COMMON PLEAS COURT
WARREN COUNTY OHIO
FILED

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JAMES L. SPAETH
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, COUNTY OF WARREN
GENERAL DIVISION

THE DREES COMPANY, et al.,	:	**CASE NO. 07CV70181**
Plaintiffs	:	
v.	:	**ENTRY GRANTING PARTIAL SUMMARY JUDGMENT TO DEFENDANTS**
HAMILTON TWNSP, OH, et al.,	:	
Defendants	:	

Pending before the court are cross motions for partial summary judgment filed by Plaintiffs and by Defendants as to counts I through IX of Plaintiffs' complaint.[1] These counts assert that impact fees imposed by Hamilton Township on new construction constitute an illegal tax, are not permissible fees, and that the Township's action is preempted by other statutory funding schemes. For the reasons that follow, partial summary judgment is granted to Defendants.

I. Stipulated Facts

Hamilton Township is a limited home rule township created under chapter 504 of the Ohio Revised Code. Its powers are described in R.C. 504.04, which allows the Township to "exercise all powers of local self-government. . . other than powers that are in conflict with general laws, except that the township shall comply

[1] The parties agreed to bifurcate the issues to address first whether the proposed impact fee is something Hamilton Township is authorized to assess in the first instance. Consequently, the Court will not at this time determine whether Defendants are entitled to summary judgment on counts XIV or XV

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with the requirements and prohibitions of this chapter, and shall enact no taxes other than those authorized by general law."[2]

In May 2007, the Township Board of Trustees passed Amended Resolution 2007-0418, which was titled "Amended Resolution Implementing Impact Fees within the Unincorporated Areas of Hamilton Township, Ohio, for Roads, Fire, Police, and Parks." Fees are assessed whenever someone applies for a zoning certificate for new construction or redevelopment. Properties developed before the effective date of the Resolution are not assessed the fees.

The aim of the new impact fees is "to ensure that impact-generating development bears a proportionate share of the cost of improvements to the Township's major roadway facilities, its fire and police protection, and its park system." Fees are assessed based upon the proposed land use for which the zoning application is made, on either a per unit basis, or per 1000 square foot basis for some commercial development. Only residential units are charged the parks impact fee.

Collected fees are kept in accounts for each of the four categories of impact fees, and are kept separate from the Township's general fund. Each of the four impact fee accounts contain fees collected from all over the Township. There are no geographical subcategories in each account. What this means is that fees paid in one geographical area of the Township may not necessarily be spent in that

[2] R.C. 504.04(A)(1)

geographical area. For instance, a parks fee paid for a particular subdivision may be spent creating a park distant from that subdivision. The Resolution requires that fees be spent on projects initiated within three years of the date the fees were collected. The Resolution contains provisions for refunding fees that have not been spent within time limits provided for in the Resolution. There are other provisions that permit developers to receive credits for improvements they constructed.

Four of the named Plaintiffs are housing construction companies that applied for zoning certificates, were assessed the impact fees, and paid them under protest. Plaintiff Homebuilders Assoc. of Greater Cincinnati represents the interests of over two hundred fifty homebuilders and residential developers in the Cincinnati area. The individuals named as Defendants in this action are members of the Hamilton Township Board of Trustees, except that Gary Boeres is the Impact Fee Administrator for the Township.

Further discussion of the facts will be made as necessary to disposition below.

II. Standard

Summary judgment is a procedure for moving beyond the allegations in the pleadings and analyzing the evidentiary materials in the record to determine whether an actual need for a trial exists.[3] "Summary judgment is proper when 1) no genuine issue as to material fact remains to be litigated; 2) the moving party is

[3] *Ormet Primary Aluminum Corp. v. Employers' Ins Of Wasau* (2000), 88 Ohio St 3d 292, 300

entitled to judgment as a matter of law; and 3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party."[4] "Regardless of who may have the burden of proof at trial, the burden is upon the party moving for summary judgment to establish that there is no genuine issue of material fact and that he is entitled to a judgment as a matter of law."[5] "After a proper summary judgment motion has been made, the nonmoving party must supply evidence that a material issue of fact exists; evidence of a possible inference is insufficient."[6]

III. Authority to Impose Impact Fees

Townships are established under Chapter 503 of the Ohio Revised Code. There is no grant of any general police power or power of self government in Chapter 503, but only grants of specific powers by legislative enactment. Chapter 504 of the Revised Code allows for the electorate of a township to adopt a "limited home rule government under which the Township exercises limited powers of local self government and limited police powers."[7] Municipalities, in contrast, do not derive their authority from statutes, but from the Ohio Constitution. O. Const.

[4] *Welco Industries, Inc.v. Applied Cos.*(1993), 67 Ohio St.3d 344, 346

[5] *AAA Enterprises, Inc. v. River Place Comm. Urban Redev. Corp.* (1990), 50 Ohio St.3d 157, paragraph 2 of the syllabus

[6] *Cox v. Commercial Parts & Serv.* (1994), 96 Ohio App.3d 417, 421

[7] R.C. 504.01. A police power is one that provides "for the common welfare of the governed." *Dublin v. State* (2009), 181 Ohio App.3d 384, 390, citing *State v. Martin* (1958), 168 Ohio St. 37, 40.

XVIII, section 3, establishes that municipalities enjoy "all powers of local self government and [may] adopt and enforce within their limits such local police, sanitary, and other similar regulations as are not in conflict with general laws." Section 3 contemplates no limitation on a municipality's power of self government, only on its police power.[8] Home Rule Townships, on the other hand, may find exercise of both police power and power of self government circumscribed by "general laws."

A. What is a General Law?

The parties at length have debated the definition of "general law." Hamilton Township urges the definition provided in *City of Canton v. State*[9] which holds that a general law is one that is (1) part of a statewide and comprehensive legislative enactment, (2) applies to all parts of the state alike and operates uniformly throughout the state, (3) sets forth police, sanitary, or similar regulations, rather than purporting only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribes a rule of conduct on citizens generally.[10]

Canton dealt with the authority of a municipality to enact an ordinance pursuant to its police power. The Ohio Constitution provides that only the

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[8] But other provisions of the Ohio Constitution permit legislative limitations on a municipality's right to tax, O.Const. XVIII sec. 13, and on its right to regulate labor issues, O.Const. II, sec 34. See *City of Lima v. State* 122 Ohio St.3d 155; 2009-Ohio-2597

[9] 95 Ohio St.3d 149; 2002-Ohio-2005

[10] *Id.*, syllabus.

municipality's exercise of police power must yield to general law, not its exercise of power of self government. The Court had to decide whether a municipal ordinance relating to "police, sanitary, or similar regulations," was, or was not, in conflict with a general law.

The definition of "general law" in the *Canton* decision is properly understood as an interpretive statement made within the context of O. Const. XVIII, section 3. It is a statement by the *Canton* court that the general assembly may not propound legislation that limits authority constitutionally granted to municipalities[11], but it may exercise the state's own police power with enactments that relate to "police, sanitary, or similar regulations," though those enactments conflict with municipal ordinances. "The meaning of this . . . principle of law is that a statute which prohibits the exercise by a municipality of its home rule powers without such statute serving an overriding statewide interest would directly contravene the constitutional grant of municipal power."[12] Put another way, the Ohio Constitution grants authority to municipalities, and what the Constitution grants, the general assembly may not take away, although the exercise of police power by municipalities will yield to the exercise of police power by the general assembly, where the two are in conflict.

[11] Except legislation that limits the rights of municipalities to levy taxes or collect debts. O Const XVIII, section 13, and legislation treating the comfort or welfare of workers. O Const. II, section 34.
[12] *Canton v. State, supra,* at 156, citing *Clermont Environmental Reclamation Co v Wiederhold* (1982), 2 Ohio St.3d 44, 48.

But there is no such constitutional obstacle to legislative enactments circumscribing the authority of a home rule township to exercise either its police power or its power of self government. Those powers do not flow from the Ohio Constitution, but rather flow from the legislative enactments themselves. The general assembly grants the authority, and may limit it. For this reason, the definition of "general law" provided in *Canton* is not a useful one for purposes of the analysis this Court must engage in. This Court concludes that a general law, for purposes of R.C. 504.04, is any enactment of the Ohio general assembly.

Hamilton Township may enact a resolution to impose impact fees, as an exercise of its police power, so long as the resolution is not "in conflict with" any other provision of the Ohio Revised Code.

B. Is the Resolution in conflict with any other statute?

To be in conflict with a general law, "the test is whether the [resolution] permits or licenses that which the statute forbids and prohibits, and vice versa."[13] This is a test of "'contrary directives,' [and] is met if the [resolution] and statute in question provide contradictory guidance."[14] The Ohio Supreme Court has also recognized a "conflict by implication."[15] "When determining whether a conflict by implication exists, we examine whether the General Assembly indicated that the

[13] *Fondessy Ent., Inc. v. Oregon* (1986), 23 Ohio St.3d 213, 217, citing *Struthers v. Sokol* (1923), 108 Ohio St 263, paragraph 2 of the syllabus
[14] *Mendenhall v. Akron* 117 Ohio St.3d 33, 40; 2008-Ohio-270
[15] *Id*

relevant state statute is to control a subject exclusively."[16] However, the Court expressly declined to adopt a preemption analysis based upon the state's apparent intent to completely occupy a field of regulation.[17]

The inquiry before the Court becomes, does the Impact Fee Resolution permit that which is forbidden by a statute? Or does it forbid what is expressly allowed by a statute? Plaintiffs urge that the resolution conflicts with the provisions of chapters 505, 511, 5517, 5571, and 5573 of the Ohio Revised Code. Plaintiffs assert that these chapters provide the only means by which Hamilton Township may fund improvements to roads, parks, police, or fire service. The parties are agreed that none of the statutes expressly deal with impact fees. Defendants argue that the funding methods described in those portions of the Code are not exclusive, and that other methods not in conflict with them may be adopted.

1. Roads

A board of township trustees may construct, reconstruct, or improve any public road under its jurisdiction.[18] The board, by unanimous resolution, and without the presentation of a petition to citizens of the township, may take the necessary steps to construct or improve a road, and "[t]he cost thereof may be paid by any of the methods provided in section 5573.07 of the Revised Code."[19] R.C.

[16] *Id.* at 41
[17] *Id.* at 42
[18] R.C. 5571.01(A)
[19] R.C. 5571.14(A)

5573.07 permits road improvements to be funded through assessments, levies, or "from any funds in the township treasury available therefore."[20] R.C. 5573.09 permits a board, by unanimous vote, to order the payment of road construction to be made from the proceeds of a levy, "or out of any road improvement fund available therefor."[21]

Nothing in these sections expressly prohibits the use of alternative methods for funding road improvements. Nothing in the statutes expressly requires that "road improvement funds" contain only proceeds of levies or assessments. The Ohio Supreme Court has declined to adopt a field preemption analysis for "conflict" in these cases, and this Court declines to adopt such an analysis here. The Court concludes that the impact fee resolution does not permit a funding mechanism forbidden by the Revised Code, and does not forbid any funding mechanism permitted by it.

2. Parks

A board of township trustees may pay the expenses of park improvements from "any funds in the township treasury then unappropriated for any other purpose."[22] If there is not enough money in the treasury, then the board may levy a tax.[23]

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[20] R.C. 5573.07(B)(2)
[21] R.C. 5573.09
[22] R.C. 511.33
[23] *Id*

No provision of Chapter 511 defines the exclusive means for funding "the township treasury" for parks purposes. If a tax is levied, it shall be levied in accordance with Chapter 511, but no tax levy is necessary to support parks, if there is sufficient money in the treasury for the purpose. The Court concludes that the impact fee resolution is not in conflict with these provisions.

3. Police and Fire Protection

R.C. 505.511 permits a township to levy a tax upon all of the taxable property in the township to defray "all or a portion of expenses of the district in providing police protection." If a levy may be used to defray only a portion of the expenses associated with providing police service, it must necessarily be the case that at least some portion may be paid with funds other than levy proceeds.

The resolution does not conflict with this statute.

R.C. 505.38 likewise allows for a tax levy to provide funding for fire protection in the township. An impact fee is not expressly forbidden by this section, nor does the resolution prohibit funding through a tax levy. There is no conflict.

IV. When is a Fee a Tax?

Home rule townships may not impose taxes except as expressly authorized by the Ohio general assembly.[24] There is no provision of general law granting Hamilton Township authority to impose taxes in the manner proposed in the impact

[24] R.C. 504.04

fee resolution. If the fee is merely a tax by another name, then it is not a permissible enactment.

Plaintiffs argue that the impact fee is a tax because (1) the amount of the fee greatly exceeds the cost to the township of providing the service of processing a zoning permit; and (2) the proceeds are used to fund improvements that benefit members of the public other than the fee payers.

In making this determination, the court looks at "the substance of the assessments, and not merely their form."[25] The Ohio Supreme Court has declined to provide "a single test that will correctly distinguish a tax from a fee in all situations where the words 'tax' and 'fee' arise."[26] Each determination must be made on a case by case basis.

In the context of an assessment charged to the owners and operators of underground storage tanks, the Ohio Supreme Court noted that the fees were part of a regulatory scheme designed to deal with environmental problems caused by leaking storage tanks. They created a fund that could be used for environmental cleanup. The assessments were never placed in the general fund, but were "used only for narrow and specific purposes, all directly related to UST problems."[27] The Court observed that the fees provided a benefit to the public, by ensuring that

[25] *State ex rel. PetroleumUndergrd Storage Tank Release Comp Bd v. Withrow* (1991), 62 Ohio St.3d 111, 117
[26] *Id.* at 117
[27] *Id.* at 116

money was available for environmental cleanup, but held that public benefit in this context would not militate in favor of finding the assessment a tax. The assessments provided a benefit to the fee payers, by providing a sort of insurance fund in the event of environmental mishap. For that reason, the Court concluded that the assessments were not taxes, because they provided those assessed with a form of protection in exchange for the payment. "A fee is a charge imposed by a government in return for a service it provides. A fee is not a tax."[28]

The Eighth Appellate District struck down an impact fee for public parks and recreational facilities as an unconstitutional tax on real estate because the Court found that the assessment program was "open-ended," permitting use of the assessments to maintain and operate existing park facilities, benefitting existing residents.[29] The Court found "no guarantee that these new construction purchasers will in fact use the existing park system, let alone cause a need for building new facilities, unlike the certainty of new users using and burdening a local sewage system as was the case in [*Amherst Bldrs. v. Amherst* (1980), 61 Ohio St.2d 345]."[30] They concluded that the assessments were not roughly equal to the cost to provide parks service to the payors of the assessments, but were "necessarily inflated so as to pay for that share of the program which should be borne by the present residents

[28] *Id* at 113, citing *Cincinnati v Roettinger* (1922), 105 Ohio St. 145, 153
[29] *Building Ind Assoc. of Cleveland v. Westlake* (1995), 103 Ohio App 3d 546
[30] *Id* at 552

and existing construction."[31] The Ohio Supreme Court has also held that "a 'fee' is in fact a 'tax' if it exceeds the 'cost and expense' to government of providing the service in question."[32]

The most salient features of these analyses are whether the charge is roughly equal to the cost of providing the service, and whether the service being paid for is provided primarily to the payers of the fee, or to other persons.

This Court notes first that the impact fees are assessed when a zoning permit is applied for, but the fees are not intended to defray the costs of providing the zoning permit. Rather, each impact fee for fire protection, police, roads, and parks, is placed into a segregated account that is meant to fund fire protection, police, roads, and parks required to serve the new population at the same level enjoyed by existing residents. Plaintiffs do not argue that the impact fees are excessive compared to the cost of making the proposed improvements. Nor is it apparent that the fees are inflated to cover the cost of improvements that should be borne by residents of existing developments. This is not a factor that weighs in favor of finding the impact fees to be taxes.

The Court further finds that there are sufficient benefits provided to those who pay the impact fees to conclude they are receiving a service in exchange for each charge. The fees are ostensibly set at a level that will allow new residents to

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[31] *Id*
[32] *Granzow v. Bur. Of Support of Montgomery Co.* (1990), 54 Ohio St.3d 35

enjoy the same level of police and fire protection as existing residents, and Plaintiffs have not shown that the fees will enhance the value to existing residents of those same services. New residents are the class benefitted by the fees.

Plaintiffs urge that the lack of geographic connection between the residence of a fee payer and for instance, a new park, weighs in favor of a tax finding. Fees are used to pay for projects on a first in, first out basis. It is the case that a new resident may pay a fee that is ultimately used for a new park installation on the other side of the Township. There is a looser connection between the individual fee payer and the service provided than in other fee cases. But the Court does not find this distinction fatal to the assessment's classification as a fee. As noted above, the Township has treated all impact fee payers as a class, and fees paid are used for improvements that benefit the class of fee payers, and have not been shown to benefit the class of non fee payers.

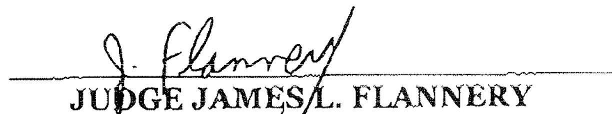
The Court concludes that the impact fee is not a tax.

V. Subdivision Regulations

Finally, Plaintiffs aver that the impact fee resolution establishes or revises subdivision regulations in violation of R.C. 504.04(B)(3). It does not. There is nothing in the resolution that requires or forbids development in any particular part of the township. It merely provides for funding of public services for new development.

Hamilton Township, pursuant to its statutory limited police powers, may make and fund improvements to benefit new development by use of its system of impact fees, because the resolution is not in conflict with any other Ohio statute, and because it is sufficiently narrowly tailored to provide services to the class of fee payers in exchange for the fees. Defendants' motion for partial summary judgment is well taken and is granted. This matter will be set for a case management conference on the remaining issues.

IT IS SO ORDERED.



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