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IN THE INDIANA TAX COURT

IN RE: PETITION OBJECTING TO THE PROPOSED EMERGENCY FIRE LOAN FOR GREGG TOWNSHIP (MORGAN COUNTY) INDIANA

DORA BROWN, BEN KINDLE, and SONJIA GRAF,

Petitioners,

v.

DEPARTMENT OF LOCAL GOVERNMENT FINANCE,

Respondent.

Cause No. 49T10-0909-TA-52

ON APPEAL FROM A FINAL DETERMINATION OF
THE DEPARTMENT OF LOCAL GOVERNMENT FINANCE

NOT FOR PUBLICATION
August 31, 2010

FISHER, J.

Dora Brown, Ben Kindle, and Sonjia Graf (the Petitioners) appeal the final determination of the Department of Local Government Finance (DLGF) approving, in part, the Gregg Township Board's (Board) loan resolution for the 2009 tax year. The Petitioners allege that the DLGF's final determination is arbitrary, capricious, an abuse

of discretion, unsupported by substantial evidence, and contrary to law. (*See* Petrs' V. Pet. for Judicial Review ¶¶ 8-9.)

RELEVANT FACTS AND PROCEDURAL HISTORY

Gregg Township (the Township), which is located in northwest Morgan County, Indiana, encompasses 25 square miles of land and has a population of approximately 3,000. There are no incorporated municipalities in the Township.

The Township contracts with a private volunteer fire department (the only one in the Township) for the provision of emergency services. Prior to 2007, the fire department responded to both fire and ambulance calls with a volunteer staff plus six paid stand-by members. In July of 2007, however, the fire department eliminated the paid positions and its ambulance service due to cost.

On January 20, 2009, the Board issued a resolution authorizing the Township to incur a loan, not to exceed $250,000, so that it could address its "fire and emergency services need[s] . . . [which had not been] included in the [T]ownship's budget estimates and levy[.]" (Cert. Admin. R. at 239-40.) More specifically, the Board authorized the loan so that the fire department could reinstate at least two paid stand-by EMS personnel per shift and, thus, restore its ambulance service. (*See*, *e.g.*, Cert. Admin. R. at 187, 202-03, 543-44, 576-77.)

The Petitioners, challenging the propriety of the proposed indebtedness, filed objections to the Board's resolution with the Morgan County Auditor (Auditor). After certifying their objections, the Auditor forwarded the matter to the DLGF.

The DLGF conducted a hearing on the Petitioners' objections on March 24, 2009. On July 29, 2009, the DLGF issued its final determination approving the loan; the DLGF, however, modified the amount of the loan from $250,000 to $120,806.[1]

The Petitioners subsequently filed this original tax appeal. On April 19, 2010, the Court heard the parties' oral arguments. Additional facts will be supplied as necessary.

ANALYSIS AND OPINION

"Each township shall annually establish a township firefighting fund which is to be the exclusive fund used by the township for the payment of costs attributable to providing fire protection or emergency services . . . and for no other purposes." IND. CODE ANN. § 36-8-13-4(a) (West 2009). The fund is generally financed through a property tax levy. *See id.* at (b). Nevertheless, if a township's board determines "that a need for fire and emergency services or other emergency exists, it may issue a special order . . . authorizing the executive to borrow a specified amount of money sufficient to meet the emergency." IND. CODE ANN. § 36-6-6-14(b) (West 2009).

On appeal, the Petitioners argue that the DLGF's final determination approving the Board's loan resolution must be reversed for four reasons. First, they argue that the Board's resolution was void *ab initio* because one of the members who voted in favor of the resolution was not a resident of the Township. Second, the Petitioners contend that the Board was statutorily prohibited from contracting with the fire department for emergency services. Third, the Petitioners assert that the evidence does not support the DLGF's finding that an emergency services need did in fact exist in the Township.

[1] As of the DLGF's hearing, the Township had reduced (i.e., pro-rated) its loan request to $157,422. (*See* Cert. Admin. R. at 539, 576.)

Finally, the Petitioners claim that with the DLGF's approval of the loan resolution, the Township will unfairly bear the entire cost for the fire department's provision of ambulance service. The Court will address each of these arguments in turn.

I.

On January 20, 2009, the Board passed the loan resolution at issue in this case by a vote of 2-0. *See id.* at (a) (requiring the consent of two Board members for the expenditure of money for fire and emergency services). The Petitioners claim that because one of those voting members, Larry Hayes, did not live in the Township at the time the vote was taken, he was ineligible to hold his seat and the resolution was therefore invalid. (Petrs' Br. at 27-29.)

Indiana's Constitution requires that "[a]ll county, township, and town officers[] shall reside within their respective counties, townships, and towns; and shall keep their respective offices at such places therein, and perform such duties, as may be directed by law." IND. CONST. art. VI, § 6. *See also* IND. CODE ANN. § 36-6-6-3(b) (West 2009). Accordingly, if a township officer voluntarily ceases to reside within his township during his term, he abandons his office and *ipso facto* surrenders his right and title to the office. *See Relender v. State ex rel. Utz*, 49 N.E. 30, 32 (Ind. 1898). Nevertheless,

> there is a well-affirmed exception to this general rule, which is that a merely temporary removal or absence for a limited time by the officer from the [township] to which his residence has been restricted by law, with no intention to abandon his office, or to cease to discharge the duties thereof, will not result in terminating his title.

Id.

In an affidavit presented to the DLGF, Hayes stated that he vacated his Township residence in September of 2008 because structural issues necessitated the

demolition and reconstruction of the improvement. (*See* Cert. Admin. R. at 689-91.) Hayes expected to begin demolition sometime in the summer of 2009, once he secured financing for the project. (*See* Cert. Admin. R. at 690.) Meanwhile, needing a place to live, Hayes relocated to a vacant property owned by his parents; while the property was less than three miles from his residence, it was just beyond the Township border. (*See* Cert. Admin. R. at 689-91.) (*See also* Cert. Admin. R. at 693.) Hayes stated, however, that his Township residence remained his legal address, he continued to receive all of his mail there, most of his personal effects were still there, and he spent a significant amount of time at the residence working. (*See* Cert. Admin. R. at 690.) Accordingly, Hayes stated that he had not, nor did he intend to, abandon his duties as a Board member. (Cert. Admin. R. at 691.) Based on this evidence, the DLGF determined that Hayes' removal from the Township was only temporary. (Cert. Admin. R. at 739-40 ¶ 21.)

The Petitioners complain that, despite Hayes' sworn statement, the Township had not "submitted [any] evidence . . . that [Hayes had actually] taken any action to begin the process of obtaining the necessary financing or securing the necessary building permits to begin demolishing and remodeling [his] home[.]"[2] (Petrs' Br. at 28 (footnote added).) "Without such evidence," the Petitioners maintain, "it is not so evident that [] Hayes intend[ed] to re-establish his domicile in [the] Township at any time in the near future." (Petrs' Br. at 28.) The Petitioners' argument misses the mark.

[2] The Petitioners point to the fact that, as of the date of the DLGF's hearing, Hayes had not yet applied for any building permits. (*See* Cert. Admin. R. at 221-22, 225, 619-63.)

In challenging the propriety of the DLGF's final determination, the Petitioners bear the burden of demonstrating its invalidity. *See*, *e.g.*, *Clark-Pleasant Cmty. Sch. Corp. v. Dep't of Local Gov't Fin.*, 899 N.E.2d 762 (Ind. Tax Ct. 2008). To show that Hayes' removal from the Township was not temporary, the Petitioners needed to do more than allege that the Township should have offered other evidence for the DLGF's consideration. Rather, the Petitioners were required to establish that the evidence in the administrative record does not support the DLGF's finding.[3] Because they did not meet this burden, the Court affirms the DLGF's final determination with respect to this issue.

II.

Next, the Petitioners argue that the DLGF's final determination must be reversed because the Board was statutorily prohibited from contracting with the fire department for emergency services altogether. As support for their argument, the Petitioners first point to Indiana Code § 36-8-13-3, which establishes that in providing fire protection, the township executive may:

> (1) Purchase firefighting and emergency services apparatus and equipment for the township, provide for the housing, care, maintenance, operation, and use of the apparatus and equipment to provide services within the township but outside the corporate boundaries of municipalities, and employ full-time or part-time personnel to operate the apparatus and equipment and to provide services in that area.
>
> *****

[3] Thus, to the extent the Petitioners believed the DLGF needed more, or different, evidence in order to properly resolve the issue of Hayes' residency, they were responsible for getting that evidence to the DLGF and into the administrative record. The Petitioners had a variety of discovery tools available to them to accomplish that task.

> (2) Contract with a municipality in the township or in a contiguous township that maintains adequate firefighting or emergency services apparatus and equipment to provide fire protection or emergency services for the township in accordance with IC 36-1-7.
> (3) Cooperate with a municipality in the township or in a contiguous township in the purchase, maintenance, and upkeep of firefighting or emergency services apparatus and equipment for use in the municipality and township in accordance with IC 36-1-7.
> (4) Contract with a volunteer fire department that has been organized to fight fires in the township for the use and operation of firefighting apparatus and equipment that has been purchased by the township in order to save the private and public property of the township from destruction by fire, including use of the apparatus and equipment in an adjoining township by the department if the department has made a contract with the executive of the adjoining township for the furnishing of firefighting service within the township.
> (5) Contract with a volunteer fire department that maintains adequate firefighting service in accordance with IC 36-8-12.

IND. CODE ANN. § 36-8-13-3(a)(1)-(5) (West 2009). Based on this statute, the Petitioners present the following argument:

> Certain subsections of this statute authorize the township to provide for **both** firefighting and emergency services. For example, [](1) authorizes the executive . . . to purchase *firefighting and emergency services* apparatus and equipment for the township, and employ full-time or part-time personnel to operate the apparatus and equipment in that area. Similarly, [] (2) authorizes the executive . . . to contract with a municipality in the township or in a contiguous township to provide *fire protection or emergency services* for the township. [](5) permits the executive . . . to contract with a volunteer fire department that owns and maintains its own *firefighting and emergency service* equipment and apparatus. [Because] none of these sections applies to the relationship between the Township and the Fire Department[, t]he statutory relationship between them[ ] must be established pursuant to [](4). . . . [In turn,] the Indiana General Assembly omitted language from this section of the statute that would permit the township to contract for emergency services. [Thus, w]hen entering into . . . a contract with a volunteer fire department for the use

> and operation of firefighting equipment and apparatus that has been purchased by the township, the plain language of the statute indicates that the township is permitted to contract for *firefighting services only*.

(Petrs' Br. at 15-16 (citations and footnotes omitted).) The Court disagrees.

Indiana Code § 36-8-13-3(a)(5) simply states that a township executive may "[c]ontract with a volunteer fire department that maintains adequate firefighting service in accordance with IC 36-8-12." A.I.C. § 36-8-13-3(a)(5). Indiana Code § 36-8-12-2 defines "volunteer fire department" as "a department or association organized for the purpose of answering fire alarms, extinguishing fires, *and providing other emergency services*, the majority of members of which receive no compensation or nominal compensation for their services."[4] IND. CODE ANN. § 36-8-12-2 (West 2009) (footnote added). Thus, to the extent a township board may contract for the provision of emergency ambulance services and emergency medical services, *see* IND. CODE ANN. §§ 36-6-4-8(c), 16-31-5-1 (West 2009), it may contract with a volunteer fire department to provide those services.

III.

Indiana Code § 36-6-6-14(d) states that when determining whether a fire and emergency services need exists,

> the [township board] and any reviewing authority considering the approval of the additional borrowing shall consider the following factors:
>
> (1) The current and projected certified and noncertified public safety payroll needs of the township.

[4] To that end, volunteer fire departments are typically comprised of both firefighters *and* emergency medical service members. *See* IND. CODE ANN. § 36-8-12-2 (West 2009).

> (2) The current and projected need for fire and emergency services within the jurisdiction served by the township.
>
> (3) Any applicable national standards or recommendations for the provision of fire protection and emergency services.
>
> (4) Current and projected growth in the number of residents and other citizens served by the township, emergency service runs, certified and noncertified personnel, and other appropriate measures of public safety needs in the jurisdiction served by the township.
>
> (5) Salary comparisons for certified and noncertified public safety personnel in the township and other surrounding or comparable jurisdictions.
>
> (6) Prior annual expenditures for fire and emergency services, including all amounts budgeted under this chapter.
>
> (7) Current and projected growth in the assessed value of property requiring protection in the jurisdiction served by the township.
>
> (8) Other factors directly related to the provision of public safety with the jurisdiction served by the township.

A.I.C. § 36-6-6-14(d). The Petitioners contend that the evidence does not support the DLGF's finding that an emergency services need exists within the Township. (*See* Petrs' Br. at 24-27.)

At the outset, the Court notes that Indiana Code § 36-6-6-14(d) does not require the DLGF to assign greater weight to any one of the statutorily listed factors, nor does it have to consider any single factor dispositive. In fact, the DLGF does not even have to base its ultimate decision on the enumerated factors; rather, all the statute requires is that the DLGF consider the listed factors. *See*, *e.g.*, *Kohl's Dep't Stores, Inc. v. Indiana Dep't of State Revenue*, 822 N.E.2d 297, 300 (Ind. Tax Ct. 2005) (explaining that the

Court will not expand or contract the meaning of the statute by reading into it language that is not there). Consequently, the Court will give deference to whatever factor or reason the DLGF bases its final determination on as long as its reasoning is supported by substantial evidence. *See Clark-Pleasant*, 811 N.E.2d at 765 (citations omitted). Substantial evidence means "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Amax Inc. v. State Bd. of Tax Comm'rs*, 552 N.E.2d 850, 852 (Ind. Tax Ct. 1990) (citation omitted).

The evidence in the administrative record shows that since 2007, the fire department has not provided ambulance service within the Township. As a result, when the fire department responds to a call and determines that an ambulance is needed, it must notify ambulance service providers from either Washington Township or Brown Township. Once called, these providers will not arrive for another 12 to 20 minutes; in the case of cardiac arrest, however, American Heart Association standards state that defibrillation must occur within four to six minutes in order to avoid irreversible harm.[5] (*See* Cert. Admin. R. at 121, 233, 337-41, 345, 546, 554, 668 (footnote added).) The evidence also indicates that while the Township has not experienced overwhelming growth, it is, nonetheless growing: both the Township's population and assessed valuation have increased since 2000 and that growth is projected to continue through 2015. (*See* Cert. Admin. R. at 233-35, 355, 573, 585.) Finally, the evidence indicates that the Township's current trustee and Board members were elected on their pro-

[5] Even if ambulance service is not required, the Township explained that with the termination of its paid members in 2007, as well as a decrease in the number of fire department volunteers over the last couple years, the fire department's response time to an emergency call has generally increased. (*See* Cert. Admin. R. at 188-89, 542-43, 545, 565, 567-68, 668.)

emergency services funding platform.[6] (*See* Cert. Admin. R. at 542, 558, 561-62 (footnote added).)

The Township desired quicker response times to its citizens' emergency needs. (*See* Cert. Admin. R. at 150-53, 160-72, 179-82, 542.) Consequently, the Board passed the loan resolution so that the fire department could pay at least two stand-by medical personnel (per shift) $11.00 an hour and thereby restore its ambulance service.[7] (*See* Cert. Admin. R. at 550, 576 (footnote added).) The DLGF concluded that, based on the aforementioned evidence, the Township's loan resolution was justified.[8] (Cert. Admin. R. at 740-44 (footnote added).)

On appeal, the Petitioners argue that the DLGF's final determination is in error because the Township failed to provide a more thorough presentation of its evidence and, as a result, failed to make a prima facie case that the loan was necessary. (*See*

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[6] The administrative record in this case also shows that Petitioners Dora Brown and Sonjia Graf ran for township offices on a platform opposing the additional funding for the fire department, but lost their elective bids. (*See* Cert. Admin. R. at 558-59.)

[7] This hourly rate was less than what neighboring fire departments were paying their stand-by staff. (*See* Cert. Admin. R. at 575.)

[8] As this Court has previously explained,

> [t]he decision as to how to best provide firefighting [and emergency] services within [a] township is one that properly lies with the local fire department and [the township b]oard. Consequently, they have a great deal of discretion in implementing policies that best meet the needs of the citizens of the township as a whole.

Perry v. Indiana Dep't of Local Gov't Fin., 892 N.E.2d 1281, 1285 (Ind. Tax Ct. 2008). In turn, when the DLGF reviews the propriety of an emergency loan, its function is not to pass judgment on how the jurisdiction chooses to provide fire and emergency services; rather, the DLGF's function is to analyze, from a tax standpoint, the jurisdiction's need for the loan in light of those policies.

generally Petrs' Br. at 22-26.) For instance, the Petitioners assert that the Township should have presented an analysis showing how the fire department's reduction in volunteers actually affects the public safety needs of the Township. (*See* Petrs' Br. at 24.) Likewise, the Petitioners assert that the Township should have presented documentation demonstrating how an increase in run times affects the Township's need for emergency services. (*See* Petrs' Br. at 24.) At another point, the Petitioners contend that the Township should have provided "quantifiable evidence" demonstrating "how an increase in population as small as 12 percent over ten years" affects the public safety needs of the Township. (Petrs' Br. at 25.)

The DLGF, as the finder of fact, understood the Township's evidence and determined that it had probative value. Consequently, the Court will not overturn the DLGF's determination that the Township established a prima facie case absent an abuse of discretion. *See*, *e.g.*, *French Lick Twp. Tr. Assessor v. Kimball Int'l*, *Inc.*, 865 N.E.2d 732, 739 (Ind. Tax Ct. 2007) (explaining that where the Indiana Board of Tax Review understood a taxpayer's evidence and found that it had probative value, the Court would not overturn its decision that the taxpayer made a prima facie case absent an abuse of discretion). The Petitioners' allegation that the Township "should have done more" in presenting its case-in-chief does not rise to that level. Accordingly, the Court cannot say that the DLGF's finding that an emergency services need existed within the Township was in error.

IV.

Finally, the Petitioners explain that they presented evidence demonstrating that the loan proceeds would not only be used to pay for the fire department's provision of

ambulance service to people within the Township, but they would also be used to pay for the fire department's provision of ambulance service to people who live beyond the Township's borders. The Petitioners contend that the DLGF ignored this evidence and, in doing so, unfairly "saddled" the Township with the entire amount of the loan.[9] (*See*, *e.g.*, Cert. Admin. R. at 123-24; Oral Argument Tr. at 10-13 (footnote added).)

During the DLGF hearing, the Petitioners presented evidence demonstrating that between 2004 and 2008, the fire department responded to a total of 1,886 calls; only 635 of them, however, were within the Township. (*See* Cert. Admin. R. at 296-336.) The Petitioners acknowledged that while the fire department responded to some of the calls outside the Township for the purpose of providing "mutual aid," many responses were made in the capacity as "primary responder."[10] (*See* Cert. Admin. R. at 223-24 (where Petitioners assert that when a fire department contracts to provide services to a jurisdiction, "[t]hat means it's a primary responder") (footnote added).) More specifically, the Petitioners claimed that, at the very minimum, the fire department responded to 217 calls in Adams Township, 155 calls in Ashland Township, and 410 calls in Jefferson Township as a "primary responder." (*See* Cert. Admin. R. at 296-336 (delineating how

[9] The DLGF's final determination did not address this claim. (*See* Cert. Admin. R. at 734-44.) Accordingly, the Court will review the evidence in the record and make its own conclusion thereon. *See Perry*, 892 N.E.2d at 1285 (explaining that while the Court would have generally deferred to the DLGF's findings of fact, it would have reviewed the DLGF's conclusions of law *de novo*) (citations omitted).

[10] The Petitioners explained that a "primary responder" is the fire department that has been contractually engaged to provide services within a jurisdiction. (*See* Cert. Admin. R. at 223-24, 397-409; Oral Argument Tr. at 26-28.) In contrast, "mutual aid" is provided by a fire department when another fire department (i.e., the primary responder) requests assistance in responding to a call. (*See*, *e.g.*, Cert. Admin. R. at 121; Oral Argument Tr. at 27.)

many calls were made to Adams, Ashland, and Jefferson Townships), 344 (photocopy of fire department's web-brochure stating that it "protects both Gregg and Jefferson Townships . . . [and] also covers Ashland and Adams Townships for EMS . . . [f]or a total of 100 square miles of EMS coverage with[in] all four townships"), 602-04 (2006 contract between fire department and Jefferson Township).)[11] Thus, the Petitioners argue, to the extent the fire department is also serving as the primary responder for these three other jurisdictions, they should bear a portion of the overall cost associated with the fire department's provision of ambulance service (i.e., the paid stand-by personnel).[12] (*See* Oral Argument Tr. at 3-4, 14 (footnote added).)

A reasonable mind would accept this evidence as adequate to support the conclusion that the Township will indeed be paying for the fire department's provision of primary response EMS services to other jurisdictions. *See Amax*, 552 N.E.2d at 852. In response, the Township did little to convince a reasonable mind otherwise. (*See*, *e.g.*, Cert. Admin. R. at 184-85 (where Township merely asserts that Petitioners' statements that fire department was the primary responder for Martinsville, Monroe Township, and Clay Township "were incorrect"), 190, 544 (where Township states that

[11] The Petitioners also claimed that the fire department was the primary responder to calls from the City of Martinsville, and that they had the contract to prove it. (*See* Cert. Admin. R. at 223-24.) The administrative record, however, contains no such contract. (*See* Cert. Admin. R. at 229-534, 587-663 (all evidence offered by Petitioners).) (*But see* Cert. Admin. R. at 608-10 (2006 contract between fire department and the Morgan County Board of Commissioners for the "provi[sion of] adequate professional ambulance and emergency services to all citizens of Morgan County").)

[12] It should be noted, however, that the fire department was not precluded from contracting to provide services, for consideration, to other jurisdictions. *See*, *e.g.*, IND. CODE ANN. § 36-8-12-16(c) (West 2009). (*See also* Cert. Admin. R. at 397-409, 578-84.)

given Morgan County's dispatch system, ambulance providers were called based solely upon their geographical proximity to an emergency).) Indeed, the Township admitted it had a contract with Jefferson Township, and it admitted it provided EMS coverage in both Adams and Ashland Township. (*See* Cert. Admin. R. at 184-86, 197-98, 544-45.) Furthermore, it presented documents which indicated that the entire amount necessary to fund the two stand-by positions for one year was solely allocated to the Township. (*See* Cert. Admin. R. at 539, 576.)

The DLGF's final determination not only fails to address this evidence, it fails to address the claim whatsoever. (*See* Cert. Admin. R. at 734-44.) *But see* A.I.C. § 36-6-6-14(d)(8) (requiring the DLGF to consider "[o]ther factors directly related to the provision of public safety with the jurisdiction served by the township"). Accordingly, the Court remands the matter to the DLGF so that it may determine what portion of the overall loan amount accurately reflects the fire department's provision of ambulance service to the Township.[13]

CONCLUSION

Based on the foregoing reasons, the DLGF's final determination is AFFIRMED in part and REVERSED in part. The matter is REMANDED to the DLGF to take action consistent with this opinion.

[13] There are a variety of comparative factors the DLGF may consider to make this determination. For example, the administrative record contains data as to the total number of EMS runs made within each of the jurisdictions, the size of each jurisdiction, and the population within each jurisdiction.