

**IN THE COURT OF APPEALS
TWELFTH DISTRICT COURT OF OHIO
WARREN COUNTY, OHIO**

THE DREES COMPANY, <i>et al.</i>)	Appeal No. 2009-11-150
)	
Plaintiffs-Appellants,)	Trial No. 07-CV-70181
)	
-v-)	
)	
HAMILTON TOWNSHIP, OHIO, <i>et al.</i>)	
)	
Defendants-Appellees.)	

AMICUS BRIEF ON BEHALF OF APPELLANTS

Joseph L. Trauth, Jr. (0021803)
Thomas M. Tepe (0071313)
Charles M. Miller (0073844)
KEATING MUETHING & KLEKAMP PLL
One East Fourth Street, Suite 1400
Cincinnati, Ohio 45202
Tel: (513) 579-6400
Fax: (513) 579-6457
jtrauth@kmklaw.com
ttepe@kmklaw.com
cmiller@kmklaw.com

And

Richard A. Paolo (0022506)
Kevin L. Swick (0023149)
ARONOFF ROSEN & HUNT
425 Walnut Street, Suite 2200
Cincinnati, Ohio 45202
Tel: (513) 241-0400
Fax: (513) 241-2877
rapaolo@arh-law.com
klswick@arh-law.com
Attorneys for Appellants.

Wilson G. Weisenfelder, Jr.
James J. Englert
Lynne M. Longtin
RENDIGS, FRY, KIELY & DENNIS, L.L.P.
One West Fourth Street, Suite 900
Cincinnati, Ohio 45202-3688
Tel. (513) 381-9200
Fax (513) 381-9206
wgw@rendigs.com
jje@rendigs.com
lml@rendigs.com

And

Warren J. Ritchie
Thomas T. Keating
KEATING RITCHIE
8050 Hosbrook Road
Cincinnati, Ohio 45236
Tel (513) 891-1530
Fax (513) 891-1537
writchie@krslawyers.com
tkeating@krslawyers.com
*Trial Attorneys for Appellees/Defendants,
Hamilton Township, Ohio et al.*

Maurice A. Thompson (0078548)
1851 Center for Constitutional Law
Buckeye Institute
88 E. Broad Street, Suite 1120
Columbus, Ohio 43215
Tel. (614) 224-4422
Fax (614) 224-4644
MThompson@BuckeyeInstitute.org
Attorney for Amicus Curiae

Now comes *Amicus Curiae*, the Buckeye Institute's 1851 Center for Constitutional Law, and respectfully submits this brief in support of Plaintiffs' Appeal of the Warren County Court of Common Pleas September 30, 2009 Entry Granting Partial Summary Judgment to Defendants. Given the extensive briefing of this matter, Amicus counsel will defer to parties' recitations of facts and issues, and confine this brief to (1) its interest in the matter; and (2) applicable law and analysis.

INTEREST OF AMICUS CURIAE

The Tax Foundation's 2010 State Business Tax Climate Index ranks Ohio 47th in the nation, noting that Ohio's current policies are "inhospitable to economic growth." This is the result of a state tax climate whereby Ohio's state and local governments impose income, corporate, property, sale and estate tax burdens that are all amongst the nation's worst.¹ The Buckeye Institute for Public Policy Solutions, a non-profit research organization formed in 1994, seeks to improve Ohioans lives through improving this climate.

Formed to support public policies that advance liberty, individual rights, and a strong economy in Ohio, The Buckeye Institute for Public Policy Solutions is a nonpartisan research and educational institute devoted to economic freedom and dynamism, personal responsibility and limited government . The Buckeye Institute develops ideas with the assistance of 45 scholars from 23 universities and colleges throughout Ohio, disseminates them through publications, lectures and special events, and distributes them to policy makers and key opinion leaders to make meaningful change. The Buckeye Institute's work has made inroads in numerous areas: identifying regulations that stifle economic growth, demonstrating the benefits of market-based education reform, publicizing free market alternatives in health care, showing

¹ See *Rich States, Poor States, ALEC-Laffer State Economic Competitiveness Index*, by Arthur B. Laffer, Stephen Moore & Jonathan Williams.

the savings that competition will bring to state and local governments, and identifying how to cut sales, income, property and business taxes and questionable government spending.

The Buckeye Institute's 1851 Center for Constitutional Law is dedicated to protecting Ohioans' control over their lives, their families, their property, and thus, ultimately, their destinies. More pointedly, the 1851 Center has an interest in protecting Ohioans' rights to acquire, possess, use, and dispose of their private property, including earnings, in a way that does not harm others, and in ensuring that government acts responsibly and constitutionally when it seeks to interfere with those fundamental rights.

The 1851 Center has a further interest in protecting Ohioans from unconstitutional and prosperity-inhibiting taxes and regulations. *Amicus* thus has a strong interest in this Court's ruling on whether an Ohioan has a right to be free from an Ohio Township's circumvention of the constitutional limits of its limited taxing authority.

INTRODUCTION

The stakes of this case are high. Four million Ohioans, or 35 percent of the state's population, now reside in townships.² This constitutes a "substantial population redistribution within the state," whereby Ohioans have moved from municipalities to townships.³ While many citizens may make the move merely because they prefer a more rural lifestyle, it cannot be denied that many others do so to protect themselves from municipal income taxation (which, as noted above is amongst the highest in the nation), and many of the other expenses associated with municipal life. If not enjoined, Hamilton Township's "impact fee" resolution would usher in a new era of township taxing authority - - one that would imperil existing township residents'

² *Growth and Change: Population Change in Ohio and its Rural-Urban Interface*, by Mark Partridge, found at www.ag.ohio-state.edu/

³ *Id.*

freedom from high taxation and investment-backed expectations, and prospective township residents' capacity to order their lives so as to avoid such taxation.

In its September 30, 2009 entry granting partial summary judgment to Hamilton Township, the Trial Court mistakenly characterized an unconstitutional back-door tax on new homeowners and developers as a permissible "fee." Specifically, the Court upheld that Hamilton Township's May 2007 Amended Resolution, entitled "Amended Resolution Implementing Impact Fees within the Unincorporated Areas of Hamilton Township, Ohio for Roads, Fire, Police, and Parks."⁴

However, the Court failed to account for a myriad of attributes that render this assessment a tax:

- The assessment applies to all who apply for a zoning certificate for new construction or redevelopment.⁵
- Factual Findings (5), (6), (7), and (8) of the Resolution indicate that the purpose of the tax on developers and new homeowners is "to benefit one of the fastest growing townships in the state of Ohio;" "to protect * * * the community;" and to protect "the citizens and property owners of the Township."⁶
- Factual Findings (5), (6), (7), and (8) of the Resolution further indicate that, in spending the taxes collected from new developers and homeowners, the "entire township" will be treated as "one single service area"⁷
- Revenues are spread out over all improvements to parks, roadways, fire, and police in Hamilton Township, irrespective of whether the improvements are related to new residential construction.
- Present residents of Hamilton Township receive the benefit of the improvements without any obligation to share in the costs.
- There is no evidence in the record demonstrating that new residential construction so overburdens existing parks as to require additional park space, which would be available to all Hamilton Township residents, but funded solely by new construction.

⁴ September 30, 2009 Entry Granting Partial Summary Judgment to Defendants, p. 2.

⁵ Id.

⁶ See Hamilton Township, Ohio Amended Resolution No. 2007-0418.

⁷ Id., at Factual Finding (13).

In other words, the purpose and effect of the Resolution is plainly to collect revenues that are used “for the equal benefit of all of the people” of Hamilton Township. As articulated more thoroughly below, when such is the case, an assessment constitutes a tax. Accordingly, the Court erred in permitting Hamilton Township to circumvent the Ohio Revised Code’s proscription against township taxation.

LAW AND ANALYSIS

A. An Impermissible Tax

Townships of Ohio have no inherent or constitutionally granted police power. Whatever police power townships of Ohio have is that delegated by the General Assembly, and “it follows that such power is limited to that which is expressly delegated to them by statute.”⁸ R.C. 505.04 plainly provides that an Ohio township “shall exact no taxes other than those provided for by general law.”

Having not found the authority “provided for by general law,” Hamilton Township has simply levied a tax on new homeowners and homebuilders, and labeled it a “fee.” In light of speciousness of this designation, and the danger it poses to the four million Ohioans who reside in townships, Plaintiffs arguments on this point warrant some elaboration.

Ohio law is clear on this matter. Although Defendants’ label their tax a “fee,” a fee is “a charge imposed by a government in return for a service.”⁹ “Taxation,” meanwhile, “refers to those general burdens imposed for the purpose of supporting the government, and

⁸ *Yorkavitz v. Bd. of Trustees of Columbia Twp.* (1957), 166 Ohio St. 349, 2 O.O.2d 255, 142 N.E.2d 655,

⁹ *State ex rel. Petroleum Underground Storage Tank Release Compensation Bd. v. Withrow* (1991), 62 Ohio St.3d 111, 113.

more especially the method of providing the revenues which are expended for the equal benefit of all the people.”¹⁰

Here, Factual Findings (5), (6), (7), (8) of Hamilton Township Resolution No. 2007-0418 (hereinafter “the Resolution”) speak to its taxing character: they indicate that the purpose of this tax on developers and new homeowners is “to benefit one of the fastest growing townships in the state of Ohio;” “to protect * * * the community;” and to protect “the citizens and property owners of the Township.”¹¹ They further indicate that, in spending the taxes collected from new developers and homeowners, the “entire township” will be treated as “one single service area”¹² In other words, the purpose of the Resolution is plainly to collect revenues that are used “for the equal benefit of all of the people” of Hamilton Township.

Further, the Supreme Court of Ohio has held that “a ‘fee’ is in fact a ‘tax’ if it exceeds the ‘cost and expense’ to government of providing the service in question.”¹³ By failing to distinguish between improvements in park, police, fire and roadway services caused by the development on one hand, and routine improvements on the other, the Resolution utterly fails to create an intelligible mechanism for ensuring that the revenue collected will actually reflect additional governmental expenses caused by new residential construction in Hamilton Township.

In fact, pursuant to the clear expressions of Ohio’s courts, Hamilton Township’s “impact fee” scheme does not operate as a fee in return for a service at all.¹⁴ *Bldg. Industry Assn. of Cleveland v. Westlake*, for instance, found that a nearly identical ordinance was not a fee, but a

¹⁰ *Cincinnati v. Roettinger* (1922), 105 Ohio St. 145, 153-54.

¹¹ See Hamilton Township, Ohio Amended Resolution No. 2007-0418.

¹² *Id.*, at Factual Finding (13).

¹³ *Granzow v. Bur. of Support of Montgomery Cty.* (1990), 54 Ohio St.3d 35, 38.

¹⁴ Compare *Amherst Builders Assn. v. Amherst* (1980), 61 Ohio St.2d 345, syllabus (“[A] municipality, pursuant to Section 4, Article XVIII of the Constitution of Ohio, may impose upon new users a tap-in or connection fee which bears a reasonable relationship to the entire cost of providing service to those new users.”).

tax.¹⁵ The *Westlake* court found the purported impact fee resolution before it amounted to a tax because it (1) permitted the use of “impact” revenues collected on facilities which were also used by, and presumably supported by property and income taxes of, then-present residents of the city; (2) shifted, unfairly and unreasonably, the funding from the general public to the developers and purchasers of new construction without requiring a matching amount on present residents; (3) it was impossible to ascertain whether the relationship was substantial between the charge and the burden to the recreation system of existing parks caused by new development; and (4) although the city speculated that there was a nexus between the charges and the burden in that the purchasers of new construction will actually burden the existing parks through additional use, there was no guarantee that these new construction purchasers will in fact use the existing park system, let alone cause a need for building new facilities, as opposed to unlike the certainty of new users using and burdening a local sewage system.¹⁶

Each of the above is true of Hamilton Township’s Resolution. First, Revenues are spread out over all improvements to parks, roadways, fire, and police in Hamilton Township, irrespective of whether the improvements are related to new residential construction. Secondly, present residents of Hamilton Township receive the benefit of the improvements without any obligation to share in the costs. Finally, there is no reason to believe that new residential construction so overburdens existing parks as to require additional park space, which would be available to all Hamilton Township residents, but funded solely by new construction.

Instead, as Hamilton Township repeatedly emphasizes in the Resolution, “impact fees” will be collected and spent to benefit the entire township. Consequently, this court must conclude, as the *Westlake* court concluded, “[w]hile it is laudable to seek such a recreational

¹⁵ *Bldg. Industry Assn. of Cleveland v. Westlake* (1995), 103 Ohio App.3d 546

¹⁶ *Id.*

program for the city and its residents, costs associated with that program should be borne by all residents, not merely those purchasing new construction, for the benefits of such a program run to all residents.”¹⁷ Clearly then, the Resolution is a tax. Since Ohio townships have not been delegated the authority to tax in this manner, the tax must be stricken.

Nevertheless, the trial court found this tax to be a “fee,” and thus permissible. It did so by concluding that (1) the impact fees did not exceed the cost of making any particular improvement; (2) it is not apparent that the fees are inflated to cover services that are used by unassessed residents; (3) there are “sufficient benefits provided to those who pay the impact fee;” and (4) there has been no showing that the fees will enhance the value of existing services to existing residents.¹⁸ However, these factors are not determinative of whether the assessment is a tax or a fee. The determinative factors are articulated above, and they establish the following: when one is assessed for the benefit of the community, that assessment is a tax. To the extent that the court’s decision could be read to have addressed this factor through its conclusion that there is no showing that the fee benefit existing residents, the Court’s conclusion is utterly false. First, the Resolution is replete with language indicating that the entire township will benefit from the assessments. Secondly, it is *self-evident* that existing residents benefit from the lessened strain on township facilities and services, which means greater availability of those services to each of them.

¹⁷ Id.

¹⁸ September 30, 2009 Entry Granting Partial Summary Judgment to Defendants, pp. 13-14. The Court may have also relied on the fact that revenue collected from the assessments is not kept in the township’s general fund. However, this issue should not be dispositive - - otherwise townships could simply tax citizens and avoid constitutional scrutiny through imaginative account management. Moreover, the collections DO actually appear to inure to ostensibly general funds: for example the parks fund is not the township’s general treasury, but is a fund that is spread throughout the township, without regard to where the money comes from. This is tantamount to a “general fund for parks.” Put another way, even if the nominal purpose of the fund is to build new parks “to serve the new population,” the township may build new parks somewhere where there is no new population. At that point, the assessment take the form of a redistributive tax, paid for by A for the benefit of B, rather than that of a user fee.

B. A Lack of Uniformity in Assessment.

Even if Hamilton Township's tax were a fee, it would still constitute an unconstitutional assessment. State and federal constitutional provisions, viz. Section 2 of Article XII of the Ohio Constitution and Section 1 of the Fourteenth Amendment to the United States Constitution, require uniformity in the mode of assessment. Pursuant to these provisions, real property must be assessed on the basis of the same uniform percentage of actual value.¹⁹ Citizens already in the township have an impact, but are not required to pay, since the tax only applies to new development after the date of its passage.²⁰ Meanwhile, holding aside Hamilton Township's convoluted and non-obligatory leviathan of potential credits, under the Resolution, a single family homeowner who has participated new residential construction is taxed the remarkable total of \$6,153 beyond what is paid by a preexisting resident.²¹ Thus the "impact fees" are not applied uniformly to all citizens.

In *Town Properties, Inc. v. Fairfield*, the Supreme Court of Ohio found a recreational tax on building permits constitutional because the *existing* residents in Fairfield were also charged with an equal share of the cost for the acquisition, development, maintenance and operation of publicly owned recreation sites and facilities.²² The statutory scheme in *Fairfield* required "* * * an appropriation equal to the revenue derived from the subject tax to be made annually from the general fund to the recreational capital improvement fund."²³

Accordingly, absent a matching amount on present residents, the township's Park and Recreational Improvement Fee places an unfair and unreasonable burden on developers and purchasers of new construction. Therefore, the resolution is not only impermissible as one

¹⁹ *Black v. Bd. Of Revision of Cuyahoga Cty.* (1985), 16 Ohio St.3d 11.

²⁰ *Id.*, at Section III(1).

²¹ \$3,964 (roads), \$335 (fire), \$206 (police), \$1,648 (parks).

²² *Town Properties, Inc. v. Fairfield* (1977), 50 Ohio St.2d 356.

²³ *Id.*

township's back door attempt at taxation, but even if the township had such taxing authority, the mode of assessment is anything but uniform.

In conclusion, Justice Pfeiffer's commentary on this exact subject rings true:

Here, however, [the government] is attempting to force developers to pay for improvements or additions to infrastructure as *quid pro quo* for developing a site, even when the improvements or additions occur beyond the property lines of the development. This strikes me as a tax, and since it is not applied uniformly, as an unconstitutional tax.²⁴

With respect to Hamilton Township's assessment, this Court must concur.

C. No Deference Due.

Finally, Hamilton Township masquerades its tax on new developers and homeowners by indicating that it has performed studies and used engineers to establish an impact fee system. Apparently based on these studies, the Township concludes that "there is both a rational nexus and a rough proportionality between the development impacts created by each type of new development covered by this resolution and the impact fees that such a development will be required to pay."²⁵

These studies and their findings are entitled to no deference, since the question of whether this assessment is a tax or a fee is a legal issue. As the Ohio Supreme Court has observed, "[w]e must examine the substance of the assessments and not merely their form."²⁶ As just one example, the disingenuousness of the Resolution's claim to be an "impact fee" is exhibited by Section VI(6) of the Resolution, which exempts "tax-revenue generating enterprises" from the fee. That section permits the township itself to pay the fee out of its

²⁴ *Home Builders Assn. of Dayton & the Miami Valley v. Beavercreek* (2000), 89 Ohio St.3d 121, 729 N.E.2d 349.

²⁵ *Id.*, at Factual Finding (14).

²⁶ *State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow* (1991), 62 Ohio St.3d 111, 579 N.E.2d 705.

general revenue (revenue that will come, in part from the impact fees on new homeowners and developers). This arrangement plainly illustrates the Resolution to be a revenue-generating mechanism, rather than a system of fees to account for the impact of new development.

Rubber-stamping Hamilton Township's legislative findings would effectively invite every township in Ohio to levy unconstitutional taxes against their residents by merely labeling the taxes "impact fees." The Court must instead lend Hamilton Township's unconstitutional tax the scrutiny it deserves. Upon doing so, it should conclude that the Resolution levies a tax, and an unconstitutional one at that.

Respectfully Submitted,



Maurice A. Thompson (0078548)
1851 Center for Constitutional Law
Buckeye Institute
88 E. Broad Street, Suite 1120
Columbus, Ohio 43215
Tel: (614) 224-4422
Fax: (614) 224-4644
MThompson@BuckeyeInstitute.org

CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the following this 1st day of February, 2010:

Charles Miller
Thomas M. Tepe
Joseph L. Trauth, Jr.
Keating Muething & Klekamp PLL
One East Fourth Street, Suite 1400
Cincinnati, Ohio 45202

Wilson G. Weisenfelder, Jr.
James J. Englert
Lynne M. Longtin
Rendigs, Fry, Kiely & Dennis, LLP
One West Fourth Street, Suite 900
Cincinnati, Ohio 45202

Warren J. Ritchie
Thomas T. Keating
Keating Ritchie
8050 Hosbrook Road, Suite 200
Cincinnati, Ohio 45236



Maurice A. Thompson (0078548)