

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

**MEMORANDUM OF APPELLANT, CITY OF CENTERVILLE
 IN OPPOSITION TO MOTION OF SUGARCREEK TOWNSHIP
 TO DISMISS THE APPEAL AS IMPROVIDENTLY GRANTED
 DUE TO SUPERVENING DEVELOPMENTS**

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Liberty Township*

Introduction

The court accepted this case on discretionary appeal because it is a matter of public or great general interest statewide. It is a case of first impression. It involves the interpretation of annexation and tax statutes that affect what funds are available for tax incentives, known as tax increment financing (TIF) to make necessary public improvements for business development and job growth throughout the state. There are no “supervening developments” as claimed by Sugarcreek Township that either moot the issues or remove or lessen the importance of a decision.

TIF is a common development tool in Ohio. The court’s decision will have a direct and dramatic impact upon current and future TIFs in Centerville and around Ohio in any area annexed to a municipality utilizing the expedited type-2 annexation process provided for in R.C. 709.023. As can be seen by the number of amicus briefs filed in support of the court’s jurisdiction, a decision may affect the funds available to pay municipal bonds already pledged in support of existing public improvements. This Court accepted discretionary jurisdiction to determine whether municipal TIFs in joint township/municipal jurisdictions apply uniformly throughout the state to township taxes, or whether R.C. 709.023(H) (an annexation provision) creates a special exception for property annexed utilizing the expedited type-2 process that prohibits a municipal TIF from applying to township taxes on those select properties.

Expedited type-2 annexations are the overwhelmingly most common type of annexation in Ohio. At the time of the filing of Appellant’s merit brief in December 2011, the Ohio Department of Development reported there were 1,106 active TIF’s in Ohio.¹ In the last eight

¹ These TIFs are not all in territories annexed following the expedited type-2 process. That data is not reported to or kept by the Ohio Department of Development.

months, the number of reported TIFs throughout the state has increased by 37 to 1,143 TIFs at the time of this filing.² TIFs are used to encourage and support development and private investment in Ohio and are critical for development and job growth, particularly in the current depressed economy.

Appellee Sugarcreek now claims this appeal “was improvidently granted” because two lawsuits were filed two days before its motion in this Court by Cornerstone Developers, Ltd. (“Cornerstone”) requesting that Cornerstone’s commercially zoned “farmland” be detached from Centerville under a rarely used detachment statute.³ R.C. 709.41-.42. In its common pleas court filings, Cornerstone asserted it is the new owner and developer of property that, together with other property, was annexed into Centerville. Appellee Sugarcreek claims that, when Cornerstone’s case is determined on the merits, this case may become moot. Sugarcreek fails to point out that Cornerstone’s predecessor, the Dille interests, signed the annexation petitions as owners, entered into development agreements and supported rezoning in the city of Centerville. Sugarcreek is not even a party to Cornerstone’s lawsuits.

The timing of the filings were clearly orchestrated in an attempt to have this Court dismiss the very reasons the court took jurisdiction of this case in the first instance – to provide statewide guidance on TIFs, development and public assistance for public improvements necessary for jobs and development. Two filings made in a common pleas court two days before the Appellee’s motion is filed when no answer is even due, no facts determined, no trial has taken place and no final order issued cannot dictate this Court’s jurisdiction.

² The Ohio Department of Development (“DOD”) receives annual reports from TIFs (and other tax incentives) each year. The DOD reports on its website there are 1,143 active TIFs in Ohio as of the date of the filing of this Memorandum. *See* <http://www.development.ohio.gov/OTEISearch/tif/selection.aspx?County=All&Project=>.

³ The Petitions are attached to Appellee’s motion and were filed on July 27, 2012 in Greene County Court of Common Pleas in Case Nos. 2012CV0793 and 2012CV0794.

Sugarcreek's basic argument is that the filing of a separate lawsuit moots the appeal. The case is not moot for a number of reasons. First, the detachment petitions ask for the removal of the "Dille" property which is only part of the annexation territory. If the prayer of the petitions were granted, the remaining property would still be in the joint jurisdictions of Sugarcreek Township and the City of Centerville and the issues here would remain. Second, the issues in this case will repeatedly arise whenever municipal tax incentives are used to encourage development following type-2 annexations. Appellant urges this Court to retain jurisdiction, decide the case on the merits, and reverse the decision of the Second District Court of Appeals.

This Appeal Is Not Moot

According to Sugarcreek Township, the mere filing of petitions for detachment by Cornerstone in common pleas court makes this Court's determination of the effect of an expedited type-2 annexation on municipal TIFs moot. It does not. The merits of those cases have not been determined and are not before this Court. The burden on the owner seeking detachment in a court of common pleas is substantial and not a "slam dunk" as Appellee Sugarcreek indicates by claiming the simple filing of a petition terminates this Court's jurisdiction.

This Court recently considered the seldom-used farm detachment statute in *Campbell v. City of Carlisle*, 127 Ohio St.3d 275, 2010-Ohio-5707, 939 N.E.2d 153. In *Campbell*, this Court affirmed the trial court's denial of the petition for detachment, finding when a property owner paid taxes calculated based on the current agricultural use valuation ("CAUV") of the land, "the amount "the owner * * * is taxed and will continue to be taxed * * * for municipal purposes"" was not "in substantial excess of the benefits conferred by reason of such lands being within the municipal corporation." *Id.* at ¶8, ¶5. In the common pleas court cases cited by Appellee,

Cornerstone has the burden to meet the statutory criteria for detachment on its lands that are subject to CAUV valuation.⁴ There is no certainty, or in this case any likelihood, that Cornerstone can prevail.

As importantly, assuming for argument's sake that years from now detachment of the Cornerstone property were allowed, it would not moot this case or lessen its importance. The Cornerstone parcels are only a portion of the territory annexed. Sugarcreek Crossing, LLC and Sugarcreek Crossing Permanent, LLC are private owners whose property was also included in the type-2 annexation petition territory and is subject to the same joint township/city jurisdiction.⁵ (T.d. 89). Sugarcreek Crossing's property will also be directly affected by the decision of this Court on the TIF and the extent and availability of tax incentives for public improvements that will benefit their property irrespective of Cornerstone's petitions to detach.

Appellee Sugarcreek Township is attempting to influence this Court by asserting claims of Cornerstone that Sugarcreek Township has no standing to make and are clearly 'premature.' The most charitable characterization of Sugarcreek's motion is a desperate attempt to avoid a

⁴ In *Campbell v. City of Carlisle*, 127 Ohio St.3d 275, 277, 2010-Ohio-5707, 939 N.E.2d 153, 155, ¶5, this Court stated:

R.C. 709.42, which addresses the hearing and decision on detachment, provides: "If, upon the hearing of a cause of action as provided by section 709.41 of the Revised Code, the court of common pleas finds [1] that the lands are farm lands, and [2] are not within the original limits of the municipal corporation, [3] that by reason of the same being or remaining within the municipal corporation the owner thereof is taxed and will continue to be taxed thereon for municipal purposes in substantial excess of the benefits conferred by reason of such lands being within the municipal corporation, and [4] that said lands may be detached without materially affecting the best interests or good government of such municipal corporation or of the territory therein adjacent to that sought to be detached; then an order and decree may be made by the court, and entered on the record, that the lands be detached from the municipal corporation and be attached to the most convenient adjacent township in the same county. Thereafter the lands shall not be a part of the municipal corporation but shall be a part of the township to which they have been so attached. The costs shall be taxed as may seem right to the court." (Enumeration added.)

⁵ A portion of Interstate 675 belongs to the State of Ohio and was also included in the annexation.

decision by this Court based on an unsubstantiated claim of a third party lawsuit. Less charitably, it is simply desperate.

The continued uncertainty created by this litigation has hindered the development of the property and Centerville's ability to implement a municipal TIF for years. The uncertainty of the amount of public funding and source of payment for public improvements to encourage economic development, new buildings and business expansion (jobs) has been delayed. This uncertainty has stalled the development and jobs and opportunities have been lost. The dispute before this Court remains unchanged, irrespective of recently filings of the claimed owner of some of the territory annexed to Centerville. This case properly remains before this Court for determination, and is not, nor will it become moot.

**This Court Is Vested With Jurisdiction To Hear This Appeal
Of Public Or Great General Interest, Irrespective Of Whether
The Case May Become Moot**

When a case involves a matter of public or great general interest, this Court is vested with jurisdiction to hear the appeal, even if the case becomes moot. *In re Suspension of Huffer from Circleville High School*, 47 Ohio St.3d 12, 546 N.E.2d 1308, (1989). This case is and continues to be a matter of public and great general interest, as this Court determined when it accepted jurisdiction. This is a case of first impression that may affect hundreds of the current TIFs and future TIFs throughout the state of Ohio on all properties annexed utilizing the expedited type-2 (100% owner supported) annexation process. The importance of this case is evident from the many amicus briefs that have been filed by persons with diverse interests including developers, homebuilders, realtors, municipalities, townships, and their associations and organizations.

There are properties within the annexed territory for which this issue is not, and will not, become moot in any event. The issue will remain for any Centerville TIF that includes property

that is also in Sugarcreek Township that was annexed utilizing the expedited type-2 process, including the properties in the annexed territory owned by Sugarcreek Creek Crossing, LLC and Sugar Creek Crossing Permanent, LLC. *See Steele v. Hamilton Cty. Community Mental Health Bd.*, 90 Ohio St.3d 176, 736 N.E.2d 10, (2000), at footnote 8.

The Issues Here Are Capable Of Repetition, Yet Evading Review

“A case is not moot if the issues are capable of repetition, yet evading review. (*State, ex rel. The Repository, v. Unger* [1986], 28 Ohio St.3d 418, 28 OBR 472, 504 N.E.2d 37, approved and followed).” *In re Suspension of Huffer, supra*, syllabus, para 1. Jurisdiction is not defeated because the owner of the property has changed from the Dille interests to Cornerstone and who, now after significant time in court, has changed its mind. It is apparent from the attachments to the Appellee’s Motion that the asserted new owner is claiming an interest and rights as a successor in interest under the very Pre-Annexation Agreements that Sugarcreek Township and the lower court’s used as a basis for standing and jurisdiction in this case. *See State ex rel. the Repository v. Unger*, 28 Ohio St.3d 418, 504 N.E.2d 37, (1986).

The circumstance of whether R.C. 709.023(H), an annexation process, creates a ‘special tax exception’ for property annexed utilizing the expedited type-2 process that will continue to be repeated throughout the state. It will occur every time a municipal TIF is created on property annexed utilizing the expedited type-2 annexation process. In fact, if development is proposed years from now, but the property was annexed using the expedited type-2 process, the issue will arise. Potentially hundreds, even thousands, of TIFs may be or have been affected. It will affect municipalities, townships, and county auditors who must understand how to assess the taxes and implement the TIFs. It will also affect property owners, developers, public financing and TIF bonds that predict and rely upon certainty in the calculation of the “payments in lieu of taxes”

(PILOTS) and revenues that will be received and available to finance public improvements to support development.

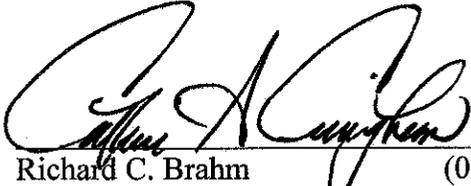
Yet, this important issue may evade review because owners and developers who would challenge the application and implementation of a municipal TIF may simply walk away from a proposed development and invest elsewhere rather than endure the time and expense of litigation as the case winds its way through the court system. Challenges by local governments, as in this case, may evade review because development is forestalled and property transferred as a result of costly, time-consuming litigation and uncertainty in the implementation of tax increment financing and the revenues it will generate.

The issue of whether an annexation statute or other statute outside the tax statute can create a “special” tax treatment different from other similarly situated land will be unanswered. Property annexed into a municipality using a different or pre-2001 (pre-Senate Bill 5) annexation process will be treated differently, even if they are across the street from each other.

Conclusion

Two critical factors in development are certainty and efficiency. Being able to get a deal done and a project financed in a reasonable time is essential. Uncertainty and delay kills development, as evidenced by the properties involved in this case and the petitions filed in the common pleas court by the new claimed owner. A decision in this case will end the uncertainty and provide an interpretation and the uniform application of annexation and TIF statutes throughout the state. This Court should not permit Sugarcreek Township to now evade the very issues it raised, and decide the case on the merits.

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 8th day of August, 2012:

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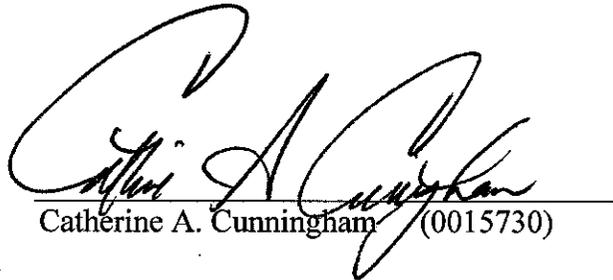
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