 53 (D)(3)(b)(iv) PROVIDES THAT A PARTY SHALL NOT ASSIGN AS ERROR ON APPEAL, A COURT'S ADOPTION OF ANY FACTUAL FINDING OR LEGAL CONCLUSION OF A MAGISTRATE, WHETHER OR NOT SPECIFICALLY DESIGNATED AS A FINDING OF FACT OR CONCLUSION OF LAW UNDER CIV. R. 53 (D)(3)(a)(ii), UNLESS THAT PARTY HAS OBJECTED TO THAT FINDING OR CONCLUSION AS REQUIRED BY CIV. R. 53 (D)(3)(b).**

CERTIFICATE OF SERVICE: A copy hereof was served upon:

SCOTT D. PHILLIPS, ESQ., and JOSEPH W. WALKER, ESQ., 2200 PNC Center 201 E. Fifth Street, Cincinnati, OH 45202 via facsimile (513) 651-6981

RICHARD C. BRAHM, ESQ., 145 E. Rich Street, Columbus, OH 43215 via facsimile (614) 228-1472

SCOTT A. LIBERMAN, ESQ., 1700 One Dayton Centre, One South Main Street, Dayton, OH 45402 via facsimile (937) 223-5100

JOSEPH L. TRAUTH JR., ESQ, SEAN S. SUDER, ESQ., and TRENTON B. DOUTHETT, ESQ., One East Fourth Street, Suite 1400, Cincinnati, OH 45202 via facsimile (513) 579-6515

BARRY W. MANCZ, ESQ. and JOHN M. CLOUD, ESQ., 2160 Kettering Tower, Dayton, OH 45423 via facsimile (937) 223-1649

by faxing to them on the date of filing.



Michelle M. Rinehart  
Assignment Commissioner

09-03-14 1

GREENE COUNTY, OHIO  
FILED

2010 JA 15 PM 1:57

FERRI A. MAZUR, CLERK  
COMMON PLEAS COURT  
GREENE COUNTY, OHIO

IN THE COURT OF COMMON PLEAS OF GREENE COUNTY, OHIO  
CIVIL DIVISION

Sugarcreek Township,	:	Case No. 2006 CV 0784
	:	
Plaintiff,	:	
	:	Judge Stephen A. Wolaver
v.	:	
City of Centerville,	:	Magistrate George B. Reynolds
	:	
Defendant.	:	

**STIPULATIONS**

This matter is before this Court on remand following a memorandum Opinion and Final Entry of the Greene County Court of Appeals, Second Appellate District in Appellate Case Number 2009-CA-27, affirming in part and reversing in part this Court's Judgment Entry filed on March 18, 2009 on issues raised in the Defendant-Appellant, City of Centerville's third assignment of error on tax increment financing on property that has been annexed utilizing the R.C. 709.023 expedited (type 2) annexation process. All other aspects of this Court's Judgment Entry filed on March 18, 2009, remain as affirmed by the Court of Appeals.

After review of the Court of Appeals' decision, Trial Court Judgment Entry, Mar. 18, 2009, Decision of the Magistrate filed on Feb. 17, 2009 and the Order of the Magistrate dated Dec. 28, 2009, and in accordance therewith, the parties stipulate and agree to the following law and facts already in the record before this Court:

1. On April 3, 2006, Centerville entered into three pre-annexation agreements with the property owner, Dille Corporation and the developer, Bear Creek Capital, LLC relating to the property that is the subject of this action to the City of Centerville. (Opinion, p. 5 ). In the pre-annexation agreements, Centerville made a commitment to present Tax Increment Financing (“TIF”) legislation to City Council or to implement a TIF plan for the annexed territory following completion of the annexation process. (Opinion, p. 17). The TIF commitment set forth in the pre-annexation agreements was never nullified or rescinded. (Opinion, p. 17). Bear Creek Capital, LLC is no longer a party to this litigation.

2. On April 20, 2006, Sugarcreek adopted Resolution No. 2006-04-20-01 “Declaring Improvements To Parcels Of Real Property Located In Sugarcreek Township, Ohio To Be A Public Purpose Under Section 5709.73(B) of the Ohio Revised Code, Exempting Such Improvements from Real Property Taxation, Authoring The Execution Of A Service Agreement And Such Other Document As May Be Necessary Establishing A Tax Increment Equivalent Fund” to create a Tax Increment Financing (“TIF”) district. (Opinion p. 8-9; Trial Court Judgment Entry, Mar. 18, 2009, p. 5; Magistrate’s Decision, Feb. 17, 2009, p. 14). A true and correct copy of Resolution No. 2006-04-20-01 is part of the record.

3. The validity of the township’s TIF resolution was not an issue in this case. (Opinion, p. 48).

4. In late June and early July 2006, the Greene County Board of County Commissioners granted the annexation petitions. (Opinion, p. 9). Centerville then accepted each annexation in October 2006. (Opinion, p. 9).

5. In September 2006, Sugarcreek filed an action for declaratory judgment seeking a declaration that Centerville could not establish a TIF plan for the land annexed into the city. (Opinion, p. 9-10; Magistrate's Decision, Feb. 17, 2009, p. 2).

6. In May 2007, Sugarcreek amended its complaint to include allegations that the annexations and Centerville's acceptance of the annexations were invalid. (Opinion, p. 10).

7. 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. (Opinion, p. 8-9; Trial Court Judgment Entry, Mar. 18, 2009, p. 6, p. 10, ¶B(1); Magistrate's Decision, Feb. 17, 2009, p. 72). There are no issues relating to the validity of the annexations before this Court on remand.

8. The only issue before the trial court on remand is the application of the decision of the court of appeals to the decision of the trial court as it relates to the determination of the TIF/real property tax issue that was before the court on Plaintiff Sugarcreek Township's Motion for Summary Judgment and the Defendants' responses thereto. More specifically, the parties agree that the Court must reconcile the court of appeals opinion as it relates to Centerville's Third Assignment of Error with this Court's findings set forth in its March 18, 2009 Judgment Entry.

9. Sugarcreek Township has standing to bring a declaratory judgment action under R.C. 2721.03 with regard to the TIF claims. (Opinion, p. 11, 20).

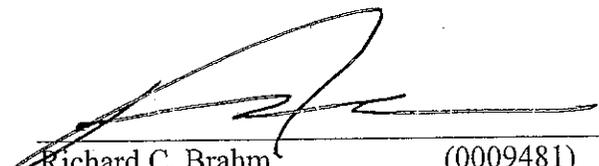
10. The TIF claims made by Sugarcreek Township present a real case in controversy and are ripe for determination. (Opinion, p. 22).

The parties cannot stipulate or agree upon the terms of the application of the Opinion of the Court of Appeals. Accordingly, the issue will be briefed and submitted to this Court for consideration and application.

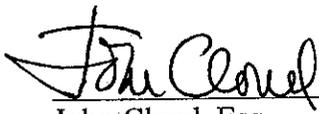
Respectfully submitted,

  
Scott D. Phillips, Esq. (0043650) *per telephone + e-mail*  
Joseph W. Walker, Esq. (0079369) *ccunningham*  
Frost Brown Todd LLC  
9277 Centre Point Drive, Suite 300  
West Chester, OH 45069  
(513) 870-8206  
Fax: (513) 870-0999  
e-mail: [sphillips@fbtlaw.com](mailto:sphillips@fbtlaw.com)  
e-mail: [jwalker@fbtlaw.com](mailto:jwalker@fbtlaw.com)

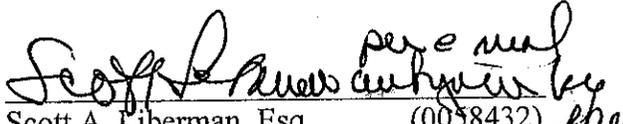
*Counsel for Plaintiff,  
Sugarcreek Township*

  
Richard C. Brahm (0009481)  
Catherine A. Cunningham (0015730)  
**BRAHM & CUNNINGHAM, LLC**  
145 East Rich Street, Fourth Floor  
Columbus, OH 43215-5240  
Phone: (614) 228-2030  
Fax: (614) 228-1472  
e-mail: [rbrahm@brahmcunningham.com](mailto:rbrahm@brahmcunningham.com)  
e-mail: [ccunningham@brahmcunningham.com](mailto:ccunningham@brahmcunningham.com)

*Trial Counsel for Defendant,  
City of Centerville*

  
John Cloud, Esq. (0006262) *per telephone + e-mail*  
Rogers & Greenberg, LLP  
2160 Kettering Tower  
Dayton, OH 45423  
(937) 223-8171  
Fax: (937) 223-1649

*Trial Attorney for Intervening Defendants,  
Dille Laboratories Corporation and  
Charles A. Dille Trust dated January 16,  
1998*

  
Scott A. Liberman, Esq. (0058432) *per e-mail*  
Altick & Corwin Co., LPA  
1700 One Dayton Centre  
One South Main Street  
Dayton, OH 45402  
(937) 223-1201  
Fax: (937) 223-5200

*Co-Counsel for Defendant,  
City of Centerville*

## C

Baldwin's Ohio Revised Code Annotated Currentness

Title VII. Municipal Corporations

▣ Chapter 709. Annexation; Detachment (Refs & Annos)

▣ Annexation on Application of Citizens

→ → **709. 023 Special procedure of annexing of land into municipal corporation when land is not to be excluded from township**

(A) A petition filed under section 709.021 of the Revised Code that requests to follow this section is for the special procedure of annexing land into a municipal corporation when, subject to division (H) of this section, the land also is not to be excluded from the township under section 503.07 of the Revised Code. The owners who sign this petition by their signature expressly waive their right to appeal in law or equity from the board of county commissioners' entry of any resolution under this section, waive any rights they may have to sue on any issue relating to a municipal corporation requiring a buffer as provided in this section, and waive any rights to seek a variance that would relieve or exempt them from that buffer requirement.

The petition circulated to collect signatures for the special procedure in this section shall contain in boldface capital letters immediately above the heading of the place for signatures on each part of the petition the following: "WHOEVER SIGNS THIS PETITION EXPRESSLY WAIVES THEIR RIGHT TO APPEAL IN LAW OR EQUITY FROM THE BOARD OF COUNTY COMMISSIONERS' ENTRY OF ANY RESOLUTION PERTAINING TO THIS SPECIAL ANNEXATION PROCEDURE, ALTHOUGH A WRIT OF MANDAMUS MAY BE SOUGHT TO COMPEL THE BOARD TO PERFORM ITS DUTIES REQUIRED BY LAW FOR THIS SPECIAL ANNEXATION PROCEDURE."

(B) Upon the filing of the petition in the office of the clerk of the board of county commissioners, the clerk shall cause the petition to be entered upon the board's journal at its next regular session. This entry shall be the first official act of the board on the petition. Within five days after the filing of the petition, the agent for the petitioners shall notify in the manner and form specified in this division the clerk of the legislative authority of the municipal corporation to which annexation is proposed, the fiscal officer of each township any portion of which is included within the territory proposed for annexation, the clerk of the board of county commissioners of each county in which the territory proposed for annexation is located other than the county in which the petition is filed, and the owners of property adjacent to the territory proposed for annexation or adjacent to a road that is adjacent to that territory and located directly across that road from that territory. The notice shall refer to the time and date when the petition was filed and the county in which it was filed and shall have attached or shall be accompanied by a copy of the petition and any attachments or documents accompanying the petition as filed.

Notice to a property owner is sufficient if sent by regular United States mail to the tax mailing address listed on the county auditor's records. Notice to the appropriate government officer shall be given by certified mail, return receipt requested, or by causing the notice to be personally served on the officer, with proof of service by affidavit of the person who delivered the notice. Proof of service of the notice on each appropriate government officer shall be filed with the board of county commissioners with which the petition was filed.

(C) Within twenty days after the date that the petition is filed, the legislative authority of the municipal corporation to which annexation is proposed shall adopt an ordinance or resolution stating what services the municipal corporation will provide, and an approximate date by which it will provide them, to the territory proposed for annexation, upon annexation. The municipal corporation is entitled in its sole discretion to provide to the territory proposed for annexation, upon annexation, services in addition to the services described in that ordinance or resolution.

If the territory proposed for annexation is subject to zoning regulations adopted under either Chapter 303. or 519. of the Revised Code at the time the petition is filed, the legislative authority of the municipal corporation also shall adopt an ordinance or resolution stating that, if the territory is annexed and becomes subject to zoning by the mu-

municipal corporation and that municipal zoning permits uses in the annexed territory that the municipal corporation determines are clearly incompatible with the uses permitted under current county or township zoning regulations in the adjacent land remaining within the township from which the territory was annexed, the legislative authority of the municipal corporation will require, in the zoning ordinance permitting the incompatible uses, the owner of the annexed territory to provide a buffer separating the use of the annexed territory and the adjacent land remaining within the township. For the purposes of this section, "buffer" includes open space, landscaping, fences, walls, and other structured elements; streets and street rights-of-way; and bicycle and pedestrian paths and sidewalks.

The clerk of the legislative authority of the municipal corporation to which annexation is proposed shall file the ordinances or resolutions adopted under this division with the board of county commissioners within twenty days following the date that the petition is filed. The board shall make these ordinances or resolutions available for public inspection.

(D) Within twenty-five days after the date that the petition is filed, the legislative authority of the municipal corporation to which annexation is proposed and each township any portion of which is included within the territory proposed for annexation may adopt and file with the board of county commissioners an ordinance or resolution consenting or objecting to the proposed annexation. An objection to the proposed annexation shall be based solely upon the petition's failure to meet the conditions specified in division (E) of this section.

If the municipal corporation and each of those townships timely files an ordinance or resolution consenting to the proposed annexation, the board at its next regular session shall enter upon its journal a resolution granting the proposed annexation. If, instead, the municipal corporation or any of those townships files an ordinance or resolution that objects to the proposed annexation, the board of county commissioners shall proceed as provided in division (E) of this section. Failure of the municipal corporation or any of those townships to timely file an ordinance or resolution consenting or objecting to the proposed annexation shall be deemed to constitute consent by that municipal corporation or township to the proposed annexation.

(E) Unless the petition is granted under division (D) of this section, not less than thirty or more than forty-five days after the date that the petition is filed, the board of county commissioners shall review it to determine if each of the following conditions has been met:

- (1) The petition meets all the requirements set forth in, and was filed in the manner provided in, section 709.021 of the Revised Code.
- (2) The persons who signed the petition are owners of the real estate located in the territory proposed for annexation and constitute all of the owners of real estate in that territory.
- (3) The territory proposed for annexation does not exceed five hundred acres.
- (4) The territory proposed for annexation shares a contiguous boundary with the municipal corporation to which annexation is proposed for a continuous length of at least five per cent of the perimeter of the territory proposed for annexation.
- (5) The annexation will not create an unincorporated area of the township that is completely surrounded by the territory proposed for annexation.
- (6) The municipal corporation to which annexation is proposed has agreed to provide to the territory proposed for annexation the services specified in the relevant ordinance or resolution adopted under division (C) of this section.
- (7) If a street or highway will be divided or segmented by the boundary line between the township and the municipal corporation as to create a road maintenance problem, the municipal corporation to which annexation is proposed has agreed as a condition of the annexation to assume the maintenance of that street or highway or to otherwise correct

the problem. As used in this section, "street" or "highway" has the same meaning as in section 4511.01 of the Revised Code.

(F) Not less than thirty or more than forty-five days after the date that the petition is filed, if the petition is not granted under division (D) of this section, the board of county commissioners, if it finds that each of the conditions specified in division (E) of this section has been met, shall enter upon its journal a resolution granting the annexation. If the board of county commissioners finds that one or more of the conditions specified in division (E) of this section have not been met, it shall enter upon its journal a resolution that states which of those conditions the board finds have not been met and that denies the petition.

(G) If a petition is granted under division (D) or (F) of this section, the clerk of the board of county commissioners shall proceed as provided in division (C)(1) of section 709.033 of the Revised Code, except that no recording or hearing exhibits would be involved. There is no appeal in law or equity from the board's entry of any resolution under this section, but any party may seek a writ of mandamus to compel the board of county commissioners to perform its duties under this section.

(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.

(I) Any owner of land that remains within a township and that is adjacent to territory annexed pursuant to this section who is directly affected by the failure of the annexing municipal corporation to enforce compliance with any zoning ordinance it adopts under division (C) of this section requiring the owner of the annexed territory to provide a buffer zone, may commence in the court of common pleas a civil action against that owner to enforce compliance with that buffer requirement whenever the required buffer is not in place before any development of the annexed territory begins.

#### CREDIT(S)

(2005 S 107, eff. 12-20-05; 2001 S 5, eff. 3-27-02 (*Thornton v. Salak*))

#### UNCODIFIED LAW

2001 S 5, § 3: See Uncodified Law under RC 709.02.

#### HISTORICAL AND STATUTORY NOTES

**Ed. Note:** 2001 S 5 Effective Date--2001 S 5 was filed with the Secretary of State's office on July 27, 2001. On October 25, 2001 a referendum petition was filed, and on March 27, 2002, the Secretary of State declared the referendum petitions invalid. In *Thornton v. Salak*, 2006-Ohio-6407, 112 Ohio St.3d 254, the Ohio Supreme Court held that 2001 S 5 went into effect upon proof that a referendum petition contains an insufficient number of valid signatures to have the matter submitted to the electorate of the state of Ohio as contemplated by Section 1g, Article II, Ohio Constitution and R.C. 3519.16.

R.C. § 709. 023, OH ST § 709. 023

Current through 2011 Files 1 to 47, 49, and 52 of the 129th GA (2011-2012) and November 8, 2011 election results.

END OF DOCUMENT

**C**

Baldwin's Ohio Revised Code Annotated Currentness

Title LVII. Taxation

▣ Chapter 5709. Taxable Property--Exemptions (Refs & Annos)

▣ Municipal Improvements Exemption (Refs & Annos)

→ → 5709.40 Improvements declared to be public purpose; objections

(A) As used in this section:

- (1) "Blighted area" and "impacted city" have the same meanings as in section 1728.01 of the Revised Code.
- (2) "Business day" means a day of the week excluding Saturday, Sunday, and a legal holiday as defined under section 1.14 of the Revised Code.
- (3) "Housing renovation" means a project carried out for residential purposes.
- (4) "Improvement" means the increase in the assessed value of any real property that would first appear on the tax list and duplicate of real and public utility property after the effective date of an ordinance adopted under this section were it not for the exemption granted by that ordinance.
- (5) "Incentive district" means an area not more than three hundred acres in size enclosed by a continuous boundary in which a project is being, or will be, undertaken and having one or more of the following distress characteristics:
  - (a) At least fifty-one per cent of the residents of the district have incomes of less than eighty per cent of the median income of residents of the political subdivision in which the district is located, as determined in the same manner specified under section 119(b) of the "Housing and Community Development Act of 1974," 88 Stat. 633, 42 U.S.C. 5318, as amended;
  - (b) The average rate of unemployment in the district during the most recent twelve-month period for which data are available is equal to at least one hundred fifty per cent of the average rate of unemployment for this state for the same period.
  - (c) At least twenty per cent of the people residing in the district live at or below the poverty level as defined in the federal Housing and Community Development Act of 1974, 42 U.S.C. 5301, as amended, and regulations adopted pursuant to that act.
  - (d) The district is a blighted area.
  - (e) The district is in a situational distress area as designated by the director of development under division (F) of section 122.23 of the Revised Code.
  - (f) As certified by the engineer for the political subdivision, the public infrastructure serving the district is inadequate to meet the development needs of the district as evidenced by a written economic development plan or urban

renewal plan for the district that has been adopted by the legislative authority of the subdivision.

(g) The district is comprised entirely of unimproved land that is located in a distressed area as defined in section 122.23 of the Revised Code.

(6) "Project" means development activities undertaken on one or more parcels, including, but not limited to, construction, expansion, and alteration of buildings or structures, demolition, remediation, and site development, and any building or structure that results from those activities.

(7) "Public infrastructure improvement" includes, but is not limited to, public roads and highways; water and sewer lines; environmental remediation; land acquisition, including acquisition in aid of industry, commerce, distribution, or research; demolition, including demolition on private property when determined to be necessary for economic development purposes; stormwater and flood remediation projects, including such projects on private property when determined to be necessary for public health, safety, and welfare; the provision of gas, electric, and communications service facilities; and the enhancement of public waterways through improvements that allow for greater public access.

(B) The legislative authority of a municipal corporation, by ordinance, may declare improvements to certain parcels of real property located in the municipal corporation to be a public purpose. Improvements with respect to a parcel that is used or to be used for residential purposes may be declared a public purpose under this division only if the parcel is located in a blighted area of an impacted city. Except with the approval under division (D) of this section of the board of education of each city, local, or exempted village school district within which the improvements are located, not more than seventy-five per cent of an improvement thus declared to be a public purpose may be exempted from real property taxation for a period of not more than ten years. The ordinance shall specify the percentage of the improvement to be exempted from taxation and the life of the exemption.

An ordinance adopted or amended under this division shall designate the specific public infrastructure improvements made, to be made, or in the process of being made by the municipal corporation that directly benefit, or that once made will directly benefit, the parcels for which improvements are declared to be a public purpose. The service payments provided for in section 5709.42 of the Revised Code shall be used to finance the public infrastructure improvements designated in the ordinance, for the purpose described in division (D)(1) of this section or as provided in section 5709.43 of the Revised Code.

(C)(1) The legislative authority of a municipal corporation may adopt an ordinance creating an incentive district and declaring improvements to parcels within the district to be a public purpose and, except as provided in division (F) of this section, exempt from taxation as provided in this section, but no legislative authority of a municipal corporation that has a population that exceeds twenty-five thousand, as shown by the most recent federal decennial census, shall adopt an ordinance that creates an incentive district if the sum of the taxable value of real property in the proposed district for the preceding tax year and the taxable value of all real property in the municipal corporation that would have been taxable in the preceding year were it not for the fact that the property was in an existing incentive district and therefore exempt from taxation exceeds twenty-five per cent of the taxable value of real property in the municipal corporation for the preceding tax year. The ordinance shall delineate the boundary of the district and specifically identify each parcel within the district. A district may not include any parcel that is or has been exempted from taxation under division (B) of this section or that is or has been within another district created under this division. An ordinance may create more than one such district, and more than one ordinance may be adopted under division (C)(1) of this section.

(2) Not later than thirty days prior to adopting an ordinance under division (C)(1) of this section, if the municipal corporation intends to apply for exemptions from taxation under section 5709.911 of the Revised Code on behalf of owners of real property located within the proposed incentive district, the legislative authority of a municipal corpo-

ration shall conduct a public hearing on the proposed ordinance. Not later than thirty days prior to the public hearing, the legislative authority shall give notice of the public hearing and the proposed ordinance by first class mail to every real property owner whose property is located within the boundaries of the proposed incentive district that is the subject of the proposed ordinance.

(3)(a) An ordinance adopted under division (C)(1) of this section shall specify the life of the incentive district and the percentage of the improvements to be exempted, shall designate the public infrastructure improvements made, to be made, or in the process of being made, that benefit or serve, or, once made, will benefit or serve parcels in the district. The ordinance also shall identify one or more specific projects being, or to be, undertaken in the district that place additional demand on the public infrastructure improvements designated in the ordinance. The project identified may, but need not be, the project under division (C)(3)(b) of this section that places real property in use for commercial or industrial purposes. Except as otherwise permitted under that division, the service payments provided for in section 5709.42 of the Revised Code shall be used to finance the designated public infrastructure improvements, for the purpose described in division (D)(1) or (E) of this section, or as provided in section 5709.43 of the Revised Code.

An ordinance adopted under division (C)(1) of this section on or after March 30, 2006, shall not designate police or fire equipment as public infrastructure improvements, and no service payment provided for in section 5709.42 of the Revised Code and received by the municipal corporation under the ordinance shall be used for police or fire equipment.

(b) An ordinance adopted under division (C)(1) of this section may authorize the use of service payments provided for in section 5709.42 of the Revised Code for the purpose of housing renovations within the incentive district, provided that the ordinance also designates public infrastructure improvements that benefit or serve the district, and that a project within the district places real property in use for commercial or industrial purposes. Service payments may be used to finance or support loans, deferred loans, and grants to persons for the purpose of housing renovations within the district. The ordinance shall designate the parcels within the district that are eligible for housing renovation. The ordinance shall state separately the amounts or the percentages of the expected aggregate service payments that are designated for each public infrastructure improvement and for the general purpose of housing renovations.

(4) Except with the approval of the board of education of each city, local, or exempted village school district within the territory of which the incentive district is or will be located, and subject to division (E) of this section, the life of an incentive district shall not exceed ten years, and the percentage of improvements to be exempted shall not exceed seventy-five per cent. With approval of the board of education, the life of a district may be not more than thirty years, and the percentage of improvements to be exempted may be not more than one hundred per cent. The approval of a board of education shall be obtained in the manner provided in division (D) of this section.

(D)(1) If the ordinance declaring improvements to a parcel to be a public purpose or creating an incentive district specifies that payments in lieu of taxes provided for in section 5709.42 of the Revised Code shall be paid to the city, local, or exempted village, and joint vocational school district in which the parcel or incentive district is located in the amount of the taxes that would have been payable to the school district if the improvements had not been exempted from taxation, the percentage of the improvement that may be exempted from taxation may exceed seventy-five per cent, and the exemption may be granted for up to thirty years, without the approval of the board of education as otherwise required under division (D)(2) of this section.

(2) Improvements with respect to a parcel may be exempted from taxation under division (B) of this section, and improvements to parcels within an incentive district may be exempted from taxation under division (C) of this section, for up to ten years or, with the approval under this paragraph of the board of education of the city, local, or exempted village school district within which the parcel or district is located, for up to thirty years. The percentage of the improvement exempted from taxation may, with such approval, exceed seventy-five per cent, but shall not exceed one hundred per cent. Not later than forty-five business days prior to adopting an ordinance under this sec-

tion declaring improvements to be a public purpose that is subject to approval by a board of education under this division, the legislative authority shall deliver to the board of education a notice stating its intent to adopt an ordinance making that declaration. The notice regarding improvements with respect to a parcel under division (B) of this section shall identify the parcels for which improvements are to be exempted from taxation, provide an estimate of the true value in money of the improvements, specify the period for which the improvements would be exempted from taxation and the percentage of the improvement that would be exempted, and indicate the date on which the legislative authority intends to adopt the ordinance. The notice regarding improvements to parcels within an incentive district under division (C) of this section shall delineate the boundaries of the district, specifically identify each parcel within the district, identify each anticipated improvement in the district, provide an estimate of the true value in money of each such improvement, specify the life of the district and the percentage of improvements that would be exempted, and indicate the date on which the legislative authority intends to adopt the ordinance. The board of education, by resolution adopted by a majority of the board, may approve the exemption for the period or for the exemption percentage specified in the notice; may disapprove the exemption for the number of years in excess of ten, may disapprove the exemption for the percentage of the improvement to be exempted in excess of seventy-five per cent, or both; or may approve the exemption on the condition that the legislative authority and the board negotiate an agreement providing for compensation to the school district equal in value to a percentage of the amount of taxes exempted in the eleventh and subsequent years of the exemption period or, in the case of exemption percentages in excess of seventy-five per cent, compensation equal in value to a percentage of the taxes that would be payable on the portion of the improvement in excess of seventy-five per cent were that portion to be subject to taxation, or other mutually agreeable compensation. If an agreement is negotiated between the legislative authority and the board to compensate the school district for all or part of the taxes exempted, including agreements for payments in lieu of taxes under section 5709.42 of the Revised Code, the legislative authority shall compensate the joint vocational school district within which the parcel or district is located at the same rate and under the same terms received by the city, local, or exempted village school district.

(3) The board of education shall certify its resolution to the legislative authority not later than fourteen days prior to the date the legislative authority intends to adopt the ordinance as indicated in the notice. If the board of education and the legislative authority negotiate a mutually acceptable compensation agreement, the ordinance may declare the improvements a public purpose for the number of years specified in the ordinance or, in the case of exemption percentages in excess of seventy-five per cent, for the exemption percentage specified in the ordinance. In either case, if the board and the legislative authority fail to negotiate a mutually acceptable compensation agreement, the ordinance may declare the improvements a public purpose for not more than ten years, and shall not exempt more than seventy-five per cent of the improvements from taxation. If the board fails to certify a resolution to the legislative authority within the time prescribed by this division, the legislative authority thereupon may adopt the ordinance and may declare the improvements a public purpose for up to thirty years, or, in the case of exemption percentages proposed in excess of seventy-five per cent, for the exemption percentage specified in the ordinance. The legislative authority may adopt the ordinance at any time after the board of education certifies its resolution approving the exemption to the legislative authority, or, if the board approves the exemption on the condition that a mutually acceptable compensation agreement be negotiated, at any time after the compensation agreement is agreed to by the board and the legislative authority.

(4) If a board of education has adopted a resolution waiving its right to approve exemptions from taxation under this section and the resolution remains in effect, approval of exemptions by the board is not required under division (D) of this section. If a board of education has adopted a resolution allowing a legislative authority to deliver the notice required under division (D) of this section fewer than forty-five business days prior to the legislative authority's adoption of the ordinance, the legislative authority shall deliver the notice to the board not later than the number of days prior to such adoption as prescribed by the board in its resolution. If a board of education adopts a resolution waiving its right to approve agreements or shortening the notification period, the board shall certify a copy of the resolution to the legislative authority. If the board of education rescinds such a resolution, it shall certify notice of the rescission to the legislative authority.

(5) If the legislative authority is not required by division (D) of this section to notify the board of education of the legislative authority's intent to declare improvements to be a public purpose, the legislative authority shall comply with the notice requirements imposed under section 5709.83 of the Revised Code, unless the board has adopted a resolution under that section waiving its right to receive such a notice.

(E)(1) If a proposed ordinance under division (C)(1) of this section exempts improvements with respect to a parcel within an incentive district for more than ten years, or the percentage of the improvement exempted from taxation exceeds seventy-five per cent, not later than forty-five business days prior to adopting the ordinance the legislative authority of the municipal corporation shall deliver to the board of county commissioners of the county within which the incentive district will be located a notice that states its intent to adopt an ordinance creating an incentive district. The notice shall include a copy of the proposed ordinance, identify the parcels for which improvements are to be exempted from taxation, provide an estimate of the true value in money of the improvements, specify the period of time for which the improvements would be exempted from taxation, specify the percentage of the improvements that would be exempted from taxation, and indicate the date on which the legislative authority intends to adopt the ordinance.

(2) The board of county commissioners, by resolution adopted by a majority of the board, may object to the exemption for the number of years in excess of ten, may object to the exemption for the percentage of the improvement to be exempted in excess of seventy-five per cent, or both. If the board of county commissioners objects, the board may negotiate a mutually acceptable compensation agreement with the legislative authority. In no case shall the compensation provided to the board exceed the property taxes forgone due to the exemption. If the board of county commissioners objects, and the board and legislative authority fail to negotiate a mutually acceptable compensation agreement, the ordinance adopted under division (C)(1) of this section shall provide to the board compensation in the eleventh and subsequent years of the exemption period equal in value to not more than fifty per cent of the taxes that would be payable to the county or, if the board's objection includes an objection to an exemption percentage in excess of seventy-five per cent, compensation equal in value to not more than fifty per cent of the taxes that would be payable to the county, on the portion of the improvement in excess of seventy-five per cent, were that portion to be subject to taxation. The board of county commissioners shall certify its resolution to the legislative authority not later than thirty days after receipt of the notice.

(3) If the board of county commissioners does not object or fails to certify its resolution objecting to an exemption within thirty days after receipt of the notice, the legislative authority may adopt the ordinance, and no compensation shall be provided to the board of county commissioners. If the board timely certifies its resolution objecting to the ordinance, the legislative authority may adopt the ordinance at any time after a mutually acceptable compensation agreement is agreed to by the board and the legislative authority, or, if no compensation agreement is negotiated, at any time after the legislative authority agrees in the proposed ordinance to provide compensation to the board of fifty per cent of the taxes that would be payable to the county in the eleventh and subsequent years of the exemption period or on the portion of the improvement in excess of seventy-five per cent, were that portion to be subject to taxation.

(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 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 men-

tal 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.

(G) An exemption from taxation granted under this section commences with the tax year specified in the ordinance so long as the year specified in the ordinance commences after the effective date of the ordinance. If the ordinance specifies a year commencing before the effective date of the resolution or specifies no year whatsoever, the exemption commences with the tax year in which an exempted improvement first appears on the tax list and duplicate of real and public utility property and that commences after the effective date of the ordinance. Except as otherwise provided in this division, the exemption ends on the date specified in the ordinance as the date the improvement ceases to be a public purpose or the incentive district expires, or ends on the date on which the public infrastructure improvements and housing renovations are paid in full from the municipal public improvement tax increment equivalent fund established under division (A) of section 5709.43 of the Revised Code, whichever occurs first. The exemption of an improvement with respect to a parcel or within an incentive district may end on a later date, as specified in the ordinance, if the legislative authority and the board of education of the city, local, or exempted village school district within which the parcel or district is located have entered into a compensation agreement under section 5709.82 of the Revised Code with respect to the improvement, and the board of education has approved the term of the exemption under division (D)(2) of this section, but in no case shall the improvement be exempted from taxation for more than thirty years. Exemptions shall be claimed and allowed in the same manner as in the case of other real property exemptions. If an exemption status changes during a year, the procedure for the apportionment of the taxes for that year is the same as in the case of other changes in tax exemption status during the year.

(H) Additional municipal financing of public infrastructure improvements and housing renovations may be provided by any methods that the municipal corporation may otherwise use for financing such improvements or renovations. If the municipal corporation issues bonds or notes to finance the public infrastructure improvements and housing renovations and pledges money from the municipal public improvement tax increment equivalent fund to pay the interest on and principal of the bonds or notes, the bonds or notes are not subject to Chapter 133. of the Revised Code.

(I) The municipal corporation, not later than fifteen days after the adoption of an ordinance under this section, shall submit to the director of development a copy of the ordinance. On or before the thirty-first day of March of each year, the municipal corporation shall submit a status report to the director of development. The report shall indicate, in the manner prescribed by the director, the progress of the project during each year that an exemption remains in effect, including a summary of the receipts from service payments in lieu of taxes; expenditures of money from the funds created under section 5709.43 of the Revised Code; a description of the public infrastructure improvements and housing renovations financed with such expenditures; and a quantitative summary of changes in employment and private investment resulting from each project.

(J) Nothing in this section shall be construed to prohibit a legislative authority from declaring to be a public purpose improvements with respect to more than one parcel.

CREDIT(S)

(2011 H 153, eff. 9-29-11; 2006 H 530, eff. 3-30-06; 2005 H 66, eff. 1-1-06; 2004 H 427, eff. 6-9-04; 2001 H 405, eff. 12-13-01; 1996 H 627, eff. 12-2-96; 1994 S 19, eff. 7-22-94; 1992 S 363, eff. 1-13-93)

R.C. § 5709.40, OH ST § 5709.40

Current through 2011 Files 1 to 47, 49, and 52 of the 129th GA (2011-2012) and November 8, 2011 election results.

(c) 2011 Thomson Reuters

END OF DOCUMENT