COMMON PLEAS COURT
WARREN COUNTY OHIO
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IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

THE DREES COMPANY, *et al.*,	)	**Case No. 07 CV 70181**
Plaintiffs,	)	**JUDGE FLANNERY**
-VS-	)	**AMICUS MEMORANDUM OPPOSING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**
HAMILTON TOWNSHIP, OHIO, *et al.*,	)	
Defendants.	)	

Now comes *Amicus Curiae*, the Buckeye Institute's 1851 Center for Constitutional Law, and respectfully submits this brief in support of Plaintiffs' Memorandum in opposition to Defendants' Motion for Summary Judgment. 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 Buckeye Institute for Public Policy Solutions is a non-profit research organization formed in 1994 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 individual liberty, economic freedom, personal responsibility and limited government in Ohio.

The Buckeye Institute develops ideas with the assistance of 45 scholars from 23 universities and colleges throughout Ohio, disseminates them through our 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 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 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 in a way that does not harm others, and in ensuring that government act responsibly and constitutionally when it seeks to impinge on 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.

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."[1] R.C. 505.04 plainly provides that an Ohio township "shall exact no taxes other than those provided for by general law."

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

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 all Ohioans who reside in townships, Plaintiffs arguments are understated, and warrant 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."[2] "Taxation," meanwhile, "refers to those general burdens imposed for the purpose of supporting the government, and more especially the method of providing the revenues which are expended for the equal benefit of all the people."[3] Here, Hamilton Township Resolution No. 2007-0418 (hereinafter "the Resolution") is a tax. Factual Findings (5), (6), (7), (8) of 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."[4] 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."[5] 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.

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

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

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

5 Id., at Factual Finding (13).

In addition, 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."[6] By failing to distinguish between improvements in parks, police, fire and roadways that will service the development, and routine improvements, the Resolution utterly fails to create an intelligible mechanism for ensuring that the revenue collected will actually serve any 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.[7] *Bldg. Industry Assn. of Cleveland v. Westlake*, for instance, found that a nearly identical ordinance was not a fee, but a tax.[8] 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

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

7 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.").

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

system, let alone cause a need for building new facilities, unlike the certainty of new users using and burdening a local sewage system.[9]

Each of the above phenomena manifests itself in Hamilton Township's efforts. 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. 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 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."[10] 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.

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

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9 Id.

10 Id.

property must be assessed on the basis of the same uniform percentage of actual value.[11] 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.[12] Meanwhile, holding aside Hamilton Township's convoluted and non-obligatory leviathan of potential credits, a single family homeowner who has participated new residential construction is taxed the remarkable total of $6,153.[13] 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.[14] 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."[15] Absent a matching amount on present residents, the City'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 township's back door attempt at taxation, but even if the township had such a right, the mode of assessment is anything but uniform.

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

12 Id., at Section III(1).

13 $3,964 (roads), $335 (fire), $206 (police), $1,648 (parks).

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

15 Id.

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 tyupe of new development covered by this resolution and the impact fees that such a development will be required to pay."[16]

These studies and their findings are entitled to no deference in this Court's inquiry to determine the legal question of whether this tax is a tax or a fee. As the Ohio Supreme Court has observed, "[w]e must examine the substance of the assessments and not merely their form."[17] 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 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.

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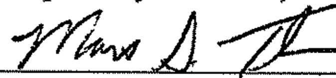
[16] Id., at Factual Finding (14).

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

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing was served upon the following parties by ordinary mail this 23rd day of January 2009:

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