# OHIO MUNICIPAL SERVICE

By Bricker & Eckler LLP

NOVEMBER/DECEMBER 2019 | VOLUME 30 | ISSUE 4

## TAX INCREMENT FINANCING—NOT JUST FOR PUBLIC USE

*By Caleb Bell, Esq. and Ty Compton, Esq., Bricker & Eckler LLP*

### BACKGROUND

Tax Increment Financing (TIF) is an economic development tool used by municipalities to finance certain public infrastructure improvements and residential rehabilitation. The TIF statutes authorize a municipality to grant a real property tax exemption with respect to the incremental increase in assessed value of certain parcels—that is, the difference between the original value of the property and the value after the development. Property owners then make payments in lieu of taxes (PILOTs) to the municipality with respect to the exempted real property taxes, in an amount equal to all or a portion of the amount of taxes that would have been paid. The PILOTs are used to fund the costs of infrastructure improvements.

### ESTABLISHING TIFS

In order to establish a TIF project, the municipality must first pass an ordinance designating the specific parcels which are exempt from taxation. Additionally, the ordinance must also contain a determination that the development or redevelopment of these parcels serve a public purpose. TIFs that last longer than 10 years or exempt greater than 75% of the assessed value of property must be approved by the affected board of education. Once approved, however, a TIF

**IN THIS ISSUE:**



Mat #42488058

THOMSON REUTERS®

can be implemented for up to 30 years and exempt up to 100% of the assessed value of property.[1]

## CAPITAL v. OPERATING EXPENSES

It is a common misconception that TIFs can be used only on capital expenses like public infrastructure improvements. However, the Ohio Revised Code defines "public infrastructure improvements" very broadly.

They include, among other eligible expenditures, "public roads and highways, water and sewer lines, the continued maintenance of those public roads and highways and water and sewer lines, environmental remediation, land acquisition, and demolition, including demolition on private property when determined to be necessary for economic development purposes."

The Ohio Revised Code's use of "continued maintenance" of public roads and sewer lines as an improvement for which funds can be paid indicates that not only can PILOTs be used to pay for capital expenses but communities can offset operating expenditures with TIF money as well. Therefore, TIF money could be used to fund continued maintenance of the public roads and sewer lines whether through public or private means.

## PRIVATE EXPENDITURES

Additionally, the breadth of the statutory language indicates that certain private improvements to land could be funded with public TIF money. This includes municipalities that are engaged in urban redevelopment under RC 5709.41. As noted above, certain TIF money may be used for land acquisition and demolition, including demolition on private property if for economic development. For example, a municipality may own land within the municipal limits. The land is sold by the municipality to private entities for the construction of buildings and businesses that will benefit the public (i.e. stadiums, parking garages, etc.). Under the broad language of the statute, TIF money could be used for the land acquisition or demolition of current structures so long as it was determined that the improvements were for public benefit or urban redevelopment. This interpretation lets private expenditures, in certain situations, be funded with public money.

**ENDNOTES:**

[1]Under a new statute (H.B. 166), RC 5709.51, certain TIFs can extend longer than 30 years under certain circumstances.



OHIO MUNICIPAL SERVICE (ISSN 1088-2006) is a journal on municipal law and practice in Ohio, edited by Beverly A. Meyer, Esq., c/o Bricker & Eckler LLP, 100 South Third Street, Columbus, Ohio 43215. It is issued 6 times per year; published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. POSTMASTER: Send address changes to OHIO MUNICIPAL SERVICE, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

# SUPREME COURT OF OHIO

## SUPREME COURT DENIED VILLAGE'S CHALLENGE TO BALLOT MEASURE SEEKING TO REDUCE TAX LEVY

*Village of Georgetown v. Brown County Board of Elections*

**Citation:** 2019-Ohio-3915, 2019 WL 4686730 (Ohio 2019)

**Headnote:** R.C. 5705.19(AAA)(5) allows voters to decrease any levy approved for a purpose set forth in R.C. 5705.19(I) (firefighting and emergency medical services), irrespective of whether the levy is a new levy, an increase levy, a replacement levy, or some other type of levy.

**Summary:** In November 2018, the electors of the Village of Georgetown voted to increase an existing 2.4-mill tax levy to a 9.5-mill tax levy to fund the Village's fire and EMS services. Specifically, the voters approved a new 9.5-mill levy and the Village repealed the 2.4-mill levy upon passage of the new levy.

In August 2019, a group of electors submitted to the Brown County Board of Elections a petition to place on the November 2019 ballot a measure to reduce to 9.5-mill levy to 2.5 mills. The Village challenged the validity of the petition, arguing that statute only allows for the reduction of an *increased* tax and that, because the 9.5-mill levy was a *new* tax, it was not subject to reduction. On review, the Board of Elections invalidated 26 signatures on the petition and, as a result, determined the petition was technically defective because it lacked the necessary number of signatures. Specifically, the Board invalidated the signatures for being printed—not written in cursive—and not matching the signatures on file with the Board. The Board declined to address the Village's argument.

In response, the petitioners submitted a declaration from many of the electors whose signatures were invalidated attesting to the propriety of their signatures on the petition. The electors signed the declaration in cursive. Upon subsequent review, the Board of Elections determined the signatures to be valid, and the Board voted unanimously to certify the measure to the ballot. The Village reasserted its substantive challenge to the petition, which the Board overruled 3-1. The Village then sought a writ of prohibition directly from the Ohio Supreme Court.

The Supreme Court began its analysis by examining the signatures. The Village argued that the printed signatures were automatically invalid because "the legislature expressly require[s] them to be in cursive" and that the Board erred in allowing them to be "cured" by the declaration. The Court disagreed. While current law defines a "signature" on a petition as the elector's "cursive-style legal mark written in that person's own hand," Supreme Court precedent has held that, where a board of elections can determine that a person's otherwise improper signature is genuine, those signatures are valid for the purpose of the petition. Accordingly, the Court found that the Board did not abuse its discretion when it reversed its prior decision to invalidate the petition signatures at issue.

The Court then turned to the Village's substantive legal challenges. First, the Village argued that the ballot measure was improper because it would effectively repeal, and not reduce, the tax. The Village cited to a Supreme Court case involving South-Western City Schools where the Court invalidated a measure that would have "reduced" a 9.7-mill levy to zero mills. There, the Court invalidated the measure, finding it to be a repeal of the tax instead of a reduction. The Village argued that the measure here would *effectively* repeal the tax because the Village could not maintain a full-time fire and EMS

 

service on the 2.5-mill tax. The Court rejected that argument, noting that the Village would continue to receive *some* tax revenue and that the measure was not a repeal.

Next, the Village argued that the 9.5-mill levy was not subject to reduction because it was a *new*, and not an *increased*, tax. The Village cited to a Supreme Court case involving Westerville City Schools where the Court had previously invalidated an attempt to reduce a replacement 11.4-mill levy because the replacement levy was not an *"increased"* levy. The Court also rejected this argument, observing that the second paragraph of R.C. 5705.19(AAA)(5) provides that a "levy for one of the purposes set forth in division * * * (I) * * * of this section may be reduced pursuant to section 5705.261." Section 5705.261 provides that the reduction must be of an "increased" rate of levy. The Board argued that this language means that the voters can vote to decrease any levy approved for a purpose set forth in R.C. 5705.19(I) (firefighting and emergency medical services), irrespective of whether the levy is a new levy, an increase levy, a replacement levy, or some other type of levy. The Village argued that any reduction under R.C. 5705.19(AAA)(5) must still be "pursuant to section 5705.261," meaning subject to all the terms and conditions set forth in R.C. 5705.261, including the limitation that reductions can only be of increased levies. The Court sided with the Board, finding that if R.C. 5705.19(AAA)(5) serves merely to incorporate the terms of R.C. 5705.261, then it would be redundant, which is an interpretation the Court must avoid in determining the operation and effect of the statute. Accordingly, the Court upheld the Board's decision and denied the Village's writ of prohibition.

## OHIO COURTS OF APPEALS

### VOLUNTEER SPECIAL DEPUTY HAD NO CLAIM AGAINST SHERIFF FOR TERMINATION OF APPOINTMENT

*Neal v. Treglia*

**Citation:** 2019-Ohio-3609, 2019 I.E.R. Cas. (BNA) 336390, 2019 WL 4256377 (Ohio Ct. App. 3d Dist. Allen County 2019)

**Headnote:** Volunteers have no constitutionally-protected property interest in position.

**Summary:** Jack Neal was appointed as a volunteer special deputy of the Allen County Sheriff's Office in 1987. As part of an agreement between the Sheriff's Office and the Lima Memorial Hospital, the Sheriff's Office provided special deputies, including Neal, to serve as security officers at the Hospital. On March 23, 2017, Sheriff Mathew Treglia terminated Neal's special deputy appointment for Neal's violation of department policy. Sheriff Treglia informed the Hospital's security supervisor, Dean McCombs, of Neal's termination and the Hospital then terminated Neal as a security officer.

Neal brought claims against both Sheriff Treglia and McCombs, alleging tortious interference with a business relationship and a deprivation of his rights under 42 U.S.C.A. 1983. Treglia and McCombs both moved for summary judgment on Neal's claims. The trial court granted summary judgment in favor of Treglia and then Neal and McCombs reached settlement and the claims against McCombs were dismissed. Neal appealed the grant of summary judgment in favor of Sheriff Treglia.

On appeal to the Third District Court of Appeals, Neal first argued that summary judgment on his 1983 claim was improper as he had a property interest or protected-liberty

interest in his special deputy appointment. The Court disagreed. Specifically, the Court found that, because Neal was a volunteer, he had no property interest in his position of which he could be deprived. As for Neal's protected-liberty claim, the Court found that Neal failed to produce any evidence to suggest that he was precluded from future professional opportunities simply because his volunteer appointment was terminated.

Turning next to the tortious interference claim, the Court noted that because Neal was a volunteer serving at the pleasure of Sheriff Treglia, Treglia was free to terminate his appointment for any reason or, even, no reason at all. Further, the Court explained that the notice to the Hospital of Neal's termination, itself, did not cause the Hospital to terminate Neal. Rather, being a special deputy was a prerequisite to the security officer position, and the termination of the special deputy appointment rendered Neal no longer qualified to hold the security officer position. As a result, the Appellate Court affirmed the trial court's grant of summary judgment to Sheriff Treglia.

## VILLAGE ZONING COMMISSION FAILED TO SUPPORT DECISION TO DENY DEVELOPMENT WITH REQUISITE CONCLUSIONS OF FACT

*Rice v. Village of Johnstown Planning and Zoning Commission*

**Citation:** 2019-Ohio-4037, 2019 WL 4855206 (Ohio Ct. App. 5th Dist. Licking County 2019)

**Headnote:** Filing of a transcript which includes discussion by Commission member does not satisfy requirement to submit conclusions of fact.

**Summary:** Andrew Rice and a group of others sought to construct a mixed residential development just outside the Village of Johnstown. The developers sought to annex the property to the Village so that the more than 200-unit development could receive Village services. In July 2018, the developers presented a Preliminary Planned Unit Development Application to the Village's Planning and Zoning Commission. The Commission raised several concerns over the development, including lack of adequate buffering, lack of functional open spaces like recreational areas or playgrounds, adequate storm water management and traffic concerns. In response, the developers submitted an Amended Preliminary PUD Application. During a September 2018 meeting, the Commission voiced continued concern over the development and voted, 4-1, to reject the application.

The developers brought an administrative appeal in the Licking County Court of Common Pleas in October 2018. Additionally, in December 2018, the developers filed a motion asking to be permitted to present additional evidence. The Village opposed the motion, arguing that the record before the trial court was complete. Ultimately, the trial court found that the Commission had not made the required findings or conclusions of fact to support its decision. Rather, the Commission "merely voted to reject the application and did not vote on any findings, nor has any written decision that included findings or support for the rejection been presented to the [trial court]." As a result, the trial court reversed the Commission's decision and remanded the matter to the Commission to make the necessary findings of fact. The Village appealed.

On appeal to the Fifth District Court of Appeals, the Village argued that the transcript filed with the appeal contained the necessary findings of fact. The Court disagreed, holding that the record did not contain detailed findings of fact explaining the reasons why each Commission member who voted to deny the

 

application did so. The Court also rejected the argument that the comments of a Commission member in the transcript constituted the necessary findings of facts, noting that the "musings" of a Commission member during the hearing are not conclusions of fact. Rather, the Court observed, the Commission simply voted to deny the application and did not give any reasons for doing so.

However, the Court found that the trial court erred by remanding the case to the Commission without admitting the additional evidence, as requested by the developers. Ohio law requires the court to hold an evidentiary hearing where the record before it is devoid of the appropriate conclusions of fact. Thus, the Court remanded the matter to the trial court and directed the trial court to hold an evidentiary hearing.

## SUPERVISOR NOT IMMUNE FROM "AIDING AND ABETTING" CLAIM BROUGHT BY TERMINATED SUBORDINATE

*Johnson-Newberry v. Cuyahoga County Child and Family Services*

**Citation:** 2019-Ohio-3655, 2019 WL 4316890 (Ohio Ct. App. 8th Dist. Cuyahoga County 2019)

**Headnote:** R.C. 4112.02(J) expressly imposes civil liability on employees of political subdivisions to trigger exception to immunity.

**Summary:** Sylvia Johnson-Newberry was employed by the Cuyahoga County Division of Children and Family Services ("CFS") as a social worker from November 2016 until her termination in August 2017. Following her termination, in November 2017, Johnson-Newberry brought suit against CFS and her former supervisor, Stacey Gura, alleging disability and race discrimination and retaliation against CFS and a claim for "aiding and abetting" discrimination under R.C. 4112.02(J) against Gura personally. After answering the complaint, CFS and Gura moved for judgment on the pleadings, arguing immunity from suit. Johnson-Newberry also filed a motion to amend her complaint to correct an error in the name of CFS. The trial court denied the motion for judgment on the pleadings and granted the motion to amend. Gura appealed to the Eighth District Court of Appeals.

As an initial matter on appeal, the Court began by finding that the grant of the motion to amend was not a final, appealable order to be reviewed.

Turning to the motion for judgment on the pleadings, Gura argued that she was immune under R.C. 2744.03 and that R.C. 4112.02(J) did not expressly impose civil liability on an employee of a political subdivision, and thus did not constitute an exception to the immunity ordinarily accorded a public employee. Gura also cited to the Ohio Supreme Court's 2014 decision of *Hauser v. Dayton Police Department*, in which the Supreme Court held that employees of political subdivisions are immune from suits brought under the similar provision in R.C. 4112.02(A), which prohibits employers from engaging in discrimination, because the statute did not expressly impose civil liability on employees of political subdivisions to trigger the exception to immunity.

The Court disagreed. The Court observed that R.C. 4122.02(J) prohibits "any person" from aiding, abetting, inciting, compelling, or coercing a discriminatory practice. Included in R.C. 4122.01(A)(1)'s definition of "person," the Court observed, is "the state and all political subdivisions." The Court also noted that the *Hauser* court expressly limited the application of its decision to the provisions concerning "employer" discrimination. Further, the Court observed, the *Hauser* court, in dicta, noted that "[a]n individual political-subdivision employee still faces liability

 

under other provisions of R.C. 4112.02 that expressly impose liability, including the aiding-and-abetting provision in R.C. 4112.02(J)." Though Gura argued that the passage in *Hauser* should be ignored as dicta of a fragmented court, the Appellate Court "[found] guidance in the court's decision," and held that R.C. 4112.02(J) expressly imposed liability on Gura so as to trigger the exception to statutory immunity under R.C. Chapter 2744. Accordingly, the Court affirmed the trial court's denial of immunity.

## UNITED STATES DISTRICT COURTS

### TERMINATED ACTING POLICE CHIEF HAD NO PROTECTED PROPERTY INTEREST TO SUPPORT DUE PROCESS CLAIM

*Reed v. Village of Wilmot*

**Citation:** 2019 WL 4750668 (N.D. Ohio 2019)

**Headnote:** Because R.C. 737.17 provides a statutory 90-day probationary period for appointed police chiefs, appointees do not have a constitutionally-protected property interest in continued employment until they are fully appointed following the probation period.

**Summary:** Daniel Reed was hired by the Village of Wilmot in March 2011 as a patrolman in the Village's police department. Reed was subsequently promoted to sergeant and captain before being appointed Acting Police Chief in February 2016. In October 2016, the Village's mayor informed Reed that he was being placed on administrative leave pending a public hearing of the mayor's complaint against Reed at the November 7th regularly scheduled Council meeting. The mayor also gave Reed a copy of a letter from the mayor to the Village Council recommending that Reed be terminated and setting forth a list of 10 charges. The mayor's letter cited R.C. 737.171 as the authority for Reed's removal, which provides that the removed person has the right to appear at a hearing to examine witnesses and answer the charges brought against him.

On November 7, 2016, the Village Council held a hearing wherein the mayor identified his charges against Reed and Reed responded to each charge. Reed sought to introduce the testimony of a Mary Arnold, but his request was denied. Thereafter, the Council voted unanimously to terminate Reed, effective immediately. Reed then brought an administrative appeal in the Stark County Court of Common Pleas in November 2016, seeking to stay his termination and to be reinstated. After a hearing on the matter, the state court denied the stay and found that it could not reinstate Reed, as the Village had disbanded its police force and contracted with a neighboring political subdivision for police services. In dicta, the state court noted that "the mechanism used to remove [Reed] was flawed and may have violated statutory provisions and simple Constitutional principles."

In October 2018, Reed brought suit in federal district court, asserting federal law claims under 42 U.S.C.A. § 1983 for violation of his due process rights and First Amendment retaliation and state law claims for wrongful termination and defamation. Both Reed and the Village moved for summary judgment in their respective favors.

The federal district court began by granting summary judgment in the Village's favor on Reed's § 1983 due process claim, holding that Reed did not have a constitutionally-protected property interest in his employment. This is because R.C. 737.17 provides that an appointed police chief must serve an initial 90-day probationary period. As such, the Court held, because an appointed police chief such as Reed could be

 

terminated at the conclusion of the probationary period, there is no protected property interest in continued employment.

Moreover, the Court noted that R.C. 737.171, which the Village's mayor cited in his letter and which Reed argued properly governed this case, did not apply. R.C. 737.171, the Court noted, applies only to "duly appointed marshal[s]." Because Reed did not make it past the probationary period, he was never "duly appointed" and the statute did not apply, the Court held. For this reason, the Court disregarded the dicta from the state court which held that the process used to terminate Reed may have violated statute.

Reed also argued that he was vested a property interest in continued employment when the Village did not terminate him until five days after the end of his 90-day probation period. The Court rejected this argument as being contrary to Sixth Circuit precedent set forth in *Curby v. Archon*. In *Curby*, the Sixth Circuit held that "a probationary employee who completes a probationary term but is not finally appointed has no reasonable expectation of continued employment." Because Reed was never finally appointed police chief, the Court reasoned, he never acquired the requisite property interest to support his § 1983 claim.

Finally, Reed attempted to argue that his *initial* probationary period from when he was hired as a patrolman should control and that his promotion to police chief did not start a new probationary period. The Court summarily rejected this argument as Reed cited no legal authority for this argument and because R.C. 737.71 plainly states that it applies to "*all* appointments" of police chiefs.

Accordingly, the Court granted summary judgment in the Village's favor on Reed's § 1983 claim.

The Court also granted summary judgment in the Village's favor on Reed's First Amendment retaliation claim. In its motion for summary judgment, the Village fully briefed its argument as to why Reed's claim should fail. In his opposition, Reed failed to address the Village's arguments; the Court noted that Reed "[did] not even mention his First Amendment claim" in his briefing. Accordingly, under Fed. R. Civ. P. 56(e), the Court deemed the claim abandoned and granted judgment in the Village's favor.

In light of granting summary judgment in favor of the Village on Reed's two federal law claims, the Court declined to exercise supplemental jurisdiction over Reed's two state law claims and dismissed those claims without prejudice.

EDITOR-IN-CHIEF
**Beverly A. Meyer, Esq.**

PUBLICATION EDITOR
**Carol L. Fetter, J.D.**