

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF OF AMICUS CURIAE CITY OF MIDDLETOWN
IN SUPPORT OF THE APPELLANT

Richard C. Brahm (0009481)
 Catherine A. Cunningham (0015730)
Counsel of Record
 Brahm & Cunningham, LLC
 145 E. Rich Street
 Columbus, Ohio 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, Ohio 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, Ohio 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, Ohio 45069
 (513) 870-8200
 Fax: (513) 870-0999
 E-mail: sphillips@fbtlaw.com

*Counsel for Appellee,
Sugarcreek Township*

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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, Ohio 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)
One Donham Plaza
Middletown, Ohio 45042
(513) 425-7830
Fax: (513) 425-7780
E-mail: lesl@cityofmiddletown.org

*Counsel for Amicus Curiae,
City of Middletown*

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

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

Matthew J. DeTemple (0023294)
6500 Taylor Road
Blacklick, Ohio 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, Ohio 43015
(740) 203-1014
Fax: (740) 203-1021
E-mail: dshulman@delawareohio.net

*Counsel for Amicus Curiae,
City of Delaware*

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STATEMENT OF FACTS

This case was originally filed by Sugarcreek Township in an effort to challenge an annexation brought by property owners seeking annexation to the City of Centerville and in conjunction therewith a proposed TIF referenced in a pre-annexation agreement between the developers, owners and the City of Centerville. The trial court in this case determined that the annexation proceedings were correct. However, the court ultimately determined that all outside millage which was levied by the township was not subject to the tax exemption under tax increment financing laws and therefore was not available as a source of funds using the TIF mechanism because the property was annexed under R.C. 709.023. The trial court held that sub-section (H) of that provision guaranteed the township that all of its taxes would be held unaffected, and the TIF could not be used to exempt those taxes.

This amicus curiae would anticipate that a more specific and detailed statement of the facts and of the case would be set-forth in the memorandum submitted by the Appellant and Appellee.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: R.C. 709.023(H) does not protect township voted millage from a TIF exemption.

The sole issue in this case is whether R.C. 709.023(H) provides a guarantee to a township that its millage on a piece of property obtained through an annexation under R.C. 709.023(H) is protected from exemption under R.C. 5709.40 implementing a tax increment financing (TIF). While the Appellees in this case assert that the clear language of the statute supports an interpretation that a TIF exemption cannot be applied to a property annexed in a “type 2 annexation”, the plain language of the statute and reference

to that language in conjunction with the statutes related to tax increment financing clearly establish that there is no legislative intent for the result sought by the Appellee.

The Court of Appeals has held that the use of a “type 2 annexation” by a property owner to annex property from a township to a municipality limits the ability of that city or municipal corporation to use TIF to temporarily capture the increased tax on improvements. The real estate tax on the unimproved ground remains unaffected by a TIF. This position is not consistent with the basic tenants of tax law in the State of Ohio. Further, the intent of the bill which enacted R.C. 709.023(H) does not support the lower court’s conclusion.

In crafting the major revision of Ohio annexation law in the early part of this decade, the General Assembly addressed a variety of issues related to annexation. The “type 2 annexation” was created by this law. In passing Senate Bill 5 in 2001, the law which revised the annexation procedures, the General Assembly specifically noted the impact that every annexation would have on inside millage and made changes to R.C. 5705.315 to assure that inside millage was split appropriately between cities and townships. However, the General Assembly chose not to address outside millage in a similar manner. This would not appear to be a simple oversight, but rather, a conscious decision on the part of the General Assembly not to change the law as it applied to outside millage.

A careful reading of R.C. 709.023(H) reflects the same intent. That sub-section reads:

“Notwithstanding anything to the contrary in section 503.07 of the Revised Code, unless otherwise provided in an annexation agreement entered into pursuant to section 709.192 of the Revised Code or in a cooperative economic development

agreement entered into pursuant to section 701.07 of the Revised Code, territory annexed into a municipal corporation pursuant to this section shall not at any time be excluded from the township under section 503.07 of the Revised Code and, thus, remains subject to the township's real property taxes."

The clear language in this sub-section indicates intent on the part of the General Assembly not to change the law as it presently existed. The General Assembly used the word "remains", a word suggesting continuance of the status quo. The goal here was to maintain township taxes so that they would not lose their right to collect their taxes through the annexation proceeding which required the territory to remain within the township. There is no expression of intent here to change any of the rules that relate to appropriate tax exemptions as they apply to this territory. The use of the term "remains" suggests that no change is anticipated. It would have been very easy for the General Assembly to add language which made it clear that tax exemptions under a TIF exemption would not apply to the property. No such language was added. The tenor of the statute and its specific wording indicates a conscious decision not to change the law and to permit outside millage to continue to be subject to exemption using a TIF mechanism.

In interpreting legislative acts, the intent of the legislative body is tantamount. There is certainly no a clear indication of legislative intent to change the fundamental basis of the TIF statutes. In undertaking a matter of this significance, one would hope the expression of the intent to do so would be obvious. In this circumstance, any evidence of an intent to change the law to protect outside voted millage from this exemption is, at best, unclear. It would have been very easy for the General Assembly to rewrite the law to make it clear that this was their intent. Having not done so, it would seem that the

intent was to maintain the prior state of the law. The law prior to 2001 allowed TIFs to apply to township territory that was annexed to a municipality and not taken from the township.

Sugarcreek Township argues that the statutory scheme created between the annexation laws and the TIF laws with the passage of Senate Bill 5 mandates that the TIF exemption be prohibited. This argument is based on two faulty premises. The first of these premises is that the implementation of a TIF is a “winner-take-all” proposition. Sugarcreek Township complains that the City of Centerville is allowed to annex property without its permission and then receive all of the property taxes from that annexed land. This is simply a misstatement of law. Tax increment financing, as indicated by its name, applies only to the incremental portion of the tax which results from the development of the property. The value of the land prior to development is still taxed and unaffected by the exemption. Therefore, for Sugarcreek Township to suggest that there is an inequity in this situation because Centerville receives all of the tax dollars is simply not factually correct. Moreover, it is the property owner who petitions for annexation, not Centerville.

Furthermore, there is no indication of any intent in the statutory development of Senate Bill 5 that the TIF statutes were to be significantly affected by the revision of the law. As previously noted, the statute regarding inside millage was adjusted to deal with the issues created by annexation, but the General Assembly specifically chose to leave the issue of outside millage alone. This undermines the statutory scheme suggested by Sugarcreek Township. Very simply, the General Assembly sought to assure townships that the land annexed would remain a part of its tax base, not that existing tax exemptions would not apply to that property.

Finally, the concept of TIF financing is the infrastructure which permits the development of the property is ultimately paid for over a limited time by property taxes on the developed property. This statutory approach allows a development help finance the infrastructure which permits the development to occur. This is a fundamentally fair and equitable approach to the construction of and payment for public infrastructure.

The statutory scheme asserted by Sugarcreek Township creates an absurd result. Property annexed by any procedure other than a “type 2 annexation” is subject to a TIF exemption. But territory annexed under a “type 2 annexation” is not. This is true regardless of whether the territory is removed from the township or remains in the township. Property which is maintained in the township after annexation is subject to the tax exemption if it is not a “type 2 annexation”, but is not subject to the tax exemption if it is a “type 2 annexation”. This distinction makes no sense. There is no logical basis for this arbitrary and disparate treatment of property. There is no logical reason to conclude that the General Assembly intended this result. In fact, logic dictates the contrary.

The plain language of R.C. 709.023(H) states that the “territory annexed into the 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, must remain subject to the townships real property taxes.” It should be noted that this plain language says as long as the property remains part of the township the township real property taxes are in place and applicable. It does not create any special protection from a TIF on those taxes. All property which remains in any township remains subject to the real property taxes of the township. This does not limit exemptions from being applied to the property. If the

property were purchased by a charitable organization and used for a charitable purpose, the exemptions provided in R.C. 5709.121 would apply.

Sugarcreek Township has argued that the City of Centerville is fixated on the language on the TIF statutes in reviewing this issue. Since a TIF exemption is what is in question in this case, the focus should be on the statutes related to TIFs; not a statute which was designed as a compromise to resolve annexation wars in the State of Ohio.

In summary, there is nothing in the language of the statute or the action of the General Assembly which supports the position taken by Sugarcreek Township in this case. In fact, every action taken by the General Assembly in conjunction with Senate Bill 5 suggests that the intent was not to change the applicability of TIF exemptions to property annexed under any type of procedure including the “type 2 annexation”. There is simply nothing to support a determination of legislative intent by the General Assembly to create the blanket exemption which the Court of Appeals has determined that exists in this case.

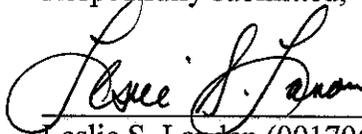
CONCLUSION

This case is a thinly veiled attempt by Sugarcreek Township to effectively overturn a “type 2 annexation” because it does not like the “type 2 annexation” procedure. In fact, the record in this case clearly shows that this was just one of many arguments in this case. It was an attack on the “type 2 annexation”. When this attack on “type 2 annexation” failed, Sugarcreek Township retrenched itself and addressed a different flank; the financing mechanism which would allow the land to be developed in the City of Centerville. By making the land worthless to the City of Centerville, Sugarcreek Township might persuade the City of Centerville to abandon the annexation.

Unfortunately, the Court of Appeals below accepted and confirmed this tactic. As a result, a useful method of financing development in undeveloped areas of the State of Ohio will be denied in certain areas which are annexed using the "type 2 annexation" procedure without any show of cause or justification therefore. This is senseless, and completely inconsistent with Ohio law. Furthermore, the result of the decision below is that many cities which have used "type 2 annexations" and have used TIF financing to develop infrastructure for the development of those areas so annexed, now face the results of a Supreme Court decision 10 years after the passage of Senate Bill 5 which would fundamentally change the game and playing field.

The results of the position taken by Sugarcreek Township and Court of Appeals are at a minimum risky to the State of Ohio and specifically to the municipal corporations located in the State of Ohio. Furthermore, there is simply no support for the position that the General Assembly intended the result which is being sought by Sugarcreek Township and has been adopted by the Court of Appeals in this case. For these reasons, the decision of the Court of Appeals should be reversed and this cause should be dismissed.

Respectfully submitted,



Leslie S. Landen (0017064)

One Donham Plaza

Middletown, Ohio 45042

Telephone: (513) 425-7830

Fax: (513) 425-7780

E-mail: lesl@cityofmiddletown.org

Counsel for Amicus Curiae,

City of Middletown

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following parties
by electronic mail this 19th day of December, 2011:

Richard C. Brahm, Esq.
Catherine A. Cunningham, Esq.
Brahm & Cunningham, LLC
145 E. Rich Street
Columbus, Ohio 43215
E-mail: ccunningham@brahmcunningham.com

Matthew C. Blickensderfer, Esq.
Frost Brown Todd LLC
3300 Great American Tower
301 E. Fourth Street
Cincinnati, Ohio 45202
E-mail: mblickensderfer@fbtlaw.com

Scott A. Liberman, Esq.
Altick & Corwin Co., LPA
1700 One Dayton Centre
One South Main Street
Dayton, Ohio 45402
E-mail: liberman@altickcorwin.com

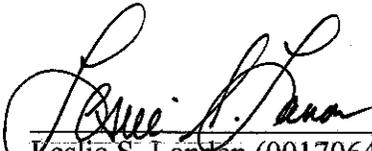
Scott D. Phillips, Esq.
Frost Brown Todd LLC
9277 Centre Point Drive, Suite 300
West Chester, Ohio 45069
E-mail: sphillips@fbtlaw.com

Robert A. Meyer, Jr., Esq.
Mark A. Snider, Esq.
L. Bradfield Hughes, Esq.
Porter Wright Morris & Arthur LLP
41 S. High Street
Columbus, Ohio 43215
E-mail: rmeyer@porterwright.com

Matthew J. DeTemple, Esq.
6500 Taylor Road
Blacklick, Ohio 43004
E-mail: detemple@ohiotownships.org

Darren M. Shulman, Esq.
Delaware City Attorney
1 S. Sandusky Street
Delaware, Ohio 43015
E-mail: dshulman@delawareohio.net

Eugene L. Hollins, Esq.
Dale D. Cook, Esq.
Wiles, Boyle, Burkholder &
Bringardner Co., LPA
300 Spruce Street, Floor One
Columbus, Ohio 43215
E-mail: ghollins@wileslaw.com



Leslie S. Landen (0017064)