ORIGINAL

IN THE SUPREME COURT OF OHIO

FRED SANBORN, *et al.*	:	**Case No. 2013-1598**
Appellants,	:	**Appeal from the Ohio Board of Tax Appeals**
v.	:	
INDIAN HILL BOARD OF EDUCATION, *et al*	:	**Appeal from BTA Case No. 2010-K-938**
Appellees,	:	

REPLY BRIEF OF APPELLANTS FRED SANBORN, RICHARD COCKS, AND RUTH HUBBARD

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I. ARGUMENT IN REPLY

Assignment of Error: The Board of Tax Appeals erroneously concluded that the un-voted tax increase at issue, the 1.25 inside millage move, was "clearly required for the ensuing fiscal year" by the Indian Hill Exempted Village School District.

Nothing in either of Appellees' Merit Briefs alters the fact that Indian Hill Exempted Village School District violated R.C. 5705.341 when it levied a property tax (1) without a vote; and (2) in excess of its own budget. That Section required the Budget Commission to exercise its statutorily defined discretion and merely look to the actual numbers in Indian Hill's Budget, rather than evaluate the needs of the school district. And even a cursory review of Indian Hill's 2011 Budget, rather than a "forensic[] evaluation," shows that the inside millage move was not clearly required, as Indian Hill was projecting a budget surplus for 2011 *without the unvoted tax increase*, an even higher surplus with the unvoted tax increase, and it maintained $25 million available in reserve funds. Meanwhile, Appellants have never questioned *the judgment* of Indian Hill regarding the needs of the School District. Rather, Appellants simply seek to safeguard taxpayer protections enacted by the Ohio General Assembly by comparing *the budget* of Indian Hill with the *taxes* being levied, as is required by R.C. 5705.341.

At the end of the day, Ohio maintains a clear public policy in favor of obtaining a vote of the public before property taxes are raised. If this Court were to rule in Appellees' favor here, it would gut R.C. 5705.341 and thwart the General Assembly's attempt to, consistent with the Ohio Constitution, require voter approval prior to tax increases that are not "clearly required." Additionally, ruling in Appellees' favor here would upset the harmony of R.C. Chapter 5705, as this Court recognized that "[t]he construction of R.C. 5705.341 prohibiting the certification of a tax levy in excess of the rate necessary to produce the revenues required by the budget is necessary to keep it in harmony with the other provisions of R.C. Chapter 5705."[1] Districts statewide will be invited to concoct inventive tactics

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[1] *Wise v. Twinsburg*, 36 Ohio St.2d 114, 118, 304 N.E.2d 390 (1973).

to raise Ohioans' property taxes without a vote of the public, despite the facts that the Ohio Constitution counsels against this, and the General Assembly has clearly spoken as to this.

Despite all of this, Appellees contend that they are entitled to prevail for the following reasons:

(1) The Indian Hill Board of Education and Indian Hill Exempted Village School District (collectively "Indian Hill") urges that "[t]his case arises, in large part, from appellants' disagreement with the considered judgment of the elected School Board that the movement of 1.25 inside mills was required by the District's budget."[2]

(2) Indian Hill argues that "the School Board provided the Budget Commission with a detailed breakdown of the capital expenditures to be funded by the permanent improvement fund created through the movement of inside mills." and "that breakdown demonstrated that the movement of 1.25 inside mills was 'clearly required' for capital improvements budgeted by the District."[3]

(3) Indian Hill claims that "[n]othing in R.C. 5705.341 prohibits the levying of funds as part of a fiscally-prudent plan, provided the levy meets other statutory requirements," and that "[t]he School Board moved the inside mills 'for the ensuing fiscal year,' and as shown above, that step was 'clearly required by [the School Board's] budget.'"[4]

(4) The Hamilton County Budget Commission ("Budget Commission") claims that "[t]he Appellant's apparent position is that the Budget Commission had a duty to scrutinize each element of Indian Hill's budget and find that the budget not only was 'a gimmick' but that it was unlawful. Unfortunately, the

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[2] Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, p. 7.

[3] Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, p. 18.

[4] Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, pp. 12-13.

Budget Commission has no such authority to determine all of the items that go into a School District's budget or the wisdom of such."[5]

(5) The Budget Commission asserts that "[if] the Budget Commission's role is to forensically examine each School Board's budget to determine the wisdom of such budget, the Legislature needs to amend the statute to give it such authority . . . ."[6]

For the reasons below, none of these contentions, not even the most sincere and earnest of intentions, can render Indian Hill's tax increase consistent with R.C. 5705.341. Accordingly, the Board of Tax Appeals must be reversed, and the tax increase at issue must be held in violation of the letter and spirit of the General Assembly's clear safeguards.

A. Ohio case law requires a budget commission to exercise limited discretion and determine if an inside millage move results in excessive taxation.

Indian Hill focuses its brief on only half of the applicable case law regarding the review of tax levies pursuant to R.C. 5705.341. Relying primarily on the 2005 Ohio Attorney General Opinion, Indian Hill repeatedly emphasizes the assertion that "a budget commission may not substitute its judgment for that of a taxing authority with respect to the desirability of expenditures included in budget or evaluate the wisdom of that budget."[7] In fact, their entire reply brief is focused on this idea, rather than the applicable statutory provision and requirements contained in R.C. 5705.341.

First, in support of their articulated principle that "a budget commission may not go beyond its statutory authority and substitute its judgment for that of a school board or other taxing authority"[8] Indian Hill cites to *State ex rel. Board of County Commissioners of Lucas County v. Austin* and an

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[5] Merit Brief of Appellee Hamilton County Budget Commission, p. 5.

[6] Merit Brief of Appellee Hamilton County Budget Commission, p. 5.

[7] Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, pp. 14-20

[8] Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, p. 16.

Attorney General opinion from 2006, however the principle Indian Hill extracts from those opinions is the result of issues that are very different from the excessive taxation issue here. Ultimately, Indian Hill concludes that "[t]he Budget Commission in this case cited the Attorney General Opinion when it recognized, correctly, that it was not empowered to second guess the School Board with respect to the District's budgetary needs."[9]

Second, Indian Hill attempts to divert the Court from the sole issue in this case, whether the inside millage move was clearly required, by claiming that *City of Portsmouth v. Scioto County Budget Commission, Village of Waite Hill v. Budget Commission of Lake County,* and *Wise v. Twinsburg* are inapplicable here because those cases either are not inside-millage cases or are distinguishable "on a crucial issue of fact: whether the revenue to be raised through the levy was clearly required by the taxing authority's budget."[10] This "distinguishable crucial issue of fact" is the crucial issue in this case, and these cases are applicable here.

Lost to Indian Hill and the Board of Tax Appeals is the fact that while review of a taxing authority's decision regarding expenditures may be limited, Ohio law is clear that a budget commission must review a decision of a taxing authority to determine if there has been excessive taxation. In *Village of South Russell v. Geauga County Budget Commission*, this Court specifically stated that "[t]he review of the budget commission of tax levies is one basically of whether there has been excessive taxation, *i.e.*, will the tax generate more funds than shown to be needed within the budget of the district or subdivision."[11]

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[9] Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, p. 15.

[10] Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, p. 20.

[11] *Vill. of South Russell v. Geauga Cnty. Budget Comm'n*, 12 Oho St.3d 126, 132, 465 N.E.2d 876 (1984).

Providing more evidence that Indian Hill fails to understand the relevant statutory language and analysis, Indian Hill argues in its brief that "[b]oiled down to its essence, [Appellants] position was that the District already had enough money and that, therefore, the funds generated by the movement of inside mills were not clearly required by the District's Budget."[12] Indian Hill argues that "the School Board provided the Budget Commission with a detailed breakdown of the capital expenditures to be funded by the permanent improvement fund created through the movement of inside mills." and "that breakdown demonstrated that the movement of 1.25 inside mills was 'clearly required' for capital improvements budgeted by the District."[13]

Indian Hill urges this Court to accept tunnel vision review of one aspect of the complex school district budget, and this does not satisfy the requirements of R.C. 5705.341. Based on Indian Hill's logic in this case, every school district in Ohio could create a new fund, call it the permanent improvement fund, add expenditures to the fund, and then claim that an inside millage move is clearly required because there are unfunded expenses in the newly created fund. This is a perverse and incorrect application of R.C. 5705.341.

i. State ex rel. Board of County Commissioners of Lucas County v. Austin and Attorney General Opinion 2006-006 are inapposite to the issue of excessive taxation..

In *Austin*, the Lucas County budget commission refused to include a .5-mill levy that was "duly approved by popular vote" in the 1951 county budget.[14] The .5-mill levy was outside the ten-mill limitation and was permitted for a period of five years, beginning in 1947, to build a new county home.[15] The tax was levied in 1947, 1948, 1949, 1950 when a .3-mill tax was levied, and in October 1951 the

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[12] Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, pp. 12.

[13] Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, p. 18.

[14] *State ex. rel. Bd. of Cnty. Comm'rs of Lucas Cnty v. Austin*, 158 Ohio St. 476, 110 N.E.2d 134 (1953).

[15] *Id.* at 477.

county determined the county home as built was inadequate, and "since the tax levy authorized was not exhausted it was resolved to construct an addition to such building."[16]

The County Commissioners adopted a budget that included the .5-mill levy for the addition to the county home, but the county budget commission "refused to certify such a levy on the ground that the purpose for which the original levy was voted had been fulfilled and that the relator was without right or authority to levy a tax vote for a specific purpose when such purpose had been accomplished . . . ."[17] *Austin* is inapposite to the case here in two major ways.

First, the budget commission in *Austin* was facing a much different question that the question before this Court. The *Austin* budget commission was determining whether funds had to be used for the reason they were levied, rather than whether there was excessive taxation as a result of a tax levy.

Second, an important distinction between *Austin* and the case here is the language and operation of the controlling statute in *Austin.* The controlling statute in *Austin* stated as follows:

> The budget commission shall examine such budget and ascertain the total amount proposed to be raised in the county for the purposes of each subdivision and other taxing units therein. . . . The budget commission shall ascertain that the following levies are properly authorized and if so authorized, shall approve them without modification: . . . (a) All levies outside of the ten mill limitation. . . ."[18]

As a result of the specific language of the statute, "the only power of the budget commission is to determine whether such levies are properly authorized; if so, such levies must be included."[19] The Court continued, stating that "'properly authorized' as used in this section means that such tax is one which the

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16 *Id.*

17 *Id.*

18 *Id.* at 480. (emphasis added). The statute considered in *Austin* is currently codified at R.C. 5705.31.

19 *Id.*

taxing authority had the power to impose, either by its own action or by vote of the people, and that the enactment of the measure imposing the tax was in compliance with statutory requirements."[20]

Thus in *Austin*, the budget commission only had the power to determine whether "the tax involved was within the power of the taxing authority to levy and that in the enactment levying it all the necessary procedural steps were taken" - - it was mandatory that the budget commission levy the tax if the procedural requirements were met.[21] As the tax in *Austin* was actually voted on by the taxpayers in Lucas County, unlike the unvoted tax here, and the county followed procedure by including the levy in the budget, the budget commission, by statute, should have included the levy. That procedure is not similar to the operation of R.C. 5705.341 and the unvoted tax increase at issue here.

This Court recognized these exact differences in *Village of South Russell v. Budget Commission of Geauga County*, and clarified the interpretation and relationship between R.C. 5705.31, which is the same statute that was at issue in *Austin*, and R.C. 5705.341. In *South Russell*, the Court recognized that R.C. 5705.31 requires a budget commission to "examine each budget and ascertain the total amount proposed to be raised in the county for purposes of each subdivision and the taxing units therein."[22] The Court also recognized that "a number of provisions of the tax levy law establish specific limitations upon the authority of the budget commission to alter or adjust the levies as submitted to them. There are sections of law providing that the commission shall not *modify* certain levies, and other provisions which provide that the commission shall not *reduce* certain specified levies."[23]

With this background of the proper operation of R.C. Chapter 5705, the Court stated that "[m]ore importantly to the issue presented in the case *sub judice,* when reviewing certain levies and after

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20 *Id.*

21 *Id.*

22 *Village of South Russell v. Budget Comm'n of Geauga Cnty.*, 12 Ohio St.3d 126, 128, 465 N.E.2d 876 (1984).

23 *Id.* at 128-29.

ascertaining that such have been properly authorized, the budget commission is mandated by R.C. 5705.31 to approve the levies without modification."[24] The Court reaffirmed its holding from *Austin*, then, citing *Wise v. Twinsburg and Waite Hill v. Budget Commission*, held that:

> Pursuant to R.C. 5705.341, a budget commission does now have a greater role of inspection and review of the tax levies contained in the budgets presented to it than was required or permitted at the time of this court's pronouncement in *Austin*. Currently, the phrase "properly authorized," as employed in R.C. 5705.31, requires the budget commission to determine that such tax is one which the taxing authority had the power to impose, either by its own action or by vote of the people, and that the enactment of the measure imposing the tax was in compliance with statutory requirements. Additionally, the term encompasses the requirement that the budget commission determine whether any rate of taxation is clearly required by the budget of the taxing district or the political subdivision.[25]

The lack of review Indian Hill argues applies from *Austin* is, as a result of the holding in *South Russell*, the very same review standard that Appellants have consistently argued applies, as this Court held that "properly authorized" "encompasses the requirement that the budget commission determine whether any rate of taxation is clearly required by the budget of the taxing district or political subdivision." Therefore, in addition to the differences in the issue and statutory language in *Austin*, this Court clarified that "properly authorized" requires a budget commission to determine whether the rate of taxation is clearly required by the budget.

In *Austin*, the budget commission was required approve a tax levy without modification if such levy "[was] properly authorized," which is much different than approval of a movement of inside-mills "unless such rate of taxation for the ensuing fiscal year is clearly required by a budget." It is disingenuous for Indian Hill to extrapolate their principle of no discretion to review a budget from a case where the controlling statute was inapplicable here and provided the budget commission with no ability to review a budget for excessive taxation.

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24 *Id.* at 129. (emphasis added).

25 *Id.* at 131-32.

Again Indian Hill misses the mark when it cites a 2006 Ohio Attorney General Opinion for the proposition that "a budget commission may not substitute its judgment with respect to a need for budgeted funds even when the purpose for which the funds were originally intended no longer exists, as long as other statutory requirements have been fulfilled."[26] In the 2006 Opinion the City of Shelby established a new division of the Department of Public Safety that was later abolished, and the opinion stated that "even if the legislative authority of the city has abolished the board of health," as long as "a city tax levy in excess of the ten-mill limitation for the general operation of the city's board of health was properly authorized, approved by the electors of the city, and the amounts to be levied are clearly required by the city's budget . . . the county budget commission has a duty under R.C. 5705.31 and R.C. 5705.341 to approve without modification the levy because it is 'not within the province of the [county] budget commission to determine whether the use to be made of funds comes within the purpose of the enactment of the tax.'"[27]

Conveniently, Indian Hill does not refer to other aspects of the 2006 Opinion, one part which states:

> Accordingly, pursuant to R.C. 5705.31 and R.C. 5705.341, a county budget commission is required to approve without modification a city's tax levy in excess of the ten-mill limitation for the general operation of a city board of health unless the tax levy was not properly authorized in accordance with statutory requirements or approved by the electors of the city, or <u>the amounts to be levied are not clearly required by the city's budget or other information submitted by the city.</u>[28]

Looking more critically at this Opinion, what the 2006 Opinion does stand for is that <u>only after</u> the budget commission has <u>looked at the budget</u> to determine whether a tax in excess of a ten-mill limitation <u>is clearly required by the budget</u>, and the other procedural requirements are met, is the budget

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[26] Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, pp. 17.

[27] 2006 Ohio Op. Atty. Gen. 2-55, 2006 WL 758351 at 4.

[28] 2006 Ohio Op. Atty. Gen. 2-55, 2006 WL 758351 at 3.

commission required to certify a levy. Merely because a tax was authorized does not end the review by a budget commission. The budget commission, pursuant to R.C. 5705.341, must review a budget to determine whether a tax levy is "clearly required by a budget," which is where the Budget Commission and Board of Tax Appeals failed here.

ii. Contrary to Appellees' claims, City of Portsmouth v. Scioto County Budget Commission, Village of Waite Hill v. Budget Commission of Lake County, and Wise v. Twinsburg are applicable here and speak directly to the issue in this case, whether the inside millage move was clearly required by the Indian Hill Budget.

Indian Hill continuously attempts to gloss over the fact that the Budget Commission was required to determine if the tax was clearly required, and in an attempt to deflect relevant precedent, like *City of Portsmouth v. Scioto County Budget Commission*, Indian Hill focuses on inconsequential factual differences.

First, Indian Hill argues that *City of Portsmouth* "did not address the movement of inside millage."[29] Appellants bring the text of R.C. 5705.341 to the attention of this Court: "Nothing in this section or any section of the Revised Code shall permit or require the levying of any rate of taxation, *whether within the ten-mill limitation or . . . in excess of the ten-mill limitation*, unless such rate of taxation for the ensuing fiscal year is clearly required by a budget of the taxing district." (emphasis added). Indian Hill has correctly highlighted a factual difference that could not be more legally inconsequential.

Second, Indian Hill argues that it had "well-founded and legitimate concerns about a decline in revenue" and that the City's expenditures in *City of Portsmouth* were "more easily quantifiable."[30] Nothing in the Revised Code, or in any of the applicable case law, instructs the Budget Commission, the

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[29] Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, p. 18.

[30] Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, p. 19.

Board of Tax Appeals or this Court to attempt to determine either: 1) the subjective motivations for *attempting* to collect more tax revenue than is justified by the ensuring year's budget; or 2) the predictability of the taxing district's future expenditures when determining whether more tax revenue is being collected than is justified by the ensuing year's budget. Rather, *City of Portsmouth* reiterated that the Board will look to whether the *taxes* that the government is attempting to levy are justified by the *budget* of the taxing district for the ensuring year.[31] Where the taxing district's annual budget already projects a surplus, that budget does not warrant additional taxes, and therefore those taxes do not comport with R.C. 5705.341.

Third, in its last attempt to create a degree of legally significant daylight between *City of Portsmouth* and the case before this Court, Indian Hill asserts that "City of Portsmouth did not purport to modify the principle . . . that a budget commission may not substitute its judgment for a school board or other taxing district where the tax levied is shown to be needed within the budget submitted by that taxing authority."[32] This argument strikes at interpreting the proper scope of the limited discretion of the Budget Commission discussed above. *City of Portsmouth* makes clear that where additional tax is not needed to meet the needs of a taxing district's budget, it cannot be levied.[33]

Indian Hill also attempts to distinguish *Village of Waite Hill v. Budget Commission of Lake County* because it is not an inside millage case, rather it is a case that involved a tax levy outside the ten-mill limitation.[34] While Appellants have demonstrated *supra* that this is irrelevant to the application of the legal principles in this case, it is also informative that "the authority most clearly on point with this

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[31] *City of Portsmouth v. Scioto Cnty. Budget Comm'n*, BTA Case No. 2002-T-1690, 2003 WL 1092145 (2003).

[32] Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, p. 19.

[33] *City of Portsmouth v. Scioto Cnty. Budget Comm'n*, BTA Case No. 2002-T-1690, 2003 WL 1092145 (2003).

[34] Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, p. 20.

case," [35] Ohio Attorney General Opinion 2005-002, states that "[t]he levying of any property tax, whether inside or outside the 10-mill limitation, is subject to the following restriction set forth in R.C. 5705.341. . . ."[36]

Moreover, none of the cases or authorities Indian Hill relies on are inside millage cases: *Austin* considered a .5-mill tax levy actually voted on by the county residents that was outside the ten-mill limitation, and the 2006 Attorney General Opinion considered a tax levy voted on by county residents for the operation of a board of health outside the ten-mill limitation. In none of the authorities cited by Indian Hill was the distinction made between inside millage and outside millage cases – any tax increase either within the ten-mill limitation or in excess of the ten-mill limitation is required to comport with all the requirements of R.C. 5705.341 and the applicable legal principles do not change as a result of the type of tax increase at issue.

Furthermore, in describing *Village of Waite Hill*, Indian Hill states that "[t]he Lake County Budget Commission refused to approve the levy because, as a factual matter, the revenue to be raised by the levy was not required by the budget submitted by the taxing authority. On that unremarkable basis, the BTA affirmed the budget commission and this Court affirmed the BTA."[37] Indian Hill manages to come to the conclusion that the sole issue in this appeal, whether the revenue raised by the inside millage move was clearly required by the 2011 Budget, actually distinguishes *Waite Hill* from the case here.

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[35] Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, p. 14.

[36] Ohio Attorney General Opinion 2005-002, 2005 Ohio Op. Atty. Gen. 2-11, 2005 WL 263797, p. 4.

[37] Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, p. 20 (emphasis added).

Indian Hill also concludes that *Wise v. Twinsburg* is distinguishable on this very same basis – "that the budgets submitted by the taxing authorities in those cases 'set forth expenditures which were less than the amounts to be generated by the levys.'"[38]

What is remarkable is that Indian Hill describes Appellant's challenge to the 1.25 inside millage move, an unvoted tax increase on the residents of Indian Hill, unremarkable. Appellants entire appeal here centers on the very same issues described by this Court in *Waite Hill* and *Wise* -- that the actual budget of Indian Hill contained tax revenues that exceeded the amount of expenditures required by the district -- under R.C. 5705.341 terms, excessive taxation. It is not clear from Indian Hill's brief why they believe that the central issue in this case is unremarkable, but Appellants, taxpayers directly affected by this unvoted tax increase, certainly find it remarkable.

B. The budget the Indian Hill School District submitted to the Budget Commission demonstrates, without review of specific expenditures, that the 1.25 inside millage move was not clearly required by the budget.

Contrary to the claims of the Budget Commission and Indian Hill, only a cursory review of the 2011 Budget reveals that the inside millage move was not clearly required, as IHSD was projecting a budget surplus for 2011 *without the unvoted tax increase*, an even higher surplus with the unvoted tax increase, and it had $25 million available in reserve funds.[39] The determination of whether the inside millage move was clearly required does not require such a "microscopic evaluation" as the Budget Commission asserts. The Budget Commission exists to "adjust[] the rate of taxation and fix[] the amount of taxes to be levied each year,"[40] and it failed to review the budget in any meaningful manner

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[38] Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, p. 20

[39] Supplement B to Appellants' Merit Brief p. S-9, Response to Interrogatory No. 5; Supplement C to Appellants Merit Brief p. S-18; Supplement C to Appellants Merit Brief p. S-18.

[40] R.C. 5705.27.

here because two of the three commissioners wrongly followed the misguided legal advice that they had no authority to review the budget *at all*.

An even perfunctory review of Indian HIll's 2011 Budget demonstrates that, on its face and on its own terms, Indian Hill was predicting a general fund surplus of about $1.6 million *without* the 1.25 mill property tax increase for that year[41], and with the tax increase, a general fund surplus of $1,849,313.[42] This surplus is calculated *without* the surplus of $151,643.03 that was projected for the Permanent Improvement Fund.[43] Furthermore, the Indian Hill 2011 Budget, again, on its face, reveals that Indian Hill maintained $25,039,122 in reserve of the General Fund in June 2010.[44] Therefore it is clear that there were enough funds in the General Fund to pay for the $717,747.23 in expenditures of the Permanent Improvement Fund[45], and the inside millage move was not clearly required. A "forensic examination" or "in-depth" review of expenditures is not required to observe these immediately apparent and fatal flaws. As such, the inside millage move was not clearly required by the 2011 Budget.

C. Long-term fiscal considerations are an impermissible basis to support an inside-millage move.

Indian Hill concludes that Appellants' argument that the decision to move inside mills was improperly motivated by long-term fiscal considerations is meritless Specifically, Indian Hill claims that "[n]othing in R.C. 5705.341 prohibits the levying of funds as part of a fiscally-prudent plan, provided the levy meets other statutory requirements," and that "[t]he School Board moved the inside mills 'for the ensuing fiscal year,' and as shown above, that step was 'clearly required by [the School

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41 Supplement B to Appellants' Merit Brief p. S-9, Response to Interrogatory No. 5;

42 Supplement C to Appellants Merit Brief p. S-18.

43 Supplement C to Appellants' Merit Brief p. S-23, Transcript on Appeal From the Hamilton County Budget Commission, BTA Case No. 2010-K-938, Exhibit L.

44 Supplement C to Appellants' Merit Brief p. S-20; Transcript on Appeal From the Hamilton County Budget Commission, BTA Case No. 2010-K-938, Exhibit L.

45 *Id.*

Board's] budget.'"[46] However, these conclusions fail to give effect to the plain language of R.C. 5705.341 regarding long-term fiscal considerations.

First, Appellants direct this Court to the language of R.C. 5705.341, which uses the term "ensuring fiscal year" it two different places – showing the General Assembly's intent to ensure that the tax rate imposed for a specific year in a taxing district does not produce excessive taxation. R.C. 5705.341 states as follows:

> The board of tax appeals shall forthwith consider the matter presented on appeal from the action of the county budget commission and may modify any action of the commission with reference to the fixing of tax rates, to the end that no tax rate shall be levied above that necessary to produce the revenue needed by the taxing district or political subdivision for the ensuing fiscal year and to the end that the action of the budget commission appealed from shall otherwise be in conformity with sections 5705.01to 5705.47 of the Revised Code.
>
> Nothing in this section or any section of the Revised Code shall permit or require the levying of any rate of taxation, whether within the ten-mill limitation or whether the levy has been approved by the electors of a taxing district, political subdivision, library district, or association library district, or by the charter of a municipal corporation in excess of such ten-mill limitation, unless such rate of taxation for the ensuing fiscal year is clearly required by a budget of the taxing district or political subdivision properly and lawfully adopted under this chapter, or by other information that must be provided under section 5705.281 of the Revised Code if a tax budget was waived.

The plain language of the statute shows that, in drafting the statute, the General Assembly emphasized the "rate of taxation for the ensuing fiscal year" and that this rate must be clearly required. In Ohio, "[e]very word in the statute is presumed to have meaning, and [courts] must give effect to all the words to avoid an interpretation which would render words superfluous or redundant."[47] Further, "the entire statute is intended to be effective;" and "[i]n determining the legislative intent of a statute, it is the duty of this court to give effect to the words used in a statute, *not to delete words used*, or to insert

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[46] Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, pp. 12-13.

[47] *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 112, 111 S.Ct. 2166 (1991).

words not used."[48] Not a single word may be deleted because "the General Assembly is not presumed to do a vain or useless thing, and that when language is inserted in a statute it is inserted to accomplish some definite purpose."[49] However, Indian Hill's argument would render "the ensuing fiscal year" meaningless, and effectively read the words out of the statute, which this Court should recognize as impermissible.

Second, as Indian Hill believes that the unvoted tax increase was clearly required and that it is not an issue in this case, it is unsurprising that Indian Hill asserts that the Budget Commission and the Board of Tax Appeals did not rely on future considerations in determining whether the movement of 1.25 inside mills was proper. Again, Indian Hill's interpretation of "ensuring fiscal year" would allow a runabout of the law. Any taxing authority could state that in three years it will lose significant funding, follow the proper procedures for effecting a tax levy, and collect the tax levy three years before any actual loss in funding, if that loss actually occurs. The tax was not clearly required for the ensuing fiscal year, however Indian Hill encourages the Court to accept this as an acceptable method of taxing Ohio citizens.

Third, it is clear that the Board of Tax Appeals relied solely upon future considerations, stating that "Indian Hill's treasurer, Julia Toth, testified regarding the district's academic achievements/objectives, its current and projected financial status and the impact of existing/anticipated local/state financial pressures which will adversely impact current and future operating budgets . . ."[50] and relying upon evidence indicating only that Indian Hill's "goal is to achieve a single year's operating balance."[51]

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48 *Columbus-Suburban Coach Lines*, supra.; *Wheeling Steel Corp., supra.* (emphasis added).

49 *State ex rel. Cleveland Elec. Illum. Co. v. Euclid*, 169 Ohio St. 476, 479, 482 (1959).

50 BTA Decision p. 2.

51 *Id.*

Meanwhile, the Board of Tax Appeals ignored Indian Hill's own admissions that the tax increase was simply part of a "long term strategy," rather than "clearly required for the ensuing fiscal year." These admissions were also highlighted by Indian Hill in their merit brief. Some specific examples of these impermissible considerations from Indian Hill's merit brief are as follows:

- Julia Toth, Treasurer of the District, "explained that the School Board was 'expecting and anticipating several threats to our revenue sources over the next couple of years, and it is in that regard that this topic has come up.' She said that the School Board was 'deeply concerned about a lot of pressure on the budget going forward."[52]
- Tim Sharp, a member and then chairman of the Finance Committee of the School Board, testified that the decision "was based on an evaluation of fiscal trends over 'a number of years.'"[53]
- Ted Jaroszewicz, member of the school board and chairman of the finance committee during the period of time when Indian Hill made the decision to move inside mills, stated that "state funding . . . would go from approximately $2.5 million to zero in the next three to five years."[54]

All of this testimony supports the conclusion that the BTA erred here because it relied upon evidence of Indian Hill's long term desire for additional revenue, rather than on Indian Hill's "requirements" for the "ensuing fiscal year" as required by R.C. 5705.341. Any consideration of the taxing district's budgetary requirements beyond the "ensuing fiscal year" is improper and impermissible.

D. Appellants are not "second guessing" the budgetary needs of the Indian Hill School District.

Indian Hill concludes that "[f]undamentally, [Appellants] were inviting the Budget Commission to accept their notion of fiscal responsibility in the District in lieu of that of the elected members of the School Board."[55] The Budget Commission further cposits that "[t]he wisdom of the School District's budget is an evaluation to be made by the voters of the Indian Hill School District who can choose to

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[52] Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, p. 8.

[53] Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, p. 9.

[54] Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, p. 10.

[55] Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, pp. 12-13.

change the School Board if they so desire. That is a political question - - not one to be decided by the Budget Commission or a Board of Tax Appeals, who have no authority to decide the wisdom of the budget."[56] Indian Hill also resorts to a tangential attack on Appellants' *motivations* for asserting its right to appeal the decision of the Budget Commission. Indian Hill states, "[a] current running below the surface" of Appellants' arguments "is an evident distaste for the whole concept of moving inside mills."[57] Appellants, in reality, have no objection to the movement of inside mills *when doing so comports with Ohio law*.

Utilizing an inside millage move to generate additional tax revenue, where doing so "is clearly required by a budget of the taxing district," can be an important and valuable tool for school districts to utilize when their budgets face *deficits*. Moreover, the proper procedure for a legal inside millage move is clearly contemplated by Ohio law.[58] Indian Hill's budget, by contrast, with its mushrooming reserve and projected annual *surplus*, is not in a position to utilize this mechanism to raise additional revenues because their budget for the ensuring year does not "clearly require" it.

Appellants have never asserted or argued that the Budget Commission erred by failing to "scrutinize each element" or "forensically examine" Indian Hill's budget to determine what expenditures or budget items were necessary for its students. Rather, the Board of Tax Appeals' act affirming the Budget Commission's approval of Indian Hill's Annual Budget for the 2011 fiscal year is unlawful and unreasonable because the unvoted property tax increase violated the plain terms of R.C. 5705.341 as the *Petition to Move 1.25 Inside Mills* was not clearly required for the ensuing fiscal year. Since, *on paper*, Indian Hill had sufficient revenue to adequately meet all of its budgeted needs *without* the additional

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56 Merit Brief of Appellee Hamilton County Budget Commission, p. 6.

57 Merit Brief of Appellees Indian Hill Board of Education and Indian Hill Exempted Village School District, pp. 21.

58 *See* R.C. 5705.341

taxation created by the inside millage movement, the new taxation cannot be justified under R.C. 5705.341.

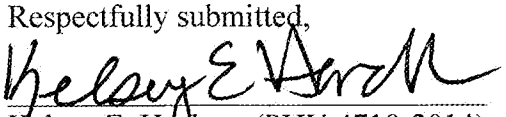
Appellants have never and do not now question the "wisdom" of the budget. *The clear mandate of the law is another matter entirely*: the Budget Commission is under a specific duty to evaluate the necessity of an inside millage move, and failed to do so here. Had it done so, it would have been required to invalidate the unvoted tax increase.

II. CONCLUSION

The Board of Tax Appeals' act of affirming the Budget Commission's approval of the Indian Hill Exempted Village School District Annual Budget for the 2011 fiscal year was and is unlawful and unreasonable because the unvoted property tax increase violated the plain terms of R.C. 5705.341: the *Petition to Move 1.25 Inside Mills* was not clearly required for the ensuing fiscal year.

This Court should reaffirm the intentions of the General Assembly in enacting R.C. 5705.341, protecting Ohio taxpayers, and find that the decision of the Board of Tax Appeals was unreasonable and unlawful and reverse the decision of the Board of Tax Appeals affirming the conversion of 1.25 inside mills to the Permanent Improvement Fund. This Court should further vacate the decision of the Board of Tax Appeals.

Respectfully submitted,



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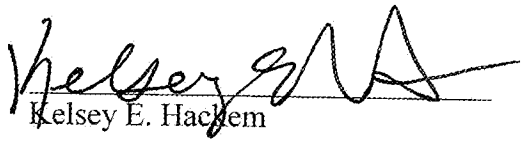

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