[Cite as *Wadsworth v. Stanley*, 2010-Ohio-4663.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

CITY OF WADSWORTH Appellee v. GARY STANLEY, KEN SPIRES, MICHAEL HICKETHIER, ROBERT HILL, CHRIS CAMP, CHARLES CARTLEDGE, WALTER S. FRANKS, JR., ANDREW P. STROJNY, JR. Appellants	C.A. Nos. 10CA0004-M 10CA0005-M 10CA0006-M 10CA0007-M APPEAL FROM JUDGMENT ENTERED IN THE WADSWORTH MUNICIPAL COURT COUNTY OF MEDINA, OHIO CASE Nos. 08-CVH-01043, 01041, 0133, 01032, 01021, 01020, 01017, 01045

DECISION AND JOURNAL ENTRY

Dated: September 30, 2010

MOORE, Judge.

{¶1} Appellants, Robert Hill, Charles Cartledge, Ken Spires and Gary Stanley (collectively "the Owners"), appeal from the judgment of the Wadsworth Municipal Court. This Court affirms.

I.

{¶2} In 2001, appellee, the City of Wadsworth, enacted City of Wadsworth Code of Ordinances section 94.30, entitled "Airport Maintenance Fees." The ordinance assesses a fee to owners of aircraft who base the aircraft at the Wadsworth Municipal Airport or anywhere in the city for more than 30 days and who use the airport. The fee is graduated by aircraft weight and provides for a multiple-aircraft discount. The fee is assessed annually with the period running

from October 1 through September 30 of the succeeding year. It must be paid by October 1 or the date on which an owner becomes subject to the fee if later than October 1.

{¶3} Each of the Owners failed to pay the fee from its inception through at least September 30, 2008. The City brought this action in an effort to collect the delinquent funds. The Owners moved for summary judgment, which the trial court denied. The matter was then tried to the bench. The Owners did not offer any testimony to rebut the City's evidence and the Owners were found liable for the fees dating back to October 1, 2002.

{¶4} The Owners timely filed notices of appeal and moved for consolidation of the cases on appeal. This Court's magistrate granted the motions to consolidate. The Owners raise one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

> "THE TRIAL COURT ERRED IN DENYING THE MOTION FOR SUMMARY JUDGMENT OF THE [OWNERS] AND HOLDING AS A MATTER OF LAW THAT THE ORDINANCE OF THE CITY OF WADSWORTH IMPOSING AN AIRPORT MAINTENANCE FEE IS NOT PREEMPTED BY [R.C.] 4561.18."

{¶5} The Owners contend that the fee is in fact a tax, the imposition of which is preempted by R.C. 4561.18. They urge reversal of the trial court's holding to the contrary. We affirm the trial court.

{¶6} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶7} Pursuant to Civil Rule 56(C), summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is 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 such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶8} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. Id. at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶9} Municipalities "have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Section 3, Article XVIII, Ohio Constitution. A municipal regulation that conflicts with a general law of the state is preempted by the state law and rendered without effect. *Traditions Tavern v. Columbus*, 171 Ohio App.3d 383, 2006-Ohio-6655, at ¶13.

{¶10} In their summary judgment motion arguing that the Airport Maintenance Fee is a tax preempted by R.C. 4561.18, the Owners primarily relied on four arguments to demonstrate that the fee is a tax: (1) in an unrelated appeal this Court analyzed the fee as a tax; (2) the ordinance is applied without regard to the volume of airport usage; (3) labeling the assessment as

a "fee" does not alter the fact that it is a tax; and, (4) the ordinance disregards any use component because aircraft owners are assessed prior to the commencement of the annual period. The Owners then attempted to demonstrate that the tax is preempted by R.C. 4561.18.

{¶11} The Owners' motion for summary judgment and briefs on appeal also contain assertions that in enacting the ordinance the City intended to tax every aircraft registered in the state and based at the airport and that the City applies the ordinance selectively so as to render the "use" requirement illusory. We note that "[i]t is a fundamental rule under Ohio law that a court must first look to the statute's language itself to determine the legislative intent." *Lake Metroparks Bd. of Commrs. v. Norfolk & W. Ry. Co.* (1999), 131 Ohio App.3d 412, 417, citing *State v. S.R.* (1992), 63 Ohio St.3d 590, 594-95. Accordingly, in reviewing the Owners' claim that the statute is preempted we look only to the plain language of the ordinance because it is not ambiguous. See *State ex rel. Fenley v. Ohio Historical Soc.* (1992), 64 Ohio St.3d 509, 511.

{¶12} For its part, the City concedes on appeal that the maintenance fee can also be described as a tax. The city argues, however, that whatever the label, the fee/tax is not preempted by R.C. 4561.18.

{¶13} This matter presents a question of first impression in this state.

> "Municipal taxing power in Ohio is derived from the Ohio Constitution. Section 3, Article XVIII of the Constitution, the Home Rule Amendment, confers sovereignty upon municipalities to 'exercise all powers of local self-government.' As this court stated in *State ex rel. Zielonka v. Carrel* (1919), 99 Ohio St. 220, 227, [], '[t]here can be no doubt that the grant of authority to exercise all powers of local government includes the power of taxation.'
>
> "However, the Constitution also gives to the General Assembly the power to limit municipal taxing authority. Section 6, Article XIII provides that '[t]he General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation *** so as to prevent the abuse of such power.' Section 13, Article XVIII provides that '[l]aws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes

> ***.' See *Franklin v. Harrison* (1960), 171 Ohio St. 329, []." *Cincinnati Bell Tel. Co. v. Cincinnati* (1998), 81 Ohio St.3d 599, 602.

{¶14} Accordingly, "[t]he taxing authority of a municipality may be preempted or otherwise prohibited only by an express act of the General Assembly." Id. at the syllabus, citing Section 13, Article XVIII, and Section 6, Article XIII, Ohio Constitution.

{¶15} City of Wadsworth Code of Ordinances section 94.30, titled "Airport Maintenance Fees," provides, in relevant part, that:

> "(A) An annual airport maintenance fee to provide funds to make payments pursuant to a franchise agreement for operation and maintenance of the Wadsworth Municipal Airport and for other airport related expenses shall be charged to all users of the airport who have aircraft based in the city. The fee shall be based on the weight of the aircraft, at maximum takeoff weight, with the following weight classes and fees:
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> "***
>
> "(B) Applicability. This fee shall apply to all users of the airport property that have an aircraft based at the airport property or elsewhere in the city for more than 30 days. The Director of Public Service shall, in cooperation with the current airport manager, seek to verify all field based aircraft and impose this fee on an annual basis. The annual fee shall be for an annual period beginning October 1 of each year and ending September 30, of the succeeding year. It must be paid by October 1 or at such later date that it becomes applicable if an aircraft becomes subject to it subsequent to October 1. For purposes of this section, the owner of the aircraft shall be deemed to be the user subject to the fee."

{¶16} R.C. 4561.18 provides for a license tax on all aircraft based in this state. R.C. 4561.18(F) specifically states that "[t]he taxes this section requires are in lieu of all other taxes on or with respect to ownership of an aircraft."

{¶17} "The test to determine when a conflict exists between a municipal ordinance and a general law of the state is 'whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.'" *Village of Sheffield v. Rowland* (1999), 87 Ohio St.3d 9, 11, quoting *Struthers v. Sokol* (1923), 108 Ohio St. 263, paragraph two of the syllabus. "Where there is a direct conflict, the state regulation prevails." *Canton v. Whitman* (1975), 44 Ohio St.2d

62, 66. "Whether there is a conflict between the city's ordinance and the state's general law presents a question of law, which this Court reviews de novo." (Citations omitted.) *Independence Excavating, Inc. v. Twinsburg*, 9th Dist. No. 20942, 2002-Ohio-4526, at ¶9.

{¶18} Despite the Owners' arguments and the City's concession, we need not determine whether the airport maintenance fee constitutes a tax. Assuming, without deciding, that the fee is actually a tax, we hold that the municipal ordinance and the statute do not conflict. R.C. 4561.18(F) specifically limits itself to taxes with respect to *ownership* of an aircraft. The ordinance applies not to all owners of airplanes based in the city, but instead to "all *users* of the airport property that have an aircraft based at the airport property or elsewhere in the city for more than 30 days." (Emphasis added.) Rather than applying to those who merely own airplanes based in the city, the ordinance requires more: use of the airport property.

{¶19} The Supreme Court of Ohio addressed related exemption arguments in *Philips Industries, Inc. v. Limbach* (1988), 37 Ohio St.3d 100, and *Howell Air, Inc. v. Porterfield* (1970), 22 Ohio St.2d 32. In those cases, the Supreme Court held that R.C. 4561.18 did not exempt airplane owners from the use tax and sales tax, respectively. *Philips*, 37 Ohio St.3d at syllabus; *Howell Air*, 22 Ohio St.2d at 35. In each case, the Supreme Court relied upon the fact that the tax in question was an *excise* tax and not a tax "on or with respect to the ownership of an aircraft" for the purposes of R.C. 4561.18. *Philips*, 37 Ohio St.3d at 102; *Howell Air*, 22 Ohio St.3d at 34-35.

{¶20} Thus, assuming that the ordinance is a tax, we believe that it is more akin to an excise tax than a tax on ownership of an aircraft. "An excise is a tax imposed on the performance of an act, the engaging in an occupation, *or the enjoyment of a privilege*[.]" (Emphasis added.) *Saviers v. Smith* (1920), 101 Ohio St. 132, at the syllabus. In this case, the

ordinance can be construed as an excise tax, payment of which allows the owner of an airplane based at the airport property (or elsewhere in the city for more than thirty days) the privilege of *using* the airport property.[1]

{¶21} Moreover, the *Howell Air* Court observed that "[t]he 'in lieu of' provision of Section 4561.18 is limited in its application to 'all other taxes on or with respect to ownership of such aircraft.'" *Howell Air*, 22 Ohio St.2d at 35. That court compared the language of R.C. 4561.18 to that of another statute's "in lieu of" provision, which was much broader, in determining that the "in lieu of" provision in R.C. 4561.18 was limited to "taxes on or with respect to ownership of such aircraft." Id. at 34-35 (comparing the language of R.C. 4561.18 to that of another statute, which provided "not only that the tax shall be in lieu of other taxes on 'property and assets of such domestic insurance company,' but also that it shall be in lieu of 'all other taxes, charges, and excises on such domestic insurance companies.'") Had the General Assembly truly intended, as the Owners suggest, to preempt all other taxes it could have used the appropriately broad language it used in the past. For these reasons, we hold that the ordinance does not directly conflict with R.C. 4561.18 and, therefore, it is not preempted. See *Sheffield*, 87 Ohio St.3d at 11.

{¶22} As the Owners have failed to demonstrate that they are entitled to judgment as a matter of law pursuant to Civ.R. 56(C), their assignment of error is overruled.

III.

[1] Although the Owners argued that some other airport users are not assessed what we have construed to be a tax, they did so only in the context of attempting to prove that the

{¶23} The Owners' assignment of error is overruled. The judgment of the Wadsworth Municipal Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Wadsworth Municipal Court, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

CARLA MOORE
FOR THE COURT

BELFANCE, P. J.
WHITMORE, J.
CONCUR

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ordinance sets forth a tax. The Owners did not raise, and we do not address, any claim of selective enforcement.

APPEARANCES:

WILLIAM D. DOWLING and JASON M. WEIGAND, Attorneys at Law, for Appellants.

DAVID C. JACK, Attorney at Law, for Appellee.

NORMAN E. BRAGUE, Attorney at Law, for Appellee.