

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

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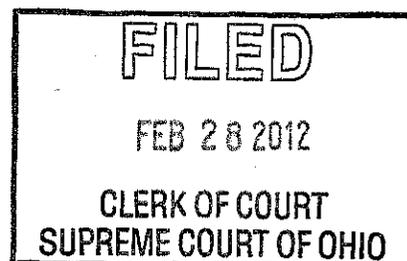
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INTRODUCTION

Annexation is, and historically has been, about the rights of property owners to choose the jurisdiction in which their property is located allowing owners to take advantage of the various benefits and development opportunities available to them. It is not about local government provincialism as the Township claims.¹ *Middletown v. McGee*, (1988), 39 Ohio St.3d 284, 286, 530 N.E.2d 902, 904. It is property owners who sign annexation petitions and whose agents file them; property owners who choose the annexation process they desire to follow; and property owners who must waive their right to appeal when they choose to follow an expedited annexation process. R.C. 709.02, R.C. 709.022-709.024. It is property owners whose bundle of rights and financial investments are affected. Appellee's assertion that municipalities control annexation, choose the annexation process that is followed or have any ability or authority to 'foist upon townships' the obligation to provide services to properties that remain in the township following annexation is contrary to statute and simply wrong.

¹ This Court recognized in *Middletown v. McGee* (1988), 39 Ohio St.3d 284, 286, 530 N.E.2d 902, 904 that "[i]n enacting the statutes governing annexation, one of the intentions of the legislature was 'to give an owner of property freedom of choice as to the governmental subdivision in which he desires his property to be located.' *Toledo Trust Co. v. Bd. of Commrs.* (1977), 62 Ohio App.2d 121, 124, 16 O.O.3d 265, 267, 404 N.E.2d 764, 766, citing *In re Lariccia* (1973), 40 Ohio App.2d 250, 69 O.O.2d 224, 318 N.E.2d 871. See, also, *Terwilliger v. Lester* (1969), 21 Ohio Misc. 18, 50 O.O.2d 58, 254 N.E.2d 724." This Court concluded a property owner's "legal interest in property he owns within the territory to be annexed will be adversely affected since he does not desire to have his property located within the city * * *." (footnotes omitted). Two years later, this Court reaffirmed that annexation is for the benefit of the petitioning property owners stating "[t]he desires of property owners relative to their lands is one of the basic underlying considerations of the Ohio General Assembly in enacting annexation laws." *In re Annexation of 118.7 Acres in Miami Twp.* (1990), 52 Ohio St.3d 124, 127, 556 N.E.2d 1140. In 1998, the Court again "note[d] that the choice of the property owner in annexing is a key consideration." *Smith v. Granville Twp. Bd. of Trustees* (1998), 81 Ohio St.3d 608, 614, 693 N.E.2d 219, 223. Annexation reform did not change the significance of the desires of private property owners to annex, rather it increased it, particularly when 100% of the property owners support annexation and their territory qualifies expedited annexation process.

The General Assembly did attempt to balance various interests with annexation reform in the form of Am. Sub. S.B. No. 5, 149 Ohio Laws, Part I, 621 ("Senate Bill 5") adopted in 2001. However, the interests involved were not just those of local governments. Realtors, developers, builders, chambers of commerce and property owners also participated in the legislative process and their interests were also considered. The statutes that emerged were the result of the balancing of all those interests with the goal of preserving a property owner's rights to take advantage of development opportunities while attempting to balance the interests of the governmental entities involved. If 100% of the property owners are in favor of the annexation, their rights should be paramount to territorial governmental interests. Lawsuits often filed for the purpose of delay were to be eliminated in the 100% owner supported expedited annexation processes. Owners' wishes are paramount.

The language in section (H) of the expedited type-2 annexation statute at issue in this case provides that the "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) (emphasis added). More simply, once annexed, the territory is in the dual jurisdictions of both the township and the municipality. This was always the case. R.C. 709.023(H) merely prevents a city from filing a separate petition with the county commissioners under R.C. 503.07 and unilaterally conforming its boundaries eliminating the township from the city. The result of the change is that a city cannot on its own eliminate the township. The result is the townships taxes remain. R.C. 709.023(H) does not address the city's ability to TIF the property as specifically set out in R.C. 5709.40.

STATEMENT OF FACTS MATERIAL TO APPELLEE'S ARGUMENT

This case does not, as claimed by the township, "involve[] 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." (Appellee's Brief, p. 1). It involves the rights of property owners and the future of economic growth and development throughout the state of Ohio and its economic prosperity.

The City of Centerville did not file any annexation petitions; the owners did. Centerville did not choose the procedure by which to annex; the owners did. Centerville did not seek to dodge anything. Directly contrary to the assertions of Sugarcreek Township, development simply was not possible in the township as will be seen. The owners and the developer each had their own lawyers. Centerville simply assisted property owners and developers who came to the city seeking support for the large scale development of prime ground after Sugarcreek Township had made every effort to undermine the proposed development in the township and then prevent its annexation to and development in Centerville.

Appellee's statement of facts and arguments are misleading and compel Appellant Centerville to provide this Court with the actual facts that drove the property owners to annex and seek to develop and obtain the necessary public improvements with public support. While the township argues cooperation was the goal of annexation reform, the township clearly did not practice what it preaches. The facts in this case demonstrate why the certainty of an "expedited type-2" annexation process was conceived: to provide 100% of property owners the ability to annex their property quickly to capture development opportunities without protracted litigation. It failed in this case. Eliminating a city's ability to finance public improvements to foster development killed the Bear Creek development and will put an end to others.

The property owners, collectively known as “Dille,” entered into a development agreement with developer, Bear Creek Capital LLC (“Bear Creek”). Dille and Bear Creek sought to develop a several hundred million dollar development of commercial, medical, office and residential mixed uses on Dille’s approximately 220± acres at a major interstate interchange in Sugarcreek Township, commonly referred to as the “Dille Property.” The development required significant public improvements. The cooperation and participation of local government was critical. (TDS 179, p. 62, Greg Scheper Depo, S-7).² Bear Creek had time limitations it was required to meet for the development: a contract deadline to close on its twenty million dollar purchase of the Dille Property and agreements for various development opportunities with deadlines. (TDS 179, p. 26, 34, S-2, S-4). These time frames required Bear Creek to get through the zoning and approval process expeditiously. (TDS 178, p. 34, Steve Kelly Depo, S-11). Bear Creek communicated these critical time constraints to all of the political subdivisions involved in this major development, including Sugarcreek Township. (TDS 178, p. 34, S-11).

Initially, Bear Creek sought to develop the Dille Property in unincorporated Sugarcreek Township. (TDS 178, p. 32, S-10). Bear Creek had previously developed a more limited commercial retail center in Sugarcreek Township³ and hoped this large-scale development could also be done in Sugarcreek. (TDS 178, p. 36-39, S-11-12). In 2004, Bear Creek representatives Greg Scheper and Steve Kelly began discussing the project with Sugarcreek Township staff and

² S-# refers to the page number in Appellant’s Supplement to the Brief where the record appears.

³ In 2001, Bear Creek developed a commercial retail center in Sugarcreek Township that included anchor stores Home Depot and Target and various smaller storefronts and outparcels. (TDS 178, p. 15, S-9). This was a much smaller development that followed a different development process in the township than the large scale development proposed here. (TDS 178, 37-40, S-11-12). The limited retail development did not require any change in zoning, only administrative approvals through the Board of Zoning Appeals. It did not involve the legislative zoning process or any large scale public improvements. (TDS 178, p. 37-40, S-11-12).

officials and worked with them on the process that would need to be followed. (TDS 179, p. 26-29, S-2; TDS 178, p. 34, S-11). Timing and public help with needed public improvements were critical.

At first the township cooperated with Bear Creek and the owners. The township approved the rezoning of the property for the mixed use development in early 2005. However, shortly after the zoning was approved, the township notified Bear Creek and the owners that the township board of trustees had unilaterally revoked the zoning for its development. (TDS 178, p. 43, S-13). Thereafter, Dick King, then a township trustee with whom Bear Creek and the owners had been negotiating, circulated petitions for the formation of a merger commission to study a municipal/township merger between the city of Bellbrook and Sugarcreek Township. (TDS 179, p. 33, S-3). The petition was signed by a sufficient number of signatures to place the issue on the ballot in November 2005.⁴ (TDS 179, p. 33-34, S-4). The filing of the merger petitions created a statutory moratorium on the filing of any annexation petition until the question of forming a merger commission was defeated by the electorate in November 2005.⁵ R.C. 709.48. The Dille property was then “captive” with new zoning awaiting the results of the merger.

Bear Creek immediately ceased all development discussions with the township. Bear Creek was “trying to establish a partnership, and it had turned into a battle of developer versus

⁴ Merger is the annexation, one to another, of the unincorporated area of a township (Sugarcreek Township) with an existing municipal corporation (Bellbrook) and is accomplished by affirmative vote of *both* the electors of the municipality and the electors of the unincorporated portion of the township. See R.C. 709.43. If a merger between Bellbrook and Sugarcreek Township had been approved, the unincorporated township would cease to exist and would become part of the city of Bellbrook.

⁵ If the formation of a merger commission is approved by both the municipality and the township, the annexation moratorium remains until either the merger commission does not timely agree upon conditions for merger or the merger conditions are defeated by the electorate. R.C. 709.48.

township, and that is never a good situation to be in.” (TDS 179, p. 39, S-5). After the merger study was defeated, Bear Creek immediately began meeting with the two municipalities who were contiguous to the subject property, the city of Kettering and the city of Centerville, in an attempt to save the development of the property. (TDS 179, 33-41, S-3-5). Both cities had development departments, planners, engineers and were well equipped to handle large scale mixed use developments. Hundreds of jobs were at stake. On April 3, 2006, Bear Creek entered into Pre-Annexation Agreements with the city of Centerville to provide for the annexation and development of the property in Centerville that had been undermined by Sugarcreek Township. (TDS 179, p. 50, S-6).

On April 5, 2006, the first (of two) annexation petition was filed by the property owner utilizing the expedited type-2 annexation process. Just two weeks later, on April 20, 2006, Sugarcreek Township adopted Resolution No. 2006-04-20-01 imposing a township TIF on essentially all of the Dille Property. (TDS 1, Ex. A). The township wanted to build a road extension on property south of the Dille Property and use increased tax revenues from the Bear Creek project to fund it.⁶ Bear Creek wrote the township a letter putting them on notice that it did not “support their TIF resolution and that upon purchase of the property we don’t intend to cooperate * * * and consent.” (TDS 179, p. 63-64, S-7; Exhibit 87). The developer stated (TDS 179, p. 64, S-7):

* * * the reality of the situation is we are trying to -- we are trying to get this development to a point where we can begin. We need to get these improvements financed. We have Sugarcreek, with their gamesmanship, slapping a TIF district on at the eleventh hour in an attempt to make our proposed development crumble.

⁶ Townships only have the authority to adopt a TIF in the unincorporated township. R.C. 5709.73(B). Once the property was annexed, the township could not impose a TIF on the Dille Property.

Contrary to the “angelic” picture the township paints in its brief, the township did everything it could to defeat the annexations and make the development unprofitable. As the record clearly shows, this is not a case in which Centerville is attempting to devastate the township fire department as claimed. Dille’s two annexation petitions in this case were approved by the Greene County Commissioners. Immediately thereafter, on September 11, 2006, Sugarcreek Township filed this action for declaratory judgment, claiming that Centerville could never adopt a TIF for property annexed utilizing the expedited type-2 process and could not interfere with Sugarcreek’s TIF. The city never sought to interfere with the township TIF even though the TIF was only to take effect in the future. Centerville never adopted its own TIF. The township twice amended its complaint to also challenge the annexations and the city’s acceptance of the annexation petitions.⁷

All parties participated in common pleas court mediation. Once again, in an effort to cooperate and save the development, the parties signed a Memorandum of Understanding (“MOU”) in which the city of Centerville agreed to pay the township for fire services it provided to the annexed property among other terms. (TDS 206, Ex. F, p. 3, S-18). On the basis of the “compromise,” the trial court dismissed the case with prejudice on the belief that the case was

⁷ The validity of Sugarcreek Township’s TIF is not an issue in this case. (TDS 251, ¶3). The General Assembly addressed the effects of the annexation of property with pre-existing township TIF’s as part of the township TIF statute. R.C. 5709.74(B) provides that “If a parcel upon which moneys are collected as service payments in lieu of taxes is annexed to a municipal corporation, the service payments shall continue to be collected and distributed to the township in which the parcel was located before its annexation until the township is paid back in full for the cost of any public infrastructure improvements it made on the parcel. The treasurer shall maintain a record of the service payments in lieu of taxes made from property in each township.” This makes sense. TIF bonds are issued based upon anticipated property value increases from an identified development and the commensurate tax revenues it will generate. Annexation does not disrupt those revenues. If property values increase beyond what was anticipated as a result of the annexation, the TIF will simply terminate early, as soon as the debt is paid. *See* R.C. 5709.73(G).

settled. (TDS 203, 207). The township rethought its position. The township both appealed the trial court dismissal and filed a Civ. R. 60(B) motion to reinstate the case. (TDS 208, 209). Ultimately, the township reneged on the MOU and had the case reinstated. (TDS 210). During the protracted court proceedings below and subsequent appeals, the development failed.

After almost six years of litigation, there were no public improvements made to support development of this prime ground, Bear Creek Capital LLC walked away from the project and the multi-million dollar development did not occur. Everyone lost.

ARGUMENT

I. THE PLAIN LANGUAGE OF R.C. 709.023(H) DOES NOT PROTECT TOWNSHIP TAXES ON EXPEDITED TYPE-2 PARCELS FROM BEING EXEMPTED, ABATED OR TEMPORARILY DIVERTED.

A. Appellee's interpretation of R.C. 709.023(H) would exclude township taxes from all exemptions, reductions or abatements on expedited type-2 parcels, not just those arising from a municipal TIF, creating township 'super levies' only on expedited type-2 parcels.

Appellee seeks to read the phrase “and, thus remains subject to township real property taxes” in a vacuum, without regard to the language that precedes it in R.C. 709.023(H) or Ohio annexation law and tax law on the subject. It is only in this vacuum that Appellee can argue that R.C. 709.023(H) mandates that the township collect 100% of its tax levies forever without postponement, exemption or reduction by a municipal corporation following an expedited type-2 annexation. This is because R.C. 709.023(H) does not refer to any specific township real property tax that is protected following annexation or any specific real property tax exemption that no longer applies to township taxes. There is no exclusion of the R.C. 5709.40 *et seq.* exemption for municipal TIFs.

R.C. 709.023(H) also places no limitation of the exercise of municipal power or sovereignty in the annexed territory with one exception: municipal corporations are prohibited from unilaterally conforming their boundaries under R.C. 503.07 to exclude the township without the township's consent. R.C. 709.023(H). Other than limiting a municipality's ability to remove the township from the city, following annexation, the municipal corporation has all of its powers over the annexed territory and the property owners and residents have rights and privileges as if the territory were "within the original limits of such municipal corporation." R.C. 709.10. The township also retains jurisdiction, but it is limited by the authority of the municipality.

Since the township boundaries cannot be unilaterally conformed by the city, the annexed property "remains subject to the township's real property taxes." Sugarcreek claims this phrase is a limitation on the powers of the city to adopt a TIF and changes municipal TIF law. According to Sugarcreek, the township's taxes on future improvements cannot be diverted or exempted by Centerville. Centerville could adopt a TIF, but it would not apply to the township's taxes. R.C. 709.023(H) does not refer to or limit the application of any tax exemption in the annexed territory, including a municipal tax exemption. If the township's view is followed, the statute would eliminate every exemption, abatement or diversion of township real property taxes from any governmental source, not just municipal TIFs. *See* Appellant's Merit Brief, p. 27. Levies generating township taxes would be guaranteed in full, without reduction, postponement or limitation, becoming, "super levies" if you will, on expedited type-2 parcels, not on others. Neither the language of the statute, nor Ohio laws on the same subject support this interpretation. Even the fiscal analysis on type-2 annexations by the Legislative Service Commission cited by Appellee recognized that "the township *could* continue to collect *general* property tax revenue,

in certain cases, and some inside millage” since type-2 property cannot be excluded from the township. (S-26).

According to the township, the court of appeals below had no real problem determining that the plain meaning of R.C. 709.023(H) was a township tax guarantee forever. Clearly, this is not the case. In *Sugarcreek I*, in a 48 page decision, the court of appeals’ interpreted the statement “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,” as merely restating and clarifying the law that existed prior to the Senate Bill 5 amendments. *Sugarcreek Township v. Centerville*, 184 Ohio App.3d 480, 2009-Ohio-4794 ¶¶132, 135, 139. It was only in *Sugarcreek II* that the court of appeals reversed itself and erroneously found the language not only granted the township its real property taxes forever, but that 709.023(H) also provided in the annexation statutes an exemption to the tax increment financing laws. *Sugarcreek Township v. Centerville*, 193 Ohio App.3d 408, 2011-Ohio-1830. This is hardly an affirmation that the process is as simple as argued by Sugarcreek.

The language “remains subject to the township’s real estate taxes” was really in response to urbanized township’s complaints about a city accepting an annexation of property the township helped develop and removing the property from the township resulting in the city getting all the real estate taxes from the developed property. The townships wanted the benefit of their bargain. The language only addresses the obligation of the city not to remove the territory from the township. TIF only affects the proportion of real estate taxes on the “new development.” TIFs do not affect the taxes on the value of already improvement property. Thus, the goals of the townships are met if they cause the improvement if the territory remains in the

township after annexation, the township gets the taxes on the improved ground and the unimproved ground.

B. Expedited type-2 parcels do remain subject to township taxes following annexation, even when there is a municipal TIF exemption on the property.

The plain language of R.C. 709.023(H) provides that the annexed territory 'remains subject to the township's real property taxes' following annexation. Undeniably, the Dille Property remains subject to Sugarcreek taxes, even if it also becomes subject to a Centerville TIF. As has been shown, if the property is included in a Centerville TIF, the township will continue to receive 100% of the township's real property taxes on the value of the land on the effective date of the TIF.⁸ It will also receive additional taxes from 25% of the value of the private improvements on the property for 10 years⁹. With a development valued at hundreds of millions of dollars, 25% is a significant sum, and far more than the property is currently generating with its agricultural use and CAUV exemption. *See* R.C. 5713.30, *et seq.* At the expiration of 10 years, or earlier if the public improvements funded by the TIF are paid in full, the township will receive taxes based upon 100% of the full (unimproved and improved) value of the Dille Property. The Dille Property is already subject to the township's real property taxes, even when there is a municipal TIF. Under no set of circumstances is the township not subject to township taxes or deprived of all township real estate taxes.

The township's argument that the Dille Property is not 'subject to' Sugarcreek Township real property taxes unless it is subject to 100% of the township taxes is beyond any rational

⁸ Without school district approval, a TIF can only effect 75% of the improved value for 10 years.

⁹ A TIF can exempt up to 75% of the value of improvements for up to 10 years without the approval of a school district or any other authority. *See* R.C. 5709.40(D)(1). A TIF may be granted for up to 100% of the value of the property for up to 30 years with the approval of the school district and county. R.C. 5709.40(E)(2).

reading of the statute. Such an interpretation requires adding language to the statute that is simply not there. As long as the Dille Property is in the township, it is within the taxing authority of Sugarcreek Township and remains “subject to” the Sugarcreek Township real property taxes.

II. READ TOGETHER, THE ANNEXATION STATUTES AND TAX STATUTES DO NOT PROTECT TOWNSHIP TAXES ON EXPEDITED TYPE-2 PARCELS FROM MUNICIPAL TIF EXEMPTION.

A. Annexation reform did not limit TIFs or development in municipalities.

A glaring omission from Appellee’s discussion of its view of annexation reform is the most critical element recognized by both the General Assembly and this Court: the rights and wishes of the property owner. *See Middletown v. McGee, supra* and footnote 1. It is clear from the three new 100% owner-supported expedited processes that one of the primary purposes of annexation reform was to allow the owners of qualifying property to quickly annex their land without protracted litigation that effectively kills development. The criteria or “merits” of expedited annexations are limited and objective. *See* R.C. 709.022(A) (expedited type-1), R.C. 709.023(E)(1)-(7) (expedited type-2) and R.C. 709.024(F)(1)-(5) (expedited type-3). Contrary to Sugarcreek’s assertions, townships do have the right to object to the “merits” of expedited annexations. But those objections are strictly limited to the merits set out in the statutory criteria for each type of annexation. R.C. 709.023(D), 709.024(C)(1). *See State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 124 Ohio St.3d 390, 2010-Ohio-169. Townships do not get to make it up anymore.

Legal challenges to expedited annexations are also strictly limited, leaving townships, municipalities and even owners very little recourse to challenge them. *See* R.C. 709.022(B),

709.023(G) and 709.024(D). Owners must waive their right of appeal with the filing of expedited type-1 or type-2 petitions. Owners are the only parties granted the right of appealing the denial of an expedited type-3 petition. R.C. 709.022(B), 709.023(A) and 709.024(G). Annexation reform did not change the fact that the annexed territory remains in both the township and the municipality following annexation. While one of the goals was to allow local government cooperation in annexation, it was not at the expense of the rights of property owners.

The purpose of annexation reform and the adoption of the expedited processes was: 1) to first allow property owners flexibility and certainty in annexing their property (expedited processes) and 2) to balance the governmental interests in such a way as to further goal number 1. The “four distinct options” for annexations are not the options of municipalities, as the township claims, they are the options of the “property owners.” The annexation reform goals to foster development, jobs and owner choice in a short period of time were clearly not met in this case.

B. The TIF statutes do not create an exception for township taxes on expedited type-2 parcels and R.C. 709.023(H) does not alter the uniform application of municipal TIFs on real property that is in both a township and a municipal corporation.

Sugarcreek’s arguments and the decision of the court of appeals are irreconcilable with the terms and operation of Ohio TIF statutes. Sugarcreek claims that R.C. 709.023(H) does not prohibit Centerville from adopting a municipal TIF, it only prohibits Centerville from applying the TIF to Sugarcreek Township taxes. This is not possible under the current Ohio statutes. TIFs are strictly statutory. Ohio municipal TIF statutes: (1) do not protect township taxes from the operation of the TIF; (2) do not permit the city of Centerville to selectively exclude the taxes of the township or any other taxing authority from its TIF; and (3) do not provide any means for the township to be paid its tax levies on the improvements after a municipal TIF is applied.

A municipal TIF Plan simply identifies the parcels subject to the TIF and the improvements it will fund. R.C. 5709.40. Contrary to Sugarcreek's assertions, Centerville does not receive the funds from a municipal TIF. The county treasurer collects and distributes real property taxes (including the township's) that are not subject to diversion for TIF improvements. TIF "payments in lieu of taxes" (PILOTS) are paid into a statutory tax increment equivalency fund ("TIF Fund"). R.C. 5709.42(C). Distributions from a TIF Fund are strictly controlled by statute. R.C. 5709.43. Township taxes cannot be paid from the TIF Fund.

Some taxes are protected from municipal TIF. The tax increases that are protected by R.C. 5709.40(F) for example. The township's claim that these taxes are irrelevant to annexation misses the point. When select tax levies are excluded from TIF application, the General Assembly has provided mechanisms for those taxes to be paid. The county treasurer is directed to pay the tax increases protected by R.C. 5709.40(F) to the appropriate taxing authority before the TIF payments are made to the TIF Fund. R.C. 5709.42(C). The TIF statutes also permit school district and county levies to be protected from municipal TIF, and permit them to be paid from the TIF Fund after the PILOTS have been deposited. R.C. 5709.40(D)-(E) and 5709.43(C)(1)(a) and (b). The General Assembly has not permitted the payment of township tax levies on TIF improvements by the treasurer, TIF fund or any other means. If the General Assembly had intended to protect township taxes from municipal TIFs, Senate Bill 5 would have amended the TIF statutes to provide for it, as it did for the distribution of inside millage in R.C. 5705.315. It did not.

All of this statutory framework is critical because often money has been borrowed and TIF bonds rated and sold all based upon projected PILOT revenues deposited in the TIF Fund that pays the TIF bonds and governmental debt that was issued for public infrastructure

improvements. Putting existing bonds at risk for expedited type-2 parcels is not a scare tactic invented by Centerville. It is a reality. If township tax revenues on expedited type-2 properties suddenly become protected from municipal TIF and PILOTS can no longer be collected and deposited into the TIF Fund, the fund may not have sufficient revenues to pay the public debt and TIF bonds. The certainty of the bond payback is then questioned.

Sugarcreek claims Centerville can avoid these strict statutory mandates and limitations on expedited type-2 territory. “[A]ll it has to do is 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.” (Appellee’s Brief, p. 16-17). This is simply not an option. This statement and Appellee’s ‘simple example’ that follows make no sense. Even if Centerville reduces the percentage of the value of the improvements subject to TIF, the reduced percentage will uniformly apply to the taxes of all taxing authorities on the expedited type-2 parcel in the city, including Sugarcreek Township. There will still be no means by which to pay the township taxes from the PILOTS received.

The idea that Centerville can “enact a TIF plan that exempts its own millage but does not interfere with the township’s millage” also makes no sense. (Appellee’s Brief, p. 17). First, Centerville cannot selectively exclude township taxes from its TIF. Second, there would be no reason for a city to ever enact a TIF that exempts its own millage and places it into a restricted fund. It would simply collect its millage, deposit it into its own unrestricted general revenue account, then use it any way it chose, including the payment of capital debt and/or bonds. Sugarcreek strains to reconcile its interpretation of R.C. 709.023(H) with the municipal TIF statutes. They cannot be reconciled because they are not connected. R.C. 709.023(H) refers to

tax levies. R.C. 5709.40 is an exemption from tax levies. Expedited type-2 property is subject to both.

III. POLICY CONSIDERATIONS REQUIRE THAT PROPERTY IN THE INCORPORATED PORTION OF A TOWNSHIP REMAIN SUBJECT TO OHIO TAX LAWS AND EXEMPTIONS, INCLUDING MUNICIPAL TIF, FOLLOWING EVERY ANNEXATION, REGARDLESS WHAT ANNEXATION PROCEDURE IS USED.

- A. There is no state policy advanced by applying a municipal TIF exemption to township taxes in every case except when the expedited type-2 annexation process is followed.**

The township has failed to explain a state policy that is advanced by distinguishing the tax incentives and funding of public improvements that are available to a property in a joint municipal/township jurisdiction based solely upon its method of annexation. The purpose of a TIF is to fund public improvements that are needed to support private development and encourage jobs. The need for public improvements is not diminished when property is annexed utilizing an expedited type-2 process. Like this case, expedited annexation is often used when TIFs are most needed – when development is available that needs public improvements and can generate sufficient property tax revenues to pay for them through TIF.

The interpretation of R.C. 709.023(H) advocated by Appellee Sugarcreek creates a tax exemption that does not uniformly apply to all parcels that are located in joint jurisdiction parcels. The township tried but failed to justify this arbitrary distinction by focusing on a “TIF Plan” rather than the tax exemption. A TIF Plan simply identifies the parcels that are subject to a TIF exemption and the public improvements that will be paid for by the TIF. R.C. 5709.40(B) – (D). The TIF exemption applies to the property and the tax levies of all taxing authorities as provided in R.C. 5709.40. There is no limitation based upon how the taxing authority obtained jurisdiction or authority over the property. Prior to Senate Bill 5, a number of cities in Ohio did

not take territory out of the township, but did adopt TIF exemptions on the property. According to the township, “expedited” annexations would not enjoy this same right or receive the same exemption.

The township argues that treating ‘TIF Plans’ differently based upon the method of annexation makes sense and is not a problem because tax exemptions are not required to be applied uniformly across all property. That is not this case. It is not the selective nature of choosing properties that are subject to municipal TIF exemption that creates a uniformity problem in this case. It is the fact that properties in identical joint jurisdictions with identical joint taxing authorities are treated differently based solely upon the method used to achieve joint jurisdiction status. If the property were annexed before 2001, it could receive TIF incentives that included township taxes. If it were annexed with an expedited type-2 process after 2001, it could not according to the township.¹⁰

B. Municipalities have no ability to force townships to provide services.

The outcome of every annexation, past and future, regardless of the process used results in annexed territory that is located in the dual jurisdictions of a municipality and township. Because the property remains in the township, the township has the independent obligation to provide its services and the township retains the authority to tax the annexed territory as provided (and limited) by statute. Centerville could not force upon Sugarcreek Township the obligation to provide fire or other services to properties in the annexed territory. The township is

¹⁰ Here, if the township interpretation is adopted it is possible that properties in the same incentive district and/or TIF parcels benefitting from the same public improvement that are identically situated in all other respects would be treated differently simply because one became part of the city using an expedited-2 annexation process and the other did not. There is no logic to this disparate result and no governmental interest served.

authorized and/or required to provide those governmental services by the General Assembly and state law, not municipalities.¹¹

The General Assembly has provided townships the authority for the cooperative provision of services and sharing of revenues. In the alternative, the township has the ability to eliminate these services obligations by removal from the municipality altogether. Perhaps most troubling in this case is that Sugarcreek Township refused to avail itself of any of these options. The township wants: (1) the annexed territory to remain in Centerville; (2) the benefits from tax increases that increased property values from development will bring; and (3) to be relieved of the obligation (that all taxing authorities share) to participate in the payment of public infrastructure improvements necessary to support the development for a limited period through TIF financing that makes the development possible. The township wants all the up side and none of the temporary down sides of the development. They do not want to participate in the needed public improvements but want to benefit from them anyway.

Municipal TIF does not result in “a terrific windfall for Centerville.” (Appellee’s Brief, p. 19). Centerville will not directly receive any money from the TIF. In fact, its own real property taxes will be subject to the TIF just like those of Sugarcreek Township. There is no evidence that the development of the Dille property will be a “fiscal nightmare” for Sugarcreek. (Appellee’s Brief, p. 19). The township taxes will increase, even with a municipal TIF.

If the township truly believed the development is a “fiscal nightmare” and its obligation to provide fire service too onerous with the development of the Dille Property, it could have

¹¹ The City of Centerville does not have a fire department because it has never conformed the boundaries of any of the several townships that also exist within it following annexation before or after Senate Bill 5. Like Sugarcreek, the various townships within Centerville have township fire departments and have always provided fire services to all township residents, including those in Centerville. The city of Centerville has never duplicated those township services. It is efficient, economical, and a good use of public resources.

entered into an annexation agreement allowing its boundaries to be conformed and the annexed territory to be removed from the township. It then could have received reparations, free from commercial TIF reductions, over the next 12 years. See R.C. 709.192(A)(13) and 709.19. It did not. The township electorate could exclude their territory from Centerville under a different statute. R.C. 503.09. Sugarcreek could have entered into a cooperative economic development agreement pursuant R.C. 701.07 or honored the Memorandum of Understanding entered among the parties in this case that provided for the sharing of additional revenues for fire services. Again, it did not. As shown in the record, it is not funding road improvements by a TIF and diverting funds from the development that is the township's concern. After all, the township TIF is for a road improvement south of the Dille property. This is simply an issue of control. If the township cannot get it all, it does not want anyone else to get part.

C. Economic development has and will be impeded by a limitation on municipal TIFs on property annexed with the expedited type-2 process.

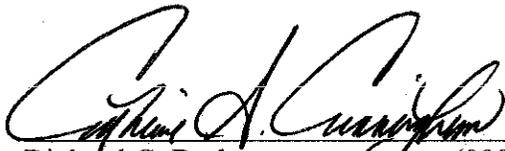
Economic development has and will be deterred or eliminated altogether if the decision of the court of appeals is allowed to stand, as the facts in this case illustrate. Astoundingly, Appellee claims "There is no evidence – only assertion – that the interpretation of R.C. 709.023(H) adopted by the court of appeals will have any impact on economic development in the state of Ohio." (Appellee's Brief, p. 21). To the contrary, this case alone is replete with direct evidence on the direct and dramatic impact on economic development. It is not a scare tactic or overstatement. The Dille Property/Bear Creek development project that would have brought hundreds of millions of dollars of investment and commensurate jobs and revenues to Centerville, Sugarcreek Township and the region, indeed, has been lost.

The township's argument reduced to its simplest form is that the legislature cannot divert, even temporarily, real estate taxes from a township using tax increment financing. The language in R.C. 709.023(H) is not so limiting or "redundant." The language merely restricted a city from taking the territory out of the township entirely with its varied effects. It did not restrict a municipality from adopting tax increment financing on type-2 annexed territory or the application of any other tax exemption, abatement or reduction from any other source on the territory.

CONCLUSION

For the reasons stated herein, Appellant City of Centerville respectfully requests that this Court REVERSE the Second District Court of Appeals and find that R.C. 709.023(H) does not prevent a municipality from adopting a TIF that applies to the township's real property taxes in territory that becomes part of the city utilizing the expedited type-2 annexation process.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon the following parties by electronic mail, on this 28th day of February, 2012:

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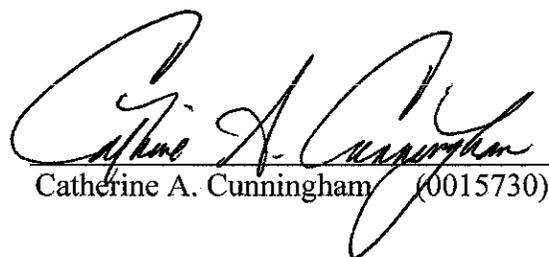
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