

IN THE SUPREME COURT OF OHIO

SUGARCREEK TOWNSHIP,

Appellee,

v.

CITY OF CENTERVILLE,

Appellant.

: Supreme Court Case No. 11-0926  
:  
: On Appeal from the Greene County Court of  
: Appeals, Second Appellate District  
:  
: Court of Appeals No. 2010-CA-0052  
:  
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:

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FILED  
FEB 08 2012  
CLERK OF COURT  
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## INTRODUCTION

This case involves an attempt by the City of Centerville to take advantage of the benefits of the expedited Type-2 annexation procedure in the Revised Code while dodging its limitations. An expedited Type-2 annexation allows a municipal corporation quickly to annex territory within a township without the township's consent and without any discretion by the board of county commissioners to deny the annexation. The trade-off is that the township retains its real property tax revenues from the annexed territory. Centerville wants the benefits of expedition and unilateral authority provided by the expedited Type-2 annexation method. But it wants to skip the trade-off and divert real property tax revenues from Sugarcreek Township.

The relevant statute, R.C. 709.023(H), is clear that the annexed territory "remains subject to the township's real property taxes." Both the court of common pleas and the court of appeals had little difficulty finding that this language means what it says, and that Centerville could not divert real property tax revenues from Sugarcreek. The Court should apply this straightforward language and affirm the judgment of the court of appeals.

## STATEMENT OF FACTS

Dille Laboratories Corporation owned two parcels of land comprising about 270 acres in Sugarcreek Township abutting the City of Centerville. (Supp. 1, 3-4)<sup>1</sup> The two parcels are located at the intersection of Interstate 675 and Wilmington Pike, about 10 miles southeast of downtown Dayton. (Supp. 2) In the fall of 2004, Dille Laboratories entered an agreement to sell

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<sup>1</sup> Citations to "Supp." are to the Supplement to the Merit Brief of Appellee Sugarcreek Township.

these parcels to a developer, Bear Creek Capital, LLC. (Appx. 64)<sup>2</sup> Bear Creek, intending to develop a commercial project on the Dille parcels, sought zoning changes for the parcels from Sugarcreek, which the Sugarcreek board of township trustees approved. (Appx. 65) Sugarcreek officials believed that Bear Creek nonetheless was “shopping” its project to neighboring municipalities, including the City of Kettering and the City of Centerville. *Id.* Officials from Kettering, Centerville, and Sugarcreek met in early 2006 to discuss possible cooperation with respect to the Bear Creek project. *Id.*

In a move that surprised Sugarcreek officials, Centerville entered pre-annexation agreements with Dille Corporation and developer Bear Creek Capital, LLC in April of 2006. (Appx. 66, 198) The pre-annexation agreements outlined a plan for Centerville to annex the Dille property from Sugarcreek using two expedited Type-2 annexations under R.C. 709.023. (Supp. 15-16) An expedited Type-2 annexation is available when initiated by all of the property owners of the territory in question. R.C. 709.023(E)(2). As long as certain technical criteria are met, the board of county commissioners has no discretion to deny the annexation. R.C. 709.023(F). The township in which the territory is located has no right to dispute the merits of the annexation. The annexed territory becomes part of the annexing municipality while also remaining within the township. R.C. 709.023(H). But the annexed territory “remains subject to the *township’s* real property taxes.” *Id.* (emphasis added).

The pre-annexation agreements nonetheless included a plan for Centerville to use tax increment financing (“TIF”) to divert to itself real property tax revenues that would otherwise go to Sugarcreek:

Coincident with the City’s approving the final plans for development of any portion of the Property that has been annexed

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<sup>2</sup> Citations to “Appx.” are to the Appendix to the Brief of Appellant City of Centerville.

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 which may be generated from the new development without approval from a school district. The payments made in lieu of taxes will be applied to the City to recoup and apply to the costs associated with the construction of necessary public improvements.

(Supp. 18) Finding that the annexation petitions met technical criteria in R.C. 709.023(E), the Greene County Board of County Commissioners approved the annexations of the Dille property in June and July of 2006. (Appx. 198; Supp. 33-37)

In an expedited Type-2 annexation, the municipality has complete discretion to choose whether it will provide *any* services to the annexed territory and, if so, which ones it will provide. R.C. 709.023(C). Centerville did not intend to provide (and has not provided) fire protection or other emergency services to the Dille property. (Supp. 52-54) Sugarcreek has remained responsible for providing these services to the annexed territory. *Id.* Thus, Centerville intended to force Sugarcreek to provide these critical services to the annexed territory while diverting real property tax revenues from Sugarcreek through the TIF plan.

Sugarcreek filed this action in the Greene County Court of Common Pleas, seeking, among other things, a declaration that the TIF plan violated the command in R.C. 709.023(H) that the annexed territory "remains subject to the township's real property taxes." (Supp. 1-14) The court of common pleas held 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." (Appx. 123)

The Second District Court of Appeals affirmed with one limited – and correct – exception. *Sugarcreek Township v. City of Centerville*, 184 Ohio App.3d 480, 2009-Ohio-4974, 921 N.E.2d 655 (2d Dist.) ("*Sugarcreek P*") (Appx. 62-111). The Second District distinguished

between “inside millage” and “outside millage.” Inside millage represents real property taxation up to the constitutional 10-mill maximum that may be imposed with voter approval. The 10-mill maximum applies to all taxing authorities with jurisdiction over the particular property, so that total inside millage imposed by all taxing authorities on a particular piece of property may not exceed 10 mills. Outside millage represents real property taxation approved by the voters in excess of the constitutional limit. *See generally* Ohio Constitution, Article XII, § 2 (“No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation.”)

When annexed territory becomes part of a municipality but also remains in a township, as it does in an expedited Type-2 annexation, both local governments are entitled to inside millage. Because of the constitutional 10-mill maximum, however, both may not be entitled to all of their inside millage. The “splitting statute” – R.C. 5705.315 – resolves this issue. In effect, the splitting statute gives each of the municipality and township the lesser of (1) half of the available inside millage remaining after accounting for other potential taxing authorities’ inside millage, or (2) the full amount of their inside millage if it can be accommodated within the 10-mill limit. The Second District therefore held that Centerville was entitled to the amount of inside millage determined by the splitting statute. *Sugarcreek I*, 184 Ohio App.3d 480, 2009-Ohio-4974, 921 N.E.2d 655, ¶ 4. (Appx. 64)

As to other real property tax revenues from the annexed territory, however, the Second District held that Centerville could not divert real property taxed that would otherwise go to

Sugarcreek: “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 Property].” *Id.* at ¶ 4. (Appx. 64)

After remand, the court of common pleas implemented the mandate of the Second District. It held that both Sugarcreek and Centerville were entitled to their respective outside millage. (Appx. 10) Consequently, while Centerville could implement a TIF plan to exempt *its own* outside millage, it could not impede Sugarcreek’s collection of Sugarcreek’s outside millage. *Id.* Centerville therefore could not implement a TIF plan that would:

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 . . . .

(Appx. 45-46)

Centerville again appealed to the Second District Court of Appeals. In a decision by the same panel that decided Centerville’s first appeal, the court of appeals affirmed. “We believe the plain language of R.C. 709.023(H),” the court of appeals held, “precludes Centerville from enacting a TIF plan that would prevent Sugarcreek from collecting the property taxes, whether in the form of inside millage or outside millage, to which it is entitled.” *Sugarcreek Township v. Centerville*, 193 Ohio App.3d 498, 2011-Ohio-1830, 952 N.E.2d 519, ¶ 21 (2d Dist.) (“*Sugarcreek II*”). (Appx. 12) After Centerville’s timely appeal, this Court accepted the case for review, with two justices dissenting. *Sugarcreek Township v. City of Centerville*, 10/05/2011 *Case Announcements*, 2011-Ohio-5129.

## ARGUMENT

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

This case turns on the interpretation of various statutes. Statutory interpretation is a pure question of law and is therefore reviewed de novo. *See Riedel v. Consolidated Rail Corp.*, 125 Ohio St.3d 358, 2010-Ohio-1926, 928 N.E.2d 448, ¶ 6.

- I. **The plain language of R.C. 709.023(H) protects township tax revenues from being exempted, abated, or otherwise diverted by a municipal corporation following an expedited Type-2 annexation.**
  - A. **Ohio's annexation reform created three new expedited annexation methods with different benefits and disadvantages to the affected localities and property owners.**

The General Assembly enacted comprehensive reform of the annexation laws in 2001.<sup>3</sup> Prior to then, Ohio law provided for a single form of annexation requiring a petition signed by a majority of affected property owners. The traditional annexation process vested discretion in the board of county commissioners to approve or deny the annexation, and certain interested parties – such as the township from which the land would be removed – had the opportunity to object. *See generally* R.C. 709.02 – 709.11.

The 2001 reform changed certain aspects of the traditional process and also created three new, expedited forms of annexation. *See generally State ex rel. Butler Township Bd. of Trustee v. Montgomery Cty. Bd. of Cty. Comm'rs*, 112 Ohio St.3d 262, 2006-Ohio-6411, 858 N.E.2d

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<sup>3</sup> Due to the filing of a referendum petition that was ultimately determined to be legally insufficient, the reforms did not become effective until 2002. *See Thornton v. Salak*, 112 Ohio St.3d 254, 2006-Ohio-6407, 858 N.E.2d 1187.

1193. Each of the three expedited annexation procedures involves trade-offs for all interested parties; each party gains some benefit for each of the new forms, but also gives up something in exchange for that benefit. The end result is that municipal corporations that seek to annex land from a township have four distinct options to accomplish that result, each option with its own advantages and disadvantages.

An expedited Type-1 annexation requires the consent of all parties – the municipal corporation, the township, and all affected property owners – as well as either an annexation agreement among the parties or a “cooperative economic development agreement.” R.C. 709.022. If these requirements are met, the board of county commissioners *must* approve the annexation, and there is no right of appeal from the commissioners’ decision. *Id.* The municipal corporation obtains the benefit of expedited, automatic approval without the possibility of appeals. But in return, it must obtain consent from all interested parties, and it must obtain the township’s agreement on tax and other economic issues.

An expedited Type-2 annexation – the form at issue here – requires a petition from all affected property owners and also requires the board of county commissioners to approve the annexation so long as certain procedural requirements are met. R.C. 709.023. The commissioners have no discretion, and the township has no ability to object on substantive grounds. *Id.* Because the township has no voice in the process, an expedited Type-2 annexation does not remove the land from the township’s jurisdiction; instead, the territory “shall not at any time be excluded from the township . . . .” R.C. 709.023(H). The land becomes part of both the township and the municipal corporation and “remains subject to the township’s real property taxes.” *Id.* Under an expedited Type-2 annexation, then, a municipal corporation obtains expedited, virtually automatic approval; it does *not* have to obtain the consent of the township or

entered into an agreement on economic terms with the township; it can obtain additional revenue from the annexation territory through earnings, sales, and hotel taxes and the like; but it cannot divert the township's real property taxes.

This design makes perfect sense. When an annexation can proceed without the affected township's consent, the municipal corporation should not be able unilaterally to remove the territory from the township. And when the annexed territory remains part of the township, the township may have financial or other obligations to the territory even after the annexation. Here, for example, Sugarcreek retains responsibility in the annexed territory for fire protection and emergency services, because Centerville is not providing them. (Supp. 52-54) The General Assembly therefore wisely provided townships with the financial resources to perform these continuing obligations by requiring that the township retains its real property tax revenues after an expedited Type-2 annexation.

The history of Senate Bill 5 confirms this understanding of the expedited annexation methods and, in particular, the expedited Type-2 method in R.C. 709.023(H). The legislation was intended to "enable townships to keep more revenue or receive higher payments from municipalities in cases when an annexation is approved." Fiscal Note & Local Impact Statement, Amended Substitute Senate Bill 5, Ohio Legislative Service Commission (June 12, 2001). Under the expedited Type-2 annexation method, the township "could continue to collect general property tax revenue, in certain cases, and some inside millage." *Id.*

An expedited Type-3 annexation is similar to an expedited Type-2 annexation in that the land is not excluded from the township and remains subject to the township's real property taxes. R.C. 709.024. The municipal corporation must obtain a certification from the state's Director of Development that the annexation is for the purpose of a "significant economic development

project,” which requires that the project meet specified investment and payroll criteria. *Id.* If this requirement is met, the board of county commissioners must approve the annexation, and the township has no ability to object on substantive grounds. *Id.*

One of the goals of the General Assembly’s annexation reform was “to promote cooperation among local governments.” *State ex rel. Butler Township Bd. of Trustee v. Montgomery Cty. Bd. of Cty. Comm’rs*, 112 Ohio St.3d 262, 2006-Ohio-6411, 858 N.E.2d 1193, ¶ 8. The annexation statutes accomplish that goal by offering an expedited form of annexation – expedited Type-1 – that provides for automatic approval by the board of county commissioners and no right of appeal when the municipal corporation and the township reach agreement on the economic issues and resolve their respective concerns about the fiscal impacts of the annexation. When the municipal corporation and township are not able to agree on these issues, the General Assembly offered two other, still expedited, annexation methods – expedited Type-2 and expedited Type-3 – in which the fiscal impact to the township will be minimized through retention of real property tax revenues. The statutory scheme therefore encourages both municipal corporations and townships to work cooperatively with each other and to try to agree on economic issues to create a win-win situation. When that does not happen, the statutes split the baby, so to speak, by allowing the annexation to occur without diversion of real property tax revenues.

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

smaller the role the township is given in a particular annexation process, the more protections the General Assembly built in for the township.

**B. Centerville's tax increment financing plan violates R.C. 709.023(H).**

Centerville wants to undo this carefully constructed system of checks and balances. It voluntarily employed an expedited Type-2 annexation, in which the Greene County Board of Commissioners had no discretion to deny the annexation, and in which Sugarcreek Township had no ability to object to the annexation on substantive grounds. Because Centerville chose an expedited Type-2 annexation, it did not have to obtain the consent of the township. And Centerville did not have to enter any sort of agreement with the township on economic issues. The trade-off, of course, is that the annexed land "remains subject to the township's real property taxes."

Centerville's tax increment financing plan would divert real property taxes that Sugarcreek would otherwise receive, and thus that plan violates the command that the annexed territory "remains subject to the township's real property taxes." Tax increment financing is a system in which a taxing authority exempts a portion of the value of certain parcels from real property taxation, then collects from the owners of the parcels payments equal to the taxes that would have been paid absent the exemptions. These payments are called "service payments in lieu of taxes." The portion of the parcels' value exempted from taxation is the *increase* in value since implementation of the plan (not the entire value) – thus the name tax "increment" financing. The funds collected by the taxing authority are then used to finance public improvements needed for the development of the exempted parcels.

Centerville's TIF plan called for exempting up to 75% of the increase in real property value in the annexed territory. Sugarcreek's inside millage and outside millage would, of course,

apply to those increases in real property value. In other words, Sugarcreek would collect additional real property taxes from the annexed territory from any increase in property values in the annexed territory. By exempting from real property taxation up to 75% of the increase in real property values in the annexed territory, Centerville would be interfering with Sugarcreek's collection of those taxes and diverting from Sugarcreek to Centerville tax revenues that Sugarcreek would otherwise obtain.

Centerville has not denied – and could not deny – that its TIF plan would interfere with the collection of real property tax revenues that Sugarcreek would receive. To the contrary, Centerville admits that its TIF plan would deprive Sugarcreek of certain real property tax revenues: the statute “does not preclude or limit a municipality from adopting a TIF ordinance that *temporarily diverts some tax payments that a township may otherwise receive* from land improvements . . . .” Brief of Appellant, City of Centerville, Ohio at 19 (emphasis added). Amici curiae Ohio Home Builders Association et alia concede this same point, acknowledging that the TIF plan would “temporarily divert[] some tax payments that a co-terminous township would otherwise receive . . . .” Brief of Amici Curiae Ohio Home Builders Association, Building Industry of Central Ohio, Ohio Association of Realtors, and Central Ohio NAIOP in Support of Appellant, City of Centerville at 10 (emphasis omitted).

Thus, Centerville wants all the benefits of the expedited Type-2 annexation process with none of the drawbacks. It wants an annexation process in which the township has no voice, the county commissioners have no discretion, and the township's real property taxes can be siphoned off for the municipality's own use. This cannot possibly be reconciled with the clear command in R.C. 709.023 that the annexed territory “remains subject to the township's real property

taxes.” This is far from the cooperation between local governments envisioned by the General Assembly under annexation reform.

Centerville attempts to avoid the plain language of R.C. 709.023(H) by minimizing it.

The full text of that subsection is as follows:

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.

R.C. 709.023(H). Centerville and its amici argue that the phrase “remains subject to the township’s real property taxes” is nothing more than emphasis on the immediately preceding phrase stating that the annexed territory “shall not at any time be excluded from the township . . . .” Under this theory, the statute merely makes the obvious point that, if the territory remains in the township, the township is a taxing authority for that territory. And, according to Centerville and its amici, the annexing municipality can use tax increment financing (and, necessarily, any other type of tax exemption or abatement) to divert real property tax revenues from the township.

There are two glaring defects in this interpretation. *First*, as a matter of plain English, the annexed territory cannot remain “subject to the township’s real property taxes” if the municipal corporation is permitted to divert those taxes. It is simply not a reasonable interpretation to say that the territory “remains subject to the township’s real property taxes” if the municipality can exempt or divert those taxes. “Subject to” means “liable,” “governed or affected by,” or “answerable for.” *Black’s Law Dictionary* 1425 (6th Ed. 1990). These definitions indicate that the township is to *receive* its real property taxes, not merely to enjoy some theoretical authority

to tax that can be defeated by the municipality. Amici curiae Ohio Home Builders Association et alia argue that being “subject to” the township’s “taxation” is consistent with the municipality’s diversion of the “incremental increase in those taxes . . . .” Brief of Amici Curiae Ohio Home Builders Association, Building Industry of Central Ohio, Ohio Association of Realtors, and Central Ohio NAIOP in Support of Appellant, City of Centerville at 13. But the statute does not say that the territory remains subject to the township’s *taxation*. It says the territory remains subject to the township’s *taxes*. The only reasonable interpretation of those words is that the township continues to receive the taxes it has imposed.

*Second*, Centerville’s interpretation violates a cardinal rule of statutory interpretation – that a statute should be interpreted so that every part of it has meaning and that no part is redundant. *See D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 26. Centerville and its amici treat the phrase “remains subject to the township’s real property taxes” as nothing more than a natural consequence of the prohibition on excluding the territory from the township. The township would of course have authority to impose taxes on territory that remained part of the township. If final phrase of R.C. 709.023(H) meant nothing more, then it is redundant and wholly unnecessary. But statutory language “should not be construed to be redundant, nor should any words be ignored.” *East Ohio Gas Co. v. Public Utils. Comm’n of Ohio*, 39 Ohio St.3d 295, 299, 530 N.E.2d 875 (1988).

**C. The tax increment financing statutes do not alter the correct interpretation of R.C. 709.023(H).**

Centerville and its amici fixate on the tax increment financing statutes, specifically R.C. 5709.40, in an effort to argue that R.C. 709.023(H) does not mean what it clearly says. According to Centerville, the General Assembly “protected” certain real property tax streams from municipal tax increment financing, and township taxes are not among them. *See R.C.*

5709.40(F)(1)-(12). The “protected” tax streams include, for example, levies for zoos, libraries, and park districts. *Id.*

This argument is premised on a misreading of R.C. 5709.40(F). That provision is a very limited one designed to address a specific situation and has nothing to do with the issues here:

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 . . . .

R.C. 5709.40(F). In simple terms, this provision protects the *increase* (but only the increase) in the enumerated single-purpose tax levies that were or are passed after 2005 from the effect of TIF plans that were or are passed after 2005. For example, assume a municipal corporation establishes a TIF plan in 2006 that, with the school district’s consent, exempts 100% of the improvements for specified parcels for a period of 20 years. Suppose in 2008 voters passed a park district renewal levy with an increase in the levied rate. Section 5709.40(F) would protect the increase in the levied rate from exemption under the TIF plan and require that the increase in taxes that voters approved for the park district go to the park district. The point of this provision is that when voters approve a tax increase for a specific purpose (such as library funding), the revenue from that tax increased ought to go to the specified purpose, rather than being diverted as a result of the TIF plan.

This is an entirely sensible result, and it has nothing to do with the interaction of municipal and township taxation after an annexation. That issue is squarely addressed by R.C.

709.023(H) – the territory “remains subject to the township’s real property taxes.” Centerville and its amici would have this Court believe that the interaction of municipal and township taxation after annexation is addressed *not* by language about taxation in an annexation statute, but rather by negative implication from the *absence* of language in a general taxation statute that does not even mention annexation.

Further proof that R.C. 5709.40(F) simply does not address the issues here is found in R.C. 5709.73 and R.C. 5709.78. These statutes provide for the use of TIF plans by townships and boards of county commissioners, respectively. Each statute includes a provision that is substantively identical to R.C. 5709.40(F) relating to the effect of a TIF plan on an increase in a single-purpose tax levy. R.C. 5709.73(F) (township TIF); R.C. 5709.78(E) (county TIF). Centerville’s theory is that the language in one subsection of the municipal TIF statute – or, more accurately, the absence of language – means that a municipal TIF can be used to divert township real property taxes after an expedited Type-2 annexation. But identical language in the township TIF and county TIF statutes obviously could have nothing to do with annexation, because neither townships nor counties have annexation powers. Centerville’s theory necessarily attributes different meanings to identical language in different statutes.

In all events, different statutes should be construed, if possible, to give effect to both. R.C. 1.51. Centerville’s interpretation violates this rule of statutory construction, as it gives no effect to the language in R.C. 709.023(H) providing that annexed territory “remains subject to the township’s real property taxes.” Sugarcreek’s interpretation, in contrast, makes sense of both R.C. 709.023(H) and R.C. 5709.40(F). The former prohibits the diversion (by a TIF plan or by any other method) of a township’s real property taxes after an expedited Type-2 annexation. The

latter ensures that a tax increase passed by voters for specific purposes is in fact used for those purposes, rather than exempted under a TIF plan.

**D. R.C. 709.023(H) does not preclude a post-annexation municipal tax increment financing plan.**

Centerville and its amici argue that the interpretation of R.C. 709.023(H) adopted by the court of appeals effectively prohibits municipal corporations from enacting tax increment financing plans in connection with expedited Type-2 annexations. That is *not* what the court of appeals held, and it is *not* a necessary consequence of that holding. Instead, the court of appeals held that a municipal corporation could not, after an expedited Type-2 annexation, use a tax increment financing plan to diminish the revenue received by the township on real property taxes imposed by the township. *Sugarcreek II*, 193 Ohio App.3d 498, 2011-Ohio-1830, 952 N.E.2d 519, ¶ 21. (Appx. 12) The Second District’s holding leaves a municipal corporation free to impose real property taxes – or to exempt real property taxes under a tax increment financing plan – in the annexed territory, *so long as* it does not diminish the revenues from taxes imposed by the township. The Second District made this perfectly clear, holding that the applicable statutes:

permit a municipal corporation to adopt a TIF ordinance affecting real property 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.

*Id. at* ¶ 28. (Appx. 14) Thus, the interpretation correctly adopted by the Second District permits municipal tax increment financing after an expedited Type-2 annexation.

Centerville and its amici nonetheless protest that a municipality cannot, as a practical matter, adopt a TIF plan that comports with the guidance from the court of appeals. Sure it can – all it has to do is to exempt a percentage of the increase in real property value that will not divert

any of the real property tax revenues from the annexed territory that the township would otherwise receive. A simple example shows how this could work:

	<b>Inside millage<sup>4</sup></b>	<b>Outside millage</b>	<b>TOTAL</b>
<b>Township</b>	5	10	15
<b>Municipal corporation</b>	5	5	10
<b>TOTAL</b>	10	15	25

In this example, the total real property tax burden on residents of the annexed territory is 25 mills. (After an expedited Type-2 annexation, residents of the annexed territory are subject to the taxes of both the township and the municipality.) Under R.C. 709.023(H), the township is entitled to the entirety of revenue from its 15-mill taxes. The municipality is entitled to the revenues from its 10-mill taxes. The municipality may enact a TIF plan that exempts its own millage but does not interfere with the township's millage. In this example, this means the municipality could enact a TIF plan that exempts up to municipality's available millage (10 mills) divided by the total millage (25 mills), or 40%. A TIF plan that exempted up to 40% of the increase in real property values in the annexed territory would affect only the municipality's tax revenues. In contrast, a TIF plan such as the one at issue, which would have exempted 75% of the increase in real property values in the annexed territory, would impact the township's millage and divert tax revenues from the township.

To be sure, municipalities may chafe at this limitation on their ability to exempt 75% or more of increased property values under a TIF plan. But municipalities *can* utilize a TIF plan after an expedited Type-2 annexation; Centerville and its amici are just wrong in claiming

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<sup>4</sup> The example assumes that application of the splitting statute, R.C. 5709.315, results in the township and municipality each receiving one-half of the constitutional 10-mill limit on inside millage.

otherwise. And the limitation on how much of an increase in property values that can be exempted is simply a necessary consequence of the requirement in R.C. 709.023(H) that the annexed territory “remains subject to the township’s real property taxes.”

**II. Policy considerations support an interpretation of R.C. 709.023(H) that protects township tax revenues.**

**A. Municipalities have the ability to force townships to provide services in annexed territory and therefore municipalities should not be able to divert township tax revenues.**

In an expedited Type-2 annexation, the annexed territory becomes part of the municipality but also remains within the township.<sup>5</sup> Section 709.023(C) of the Revised Code gives the municipality complete discretion to decide whether it will provide *any* services to the annexed territory and, if so, which ones it will provide. R.C. 709.023(C). As a result, the township is often required to provide some or all necessary public services to the annexed territory, because the municipality has chosen not to do so. Sugarcreek continues to provide fire protection and emergency services to the annexed territory, because Centerville elected not to provide these services.

Consequently, townships have a critical need to retain their real property tax revenues following an expedited Type-2 annexation. They need these revenues to support the public services that they are obligated to provide. Centerville’s theory would permit municipalities to foist on townships the responsibility to provide public services while, at the same time, depriving townships tax revenues to support those public services. The General Assembly surely could not have intended such an absurd, unfair, and irresponsible result.

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<sup>5</sup> The same is true for – and the similar policy considerations apply to – an expedited Type-3 annexation.

Undeterred, Centerville argues that tax increment financing would not decrease a township's pre-annexation real property tax revenues; it would only preclude the increase in those revenues that the township would otherwise receive. True enough, but this misses the point. Tax increment financing diverts real property tax revenues on the increase in the value of property after enactment of the TIF plan. *See, e.g., Princeton City Sch. Dist. Bd. of Educ. v. Zaino*, 94 Ohio St. 3d 66, 68, 760 N.E.2d 375 (2002). The increase in property values is caused by economic development that is supported by the TIF plan. *Id.* at 68. But that same economic development also increases the demand for public services, such as the fire protection and emergency services that Sugarcreek continues to provide the annexed territory. If a TIF plan works as intended, it will increase property values and thereby increase government revenues, but it will also increase demand for public services and thereby increase government costs. Centerville wants to benefit from the increased government revenues, while forcing Sugarcreek to incur the increase government costs. That would be a terrific windfall for Centerville, and a fiscal nightmare for Sugarcreek. Once again, the General Assembly could not have intended this irrational outcome.

**B. R.C. 709.023(H) does not create a uniformity concern.**

Centerville and its amici argue that the interpretation of R.C. 709.023(H) correctly advanced by the court of appeals will result in TIF plans being treated differently depending on the particular annexation method utilized. They contend that there is no government interest in creating such a distinction. But why is this distinction remarkable? The expedited Type-2 and expedited Type-3 annexation methods *are* different from other annexation methods. They are the only annexation methods under which a municipal corporation has no ability to exclude the annexed territory from the township. And they are the only annexation methods under which the

annexed territory “remains subject to the township’s real property taxes.” R.C. 709.023(H); R.C. 709.024(H). Given these significant differences among annexation methods, it is hardly surprising that a municipal corporation would have more limitations on its ability to implement a TIF plan in annexed territory under an expedited Type-2 or expedited Type-3 annexation than under a traditional or expedited Type-1 annexation.

These distinctions make a great deal of sense. Each annexation method offers some type of protection to townships. In the traditional method, the township has the right to object to the annexation on the merits, and the board of county commissioners has discretion to determine whether to permit or reject the annexation. In an expedited Type-1 annexation, the municipality and township agree on economic and fiscal issues; everything is done by mutual consent. Expedited Type-2 and expedited Type-3 have none of these protections for townships, so the General Assembly wisely protected townships’ real property tax revenues under these methods.

Centerville also suggests that treating TIF plans differently depending on the particular annexation method utilized violates the Ohio Constitution’s “uniform rule” of taxation. *See* Ohio Constitution, Article XII, § 2 (“Land and improvements thereon shall be taxed by uniform rule according to value . . . .”). The “uniform rule” provision merely requires uniformity in the mode of assessment. *See Goldberg v. Board of Revision of Cuyahoga Cty.*, 7 Ohio St.2d 139, *syllabus*, 218 N.E.2d 723 (1966). It does not require that tax exemptions, such as tax increment financing, be applied uniformly across all property. If it did, tax increment financing would be altogether unconstitutional, because tax increment financing allows a municipality to exempt certain parcels while not exempting others. *See, e.g.*, R.C. 5709.40(D)(2). It also allows a municipality to determine for each TIF plan what percentage of the increase in property value will be exempted. *Id.* Thus, a municipality could have one TIF plan that exempts 75% of the increase in certain

properties' values and a separate TIF plan that exempts 40% of the increase in other properties' values. This Court has previously found that the selective nature of tax increment financing does not violate the Uniformity Clause in Article II, § 26 of the Constitution. *See Princeton City Sch. Dist. Bd. of Educ. v. Zaino*, 94 Ohio St. 3d 66, 75, 760 N.E.2d 375 (2002). Thus, it is of no constitutional significance that R.C. 709.023(H) creates limits on the level of tax exemption that a municipality could implement in an annexed territory, or that these limits could be different from the tax exemption levels that could otherwise be implemented.

**C. The General Assembly is the proper forum to consider any concerns about the impact of R.C. 709.023(H) on economic development.**

Finally, Centerville and its amici argue that the court of appeals decision will impede economic development in Ohio. At best, this argument is dramatically overstated. For starters, economic development is driven by the private sector and often aided by government assistance or incentives. Even when government assistance or incentives are involved, economic development in Ohio is hardly limited to territories annexed by municipal corporations using the expedited Type-2 method. Economic development can and does occur in rural areas, townships, and the non-annexed portions of municipal corporations. Economic development can and does occur in municipally-annexed territories under other annexation methods. Economic development can and does occur in all areas of Ohio using tax incentives and exemptions other than tax increment financing. Economic development can and does occur in territories annexed by municipal corporations using the expedited Type-2 method – just not at the expense of township real property tax revenues. And economic development can and does occur without any government involvement or assistance.

There is no evidence – only assertion – that the interpretation of R.C. 709.023(H) adopted by the court of appeals will have any impact on economic development in the State of Ohio. The

only economic consequence of the decision below is that municipal corporations will not be able to use an expedited annexation procedure to deprive townships of real property tax revenues without the township's consent.

Centerville and its amici also argue that the decision of the court of appeals puts at risk bonds issued under tax increment financing plans in municipally-annexed territories. This is apparently a scare tactic, because neither Centerville nor its amici cite any evidence or real-life examples of this supposed concern. As explained above, municipalities *can* utilize tax increment financing after an expedited Type-2 annexation to the extent that the TIF plan would not divert tax revenues to which the township is entitled.

In all events, it is not the role of the courts to rewrite statutes in the name of alleged economic development. If enforcement of the plain language of the statute impedes economic development, Centerville's remedy is in the General Assembly, not the courts. Of course, a much simpler "remedy" was always available to Centerville – it could have chosen one of the annexation methods that would have allowed it to divert all of the real property taxes from the annexed territory. But that would have required working toward an agreement on economic issues with Sugarcreek, something Centerville tried hard to avoid despite the General Assembly's goal of "promot[ing] cooperation among local governments." *State ex rel. Butler Township Bd. of Trustee v. Montgomery Cty. Bd. of Cty. Comm'rs*, 112 Ohio St.3d 262, 2006-Ohio-6411, 858 N.E.2d 1193, ¶ 8.

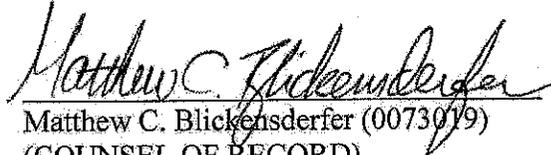
## CONCLUSION

Centerville has never offered a plausible explanation of the critical phrase in R.C. 709.023(H) that the annexed territory “remains subject to the township’s real property taxes.” The closest it comes is the suggestion that this phrase is mere surplusage, which of course violates the hoary tenet of statutory construction that all words in a statute shall be given meaning. R.C. 709.023(H) is clear and understandable. When the township has no voice in an annexation, and the board of commissioners has no discretion to deny the annexation, the township gets to retain its real property tax revenues. That is a reasonable and fair trade-off, given that the township can and usually does have obligations to the annexed territory after the annexation. And it is the trade-off the General Assembly mandated.

If Centerville wanted the annexed territory *and* the ability to siphon away Sugarcreek’s real property tax revenues, Centerville was free to pursue another method of annexation. It could have pursued a traditional annexation, excluded the territory from the township, and received all tax revenues from the annexed territory. It could have pursued an expedited Type-1 annexation and reached agreement with Sugarcreek on economic and fiscal issues. Instead, Centerville invites this Court, in effect, to create a new expedited annexation method in which *all* of the benefits accrue to the municipality and *all* of the disadvantages fall on the township. Under Centerville’s new annexation procedure, the township would have no voice in the annexation; the board of county commissioners would be required to approve the annexation, the municipality could force the township to provide all public services to the annexed territory; and the municipality could divert real property tax revenues from the township. This would undo the careful system of checks and balances the General Assembly built into the annexation statutes,

and the Court should decline Centerville's invitation. The judgment of the court of appeals should be affirmed.

Respectfully submitted,



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