

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL.,
Butler Township Board of Trustees

Relator-Appellant,

v.

Montgomery County Board
of County Commissioners, *et al.*,

Respondents-Appellees.

09-0186

On Appeal from the
Montgomery County Court
Of Appeals, Second Appellate
District

Court of Appeals
Case No. CA-022664

Supreme Court Case No. _____

RELATOR-APPELLANT'S
MEMORANDUM IN SUPPORT OF JURISDICTION

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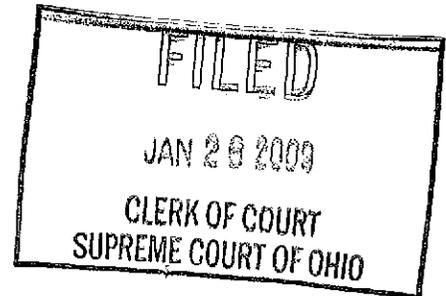


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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Appellant Butler Township Board of Trustees urges this Court to accept jurisdiction in this case as it is one of public or great general interest. The decision of the Court of Appeals addressed an issue of critical importance to townships—whether they are considered a “party” in a R.C. 709.023 expedited annexation. The decision of the court, ruling that only a petitioning property owner can be considered “any party” for purposes of initiating a mandamus action under R.C. 709.023 “to compel the board of county commissioners to perform its duties under this section” must be reversed. The decision is not supported by the language of the statute and is inconsistent with the overall R.C. Chapter 709 statutory scheme.

In 2002, the General Assembly adopted significant changes to the state’s annexation laws. One of those changes was to establish three “expedited” methods for annexation petitions signed by all owners in the annexation territory. While the unanimous consent of the owners is common to all three types, each has its own particular uses.

The first of the expedited types, R.C. 709.022, can be utilized only when the municipality to which the annexation territory would be annexed and the township in which the territory lies agree to the annexation—in other words, all parties agree to the annexation. The third type, R.C. 709.024, is only for specific circumstances involving “significant economic development projects” with investments in excess of ten million dollars.

It is the second expedited method, R.C. 709.023, that is the subject of this appeal. Since this method is now the method most commonly used for the filing of annexation petitions, the interpretation of its terms is critical to maintaining the General Assembly’s scheme for annexations in this state. Unlike R.C. 709.022, which requires no standards other than contiguity, R.C. 709.023 mandates that the petition can be approved only if the board of county

commissioners reviews the petition and finds that all of seven statutory conditions have been met.

The statutory scheme limits challenges to annexations filed pursuant to the three expedited methods. Since an R.C. 709.022 annexation petition can go forward only if all owners, the municipality, and the township agree to the annexation, that section provides for no appeal or other court action challenging the county commissioners' decision. R.C. 709.024, the method used for significant economic development projects, provides that "an owner" may appeal a denial of the annexation, but specifically provides that no other person has standing to appeal a board's decision. R. C. 709.023 (the second type, which is the subject of this appeal), provides as follows:

There is no appeal in law or equity from the board's entry of any resolution under this section, but **any party may seek a writ of mandamus to compel the board of county commissioners to perform its duties under this section.**

R.C. 709.023(F), emphasis added. In reliance on this provision, the Township filed a petition for a writ of mandamus to compel the board of county commissioners to perform its duties under R.C. 709.023. The board had issued a resolution approving the annexation, but rather than finding all seven conditions of R.C. 709.023(E) had been met, as was its duty, the board specifically ruled that six of the seven statutory conditions had been met and remained silent as to the seventh condition. Nor did its resolution find, in general, that all seven conditions had been met.

While there is nothing in R.C. 709.023 that defines the term "party," or "any party," the court below chose to limit the definition of "any party" to owners only: "only the property owner has any recourse from a decision of the board of county commissioners under R.C. 790.023, and this is only in the case where the petition is denied." Opinion, p. 13. The court

affirmed the dismissal of the Township's petition, ruling it was not "any party" and, therefore, did not have standing.

The court's limitation on "any party" is nothing more than a judicial amendment: "any owner," instead of the statute's "any party"; "only when the petition is denied," instead of the statute's "to perform its duties under this section." A ruling that only an owner is a party, when there is no definition of "party" in the statute." A ruling that only an owner is a party when not only the petitioning owners, but also the municipality and the township in which the territory lies have significant roles in the statutory process and are, indeed "parties" for purposes of R.C. 709.023(G).

In concluding that the township was not "any party," for purposes of R.C. 709.023, the court below purportedly relied upon rules of statutory construction. However, its interpretation defies one of the key rules of statutory interpretation – that the interpretation not render meaningless the term construed. By ruling that "any party" under the statute means merely "any owner" the court did render meaningless the phrase "any party." Had the General Assembly's intention been to allow only owners of property to seek a writ of mandamus to compel the board of county commissioners to perform its duties under R.C. 709.023 it would have given that right not to "any party," but to "any owner," as it had in R.C. 709.024.

The phrase "compel the board of county commissioners to perform its duties under this section" is likewise rendered devoid of any real meaning under the court of appeals' construction. Had the General Assembly's intention been to allow a mandamus action "only in the case where the petition is denied," as the court below ruled, it surely could have used language to that effect. If the right to seek a writ belongs only to an owner, the party that seeks approval, and the only duty that can be compelled is a duty to approve the annexation—there would be no need for the broader language establishing a right of "any party" to seek a writ to

compel a board of county commissioners to perform “its duties under this section.” (One of those duties is to approve an annexation only “if it finds that each of the conditions specified in division (E) of this section has been met***.” R.C. 709.023(F).)

This case is one of public or great general interest because of the impact the decision below will have on future annexations in Ohio if it is allowed to stand. A board of county commissioners could approve a R.C. 709.023 annexation that absolutely does not meet the statutory requirements knowing there would be no recourse for challenging the unlawfully approved annexation. As the Ohio Township Association has pointed out in its amicus memorandum in support of jurisdiction, even an annexation petition that clearly does not meet the requirements of R.C. 709.023—for example, is greater than five hundred acres, or creates an island of township territory, or is not signed by all owners, or does not even touch the municipal border—could be approved without there being any means for challenging such unlawful action.

The amendments to R.C. Chapter 709 are relatively new, and there are likely important legal questions of interpretation yet to be resolved. One issue of interpretation that has already come before this Court was the definition of “owner” found in R.C. 709.02(E). That issue was finally determined by this Court in *State ex rel. Butler Township Board of Trustees v. Montgomery County Bd. of Commrs.*, 112 Ohio St.3d 262, 2006-Ohio-6411. This Court overruled the interpretation applied by the Board of County Commissioners and the Court of Common Pleas. In that case, there happened to be parties in addition to the township in the mandamus action that brought the legal issue to the forefront. Had there not been, and had the court below then ruled that a township does not have standing, the question of who constitutes an “owner” for purposes of annexation would never have reached this Court—or any court—for review.

Annexations are significant occasions in the lives of townships, cities, villages, counties and the state. They redraw the boundaries of the state's political subdivisions, thereby affecting the rights of property owners—both those annexing and those impacted by the annexation, the abilities of townships to continue to thrive and to control land use within their boundaries, and the increased responsibilities and burdens on annexing municipalities, which burdens cannot always be met. These changes are permanent – they cannot be undone.

The court below stated in support of its ruling that, “the township suffers no economic detriment by the approval of the annexation.” Decision, pp. 9-10. This “finding” is based on no facts before the court – and indeed is incorrect. Even though territory annexed pursuant to R.C. 709.023 remains a part of the township, the township is harmed. First, it loses all road and bridge millage it would otherwise have collected. With regard to any millage it might retain, such benefit is illusory. Municipalities can, and do, at their discretion, divert, through the use of tax increment financing and other forms of tax abatement, tax revenues that would otherwise go to the township, regardless of the township's wishes or needs. Moreover, upon annexation, townships lose their right to determine land use issues in the annexed territory, which decisions can have a significant impact upon the remaining township.

The 2002 annexation amendments sought to strike a balance – to establish methods for smaller, uncomplicated annexations which do not require evidentiary hearings or allow appeals, and to establish more complex procedures for annexations that are larger, perhaps with opposition by included owners, or with configurations that may be of concern. Only the former, smaller and less complicated annexations, are eligible to proceed through an expedited process that moves very quickly, has no evidentiary administrative hearing, gives little if any discretion to boards of county commissioners, and limits the right to appeal.

It is in the public interest that only annexation petitions that meet the very specific statutory requirements for a R.C. 709.023 annexation petition be approved under such an expedited method. Those that do not meet those requirements must be filed, and approved, under the majority petition method, which has more exacting procedures and conditions, gives more discretion to county boards of commissions, and is subject to the state's administrative appeal process. See R.C. 709.032, 709.033 and 709.07. The state cannot tolerate a system whereby annexations that do not meet the conditions for an expedited review can nonetheless be filed and unlawfully approved thereunder due to the absence of any court oversight. The interpretation of R.C. 709.023(G) in a way that would allow annexations not eligible for an expedited review to be approved without any evidentiary hearing or the possibility of challenging such an unlawful approval will negatively impact the orderly and proper annexation of territory in this State.

For all of these reasons, and for the additional reasons set forth in the Memorandum in Support filed by the Ohio Township Association, Relator-Appellant Butler Township Board of Trustees urges this Court to accept jurisdiction over this appeal and, upon review of the merits, to reverse the decision of the court below.

STATEMENT OF THE CASE AND FACTS

A. Procedural History

The annexation petition that is the subject of this action was filed by petitioner Waterwheel Farms, Inc. on October 31, 2007. It is a petition to annex 78.489 acres of property, located in Butler Township, to the City of Union in Montgomery County. The petition was filed with the Montgomery County Board of Commissioners, pursuant to R.C. 709.023, one of the expedited methods of annexation of territory to a municipality. Under that section, a board of

county commissioners, in order to approve an annexation petition, must find that each of the seven statutory conditions for annexation had been met. R.C. 709.023(F).

Upon receipt of the annexation petition, the Butler Township Board of Trustees passed a resolution objecting to the annexation on the ground that the seventh of the seven statutory conditions for annexation (set forth in their entirety below) had not been met. The Township's resolution was filed with the Board of County Commissioners, pursuant to R.C. 709.023(D), prior to the Board's review of the petition. In the Board of County Commissioners' resolution approving the annexation, it specifically found that the first six of the seven statutory conditions had been met. However, it made no finding at all as to whether the seventh condition had been met. It made no finding that "all" conditions had been met.

The Township filed a petition for a writ of mandamus, pursuant to R.C. 709.023(G), on the ground that because the Board had improperly issued a resolution approving the annexation that did not find that all seven required conditions had been met, its Resolution was void and without legal effect and should be rescinded. The Court of Common Pleas dismissed the petition for a writ of mandamus on the ground that the Township was not "any party" for purposes of initiating a R.C. 709.023(G) mandamus action and, therefore, did not have standing. The Court of Appeals affirmed the dismissal on the same ground. It is this decision from which the Butler Township Board of Trustees appeals.

B. Statement of Facts

Other than the facts set forth above in the Procedural History, there are no disputed facts in this case. The questions before this Court are purely questions of law, and the factual information set forth above forms the necessary basis for a ruling on the issues now raised in this Court.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Appellant's Proposition of Law No. 1: A board of trustees of a township, the territory of which is included in an annexation petition filed pursuant to R.C. 709.023, and that files an objection to the annexation petition pursuant to R.C. 709.023(D), is "any party" as that term is used in R.C. 709.023(G), and, therefore, has standing to seek a writ of mandamus "to compel the board of county commissioners to perform its duties under this section," as provided in R.C. 709.023(G).

While R.C. 709.023 provides expedited procedures for annexation, an annexation under this section can be approved only when seven specific requirements are met. Subsection (G) provides that "any party" can seek a writ of mandamus "to compel the board of county commissioners to perform its duties under this section." The Board of County Commissioners in this case approved the annexation of territory lying within Butler Township, Montgomery County, without finding that all required conditions had been met (as discussed in Proposition of Law No. 2). The Butler Township Board of Trustees sought a writ of mandamus to compel the board of commissioners to perform its duties under R.C. 709.023.

The court below ruled that the Township was not "any party" and, therefore, lacked standing. (Opinion, p. 12). The court specifically ruled, "only the property owner has any recourse from a decision of the board of county commissioners under R.C. 709.023, and that is only in the case where the petition is denied." (Opinion, p. 13).¹ Pursuant to the court's reasoning, a board of trustees of the township in which annexation territory lies, can never challenge a board of county commissioners' approval of a R.C. 709.023 annexation—no matter how blatantly unlawful the petition or the board's approval. The decision was in error and must be reversed.

¹ The Township had also sought a declaratory judgment and a preliminary injunction, which the court rejected. These claims are not a subject of this appeal.

The court below acknowledged that there is no statutory definition of “party” for purposes of R.C. 709.023. It went on to find a definition elsewhere: “Looking at R.C. 709.021(D), we find that the legislature has defined ‘party’ as: ‘the municipal corporation to which annexation is proposed, each township any portion of which is included with the territory proposed for annexation, and the agent for the petitioners.’” This R.C. 709.021 definition applies only to R.C. 709.022 and 709.024. But the court opined, “Surely, the omission of this definition from R.C. 709.023 was deemed significant by the General Assembly. (Opinion, pp. 8-9). This reasoning is weak indeed. The “significance” is not explained. If the court was saying that since a township and municipality are included in the definition of owners for other sections, then they cannot be parties for purposes of R.C. 709.023, which has no definition, then one must wonder how the court can justify finding an annexation petitioner (the owner) to be a party when the petitioner too is included in other sections but not in R.C. 709.023. Had the General Assembly intended that only an owner could seek a writ of mandamus, it could have used the language “any party,” as opposed to “the owner” or “any owner.”

Words used in a statute are to be given their plain and ordinary meaning, unless the legislative intent indicates otherwise. *Lake County National Bank v. Kosydar* (1973), 36 Ohio St.2d 189, 305 N.E.2d 799; *In re Appropriation for Hwy. Purposes* (1969), 18 Ohio St.2d 214, 249 N.E.2d 48. The first definition of “party” in Black’s Law Dictionary’s, 5th Ed., is, “A person concerned or having or taking part in any affair, matter, transaction or proceeding, considered individually.” The Township fits these definitions.² This principle of statutory construction was ignored by the court below.

² Other Black’s **if it finds** that each of the conditions specified in division (E) of this section has been met, definitions, such as the one relied upon by the court below, define party in the sense of a party to a lawsuit, once a lawsuit has been filed, which is not what the issue is here. No one disputes that the Township is a “party” in this litigation. The question is whether it was a “party” in the proceedings who could bring this action.

R.C. 709.023 provides the key to unlocking the question of what “any party” means. When a R.C. 709.023 annexation petition is filed, the agent for the annexation petitioners must serve a notice of filing upon the township in which the annexation territory lies and the municipality to which annexation is sought (709.023(B)). Both the township and the municipality may issue a resolution consenting or objecting to the proposed annexation (R.C. 709.023(D)). If the township passes a resolution of objection and files it with the Board of County Commissioners, as it did in this case, then the county commissioners cannot simply grant the annexation (R.C. 709.023(D)). Rather, it must meet to review the petition to determine if each of the required conditions has been met. (R.C. 709.023(E)). A township is certainly a “party,” when applying the plain and ordinary meaning of the word. There being no definition of the term “party” in R.C. 709.023, there is no basis to conclude that only the signing owner is a party as used in R.C. 709.023(G).

It is clear from the language of the statute that, because there are specific conditions to such an annexation, the legislature intended a remedy to keep a board of county commissioners from approving an annexation petition that does not meet the requirements of R.C. 709.023. One of the “duties under this section” is to approve only those annexations that meet the seven conditions. In ruling that a mandamus can be sought “only in the case where the petition is denied,” and only by an owner, the court has interpreted “any party” in a way that limits the “duties under this section” to simply approving the annexation.

The outcome of this ruling contravenes the General Assembly’s statutory scheme. To use an example, suppose a board accepted for filing and was processing under R.C. 709.023(E) a petition seeking the annexation of 700 acres. R.C. 709.023 very specifically provides that only petitions that contain 500 or fewer acres of territory can be filed and granted pursuant to R.C. 709.023. Certainly the owner seeking annexation would not seek mandamus regarding such an

annexation. Thus, while a board of county commissioner has a “duty” to reject the annexation, there is no recourse whatsoever if it does not. The “duty” becomes merely a request.

Suppose a board of county commissioners had accepted for filing and was processing under R.C. 709.023 a petition this is not contiguous – a condition required of all annexations. R.C. 709.02. Who would seek the writ to compel the board of county commissioners to perform its duties under this section—to reject the clearly unlawful annexation? Again, certainly not the owners who, after all, filed the non-compliant petition. Only the other parties to the process would have any interest in doing so. Courts must construe statutes to avoid unreasonable or absurd results. *See State ex rel. Mason v. State Emp. Relations Bd.* (Franklin Cty. 1999), 133 Ohio App.3d 213, 219, 727 N.E.2d 181, 185. The court’s definition of “party” would have an unreasonable or absurd result.

The court below opines that, “Surely, the omission of the definition from R.C. 709.023 was deemed significant by the General Assembly.” But, more likely, surely the General Assembly’s inclusion of a mandamus remedy was to assure that boards of county commissioners could not wrongly approve, with no possible oversight, R.C. 709.023 petitions that do not meet the statutory criteria. Only if parties with a clear interest, and statutory role, in the annexation—including the township and the city—can seek the writ—under the limited circumstances in the context of R.C. 709.023—can there be such an assurance. That assurance would be lost were mandamus available to only the signing owners.

In rejecting a township’s right to seek a declaratory judgment in conjunction with a R.C. 709.023 appeal, the Fifth District Court of Appeals, in *Washington Twp. Bd. of Trustees v. City of Mansfield City Council*, Richland App. Nos. 03CA85, 03CA97, 2004-Ohio-4299, noted that a township does have standing to bring a mandamus action under R.C. 709.023(G):

Once the board of county commissioners approves the petition for annexation, the Revised Code provides no other means for a township to challenge the annexation

except that **a township may file a writ of mandamus to compel the board of county commissioners to perform its duties.** See R.C. 709.023(G).

Id. at ¶32, emphasis added. This is the only other court of appeals of which Appellant is aware to have spoken on the issue of a township's standing—and come down on the side of giving meaning to the term “any party.”

The ruling below, which would result in only owners being “parties” for purposes of filing a mandamus action pursuant to the R.C. 709.023(G), and only when there has been a denial of a petition, must be rejected. This outcome is without statutory or any other support. Were this ruling to be affirmed, blatantly unlawful annexations could be approved with absolutely no possibility of challenge. And issues of statutory interpretation could be raised without there being any means of court review—unless raised by an owner. The territory sought to be annexed in this case is in Butler Township, and the Township Board of Trustees is a proper party, to assure that a board of county commissioners “perform its duties under this section” and approve only those annexations that meet the statutory conditions.³

Appellant's Proposition of Law No. 2: A board of county commissioners reviewing an annexation petition filed pursuant to R.C. 709.023 has a clear legal duty under the statute to make a finding in its resolution approving the annexation that all seven conditions required for annexation, set forth in R.C. 709.023(E), have been met.

A petition filed under R.C. 709.023 can be approved by a board of county commissioners only “if it finds that each of the conditions specified in division (E) of this section has been met.” R.C. 709.023(F). Those conditions are as follows:

- (1) The petition meets all the requirements set forth in, and was filed in the manner provided in, section 709.021 of the Revised Code.

³ Also to be rejected is the reasoning of the court below that, even assuming the Township meets the definition of “party,” it could not prevail in a mandamus action because R.C. 709.023(D), which permits a township to file an objection to an annexation, provides the township with a plain and adequate remedy in the ordinary course of law.

- (2) The persons who signed the petition are owners of the real estate located in the territory proposed for annexation and constitute all of the owners of real estate in that territory.
- (3) The territory proposed for annexation does not exceed five hundred acres.
- (4) The territory proposed for annexation shares a contiguous boundary with the municipal corporation to which annexation is proposed for a continuous length of at least five per cent of the perimeter of the territory proposed for annexation.
- (5) The annexation will not create an unincorporated area of the township that is completely surrounded by the territory proposed for annexation.
- (6) The municipal corporation to which annexation is proposed has agreed to provide to the territory proposed for annexation the services specified in the relevant ordinance or resolution adopted under division (C) of this section.
- (7) If a street or highway will be divided or segmented by the boundary line between the township and the municipal corporation as to create a road maintenance problem, the municipal corporation to which annexation is proposed has agreed as a condition of the annexation to assume the maintenance of that street or highway or to otherwise correct the problem. As used in this section, "street" or "highway" has the same meaning as in section 4511.01 of the Revised Code.

The court below ruled that the assignment of error that raised this issue "is moot," but it went on to "address it briefly." Opinion, p. 12. Relying solely upon *Lawrence Twp. Board of Trustees v. Canal Fulton*, Stark App. No. 2007CA00308, 2008-Ohio-2690, the court said it agreed with that court that boards of county commissioners did not need to find that all of the conditions for a R.C. 709.023 annexation had been met in order to approve the annexation.

In fact, *Lawrence* does not support the ruling of the court below. The board of county commissioners' resolution at issue in the *Lawrence* case stated, "WHEREAS, The Board***has determined that the petition for annexation meets all of the conditions for Type 2 Annexations as outlined in ORC 709.023(E) ***." *Id.* at para. 28. The *Lawrence* appeals court relied upon this language in rejecting the township's argument that the board had not fulfilled its duties:

The Stark County Board specifically stated it “has determined” that the annexation petition meets all of the conditions as outlined in R.C. 709.023(E). We find this language to be sufficient to fulfill the statutory duty of the Stark County Board under R.C. 709.023.

Id. at ¶30. The *Lawrence* court did not conclude, as the court below did, that a board of county commissioners could fulfill its statutory duty by merely stating with specificity that it had found that six of the statutory conditions had been met and then being silent as to the seventh condition, not even stating, as the Stark County Board had, that all conditions had been met.

In fact, the *Lawrence* decision is apropos to this appeal in a more significant way, which favors the Township’s position. That court’s ruling on the extent of the county commissioners’ duty was possible only because a township had filed a petition for a writ of mandamus. The court did not dismiss the petition on the ground the township had no standing, and therefore was able to reach the merits of this unresolved legal issue.

Since a board of county commissioners speaks through its resolutions, if the board does not, at the very least, state in its resolution of approval that all seven statutory conditions have been met, the public could never determine if, in fact, the board had followed the dictates of the statute to find “that each of the conditions specified in division (E) of this section has been met.” It is even more problematic on the facts in this appeal, where the board specifically found that the first six conditions had been met. And then stated nothing about the seventh. Utilizing the legal principle that the expression of one is the exclusion of another, the only reasonable conclusion to be drawn from the resolution is that the board did not find that the seventh condition—the very one that had been the subject of a formal objection—had been met. The public should not have to assume that the seventh condition was met.

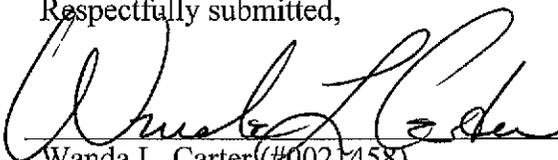
CONCLUSION

If the only “party” to have standing to “seek a writ of mandamus to compel a board of county commissioners to perform its duties” under R.C. 709.023 is an annexing owner, and if a

mandamus can be sought by an owner only where the petition is denied – as ruled by the court below – then there will be absolutely no means by which an annexations that is unlawfully approved – no matter how blatantly unlawful – can be reviewed or overturned. There will be no means by which any issues of interpretation or other legal issues arising out of R.C. 709.023— unless they are of interest to the owner—will ever receive court review. The decision of the court below on the question of standing is not supported by the language of the statute, by the overall statutory scheme for annexations, by logic, or by public policy and should be reversed. Likewise, the court’s holding that requires the public to presume that a board of county commissioners has found that an annexation petition meets all of the statutory requirements for a R.C. 709.023 annexation should be reversed.

Relator-Appellant Butler Township Board of Trustees urges this Court to accept jurisdiction over this appeal so that it can rule upon the important issues raised herein.

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Relator-Appellant's Memorandum in Support of Jurisdiction was sent by regular US Mail, postage prepaid, to:

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Catherine A. Cunningham
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145 E. Rich Street
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this 26th day of January, 2009.


Wanda L. Carter (#0021458)

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CLERK OF COURTS
MONTGOMERY CO. OHIO
39

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO, EX REL., BUTLER TOWNSHIP BOARD OF TRUSTEES	:	
Relator - Appellant	:	C.A. CASE NO. 22684
v.	:	T.C. NO. 2008-CV-0508
MONTGOMERY COUNTY BOARD OF COUNTY COMMISSIONERS, ET AL.	:	<u>FINAL ENTRY</u>
Respondents-Appellees	:	

Pursuant to the opinion of this court rendered on the 12th day of
December, 2008, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.



JAMES A. BROGAN, Judge



MIKE FAIN, Judge



SUMNER E. WALTERS, Judge
(Sitting by assignment of the Chief
Justice of the Supreme Court of Ohio)

THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

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THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT



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MONTGOMERY CO. OHIO
33

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO, EX REL., BUTLER TOWNSHIP BOARD OF TRUSTEES	:	
Relator-Appellant	:	C.A. CASE NO. 22664
v.	:	T.C. NO. 2008-CV-0509
MONTGOMERY COUNTY BOARD OF COUNTY COMMISSIONERS, ET AL.	:	(Civil Appeal from Common Pleas Court)
Respondents-Appellees	:	

OPINION

Rendered on the 12th day of December, 2008.

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Attorney for Respondents-Appellees, Joseph P. Moore, Agent and City Council, City
of Union

THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

WALTERS, J. (by assignment)

Relator-Appellant, Butler Township Board of Trustees, appeals from the judgment of the Montgomery County Common Pleas Court in favor of Respondents-Appellees, Montgomery County Board of County Commissioners, et al., which dismissed Butler Township's complaint for a writ of mandamus, declaratory relief, and injunctive relief.

Butler Township sets forth four assignments of error claiming that the trial court erred in determining that the township was not a party to an expedited type II annexation, which had standing to bring a mandamus action; that the trial court erred in determining that the County Commissioners had no duty to make affirmative findings prior to granting the annexation; that the trial court erred in denying Butler Township a preliminary injunction to preserve the status quo and denying its motion to amend the complaint on the grounds that it was moot.

Because we determine that the trial court properly dismissed Butler Township's mandamus and declaratory judgment action on the ground of standing, and because the other issues are therefore moot, we affirm the judgment appealed from.

On October 31, 2007, Waterwheel Farms, Inc., through its agent, Joseph P. Moore, filed a petition to annex 78.489 acres of property, located in Butler Township, to the City of Union. This petition was filed pursuant to R.C. 709.021, 709.023, as an expedited type II annexation.

This was the second attempt by Waterwheel to annex this property to the City of Union. In 2004, Waterwheel filed a similar petition to annex this same property, but included in the petition a portion of Jackson Road (along with the berm, shoulder, and other incidentals of the right of way) that does not abut Waterwheel's property. In that

case, Butler Township filed objections to the proposed annexation on the basis that all of the property owners had not consented to the annexation. The property owners referred to in the objection were a number of landowners whose properties adjoin Jackson Road and who were the fee-simple owners (up to the centerline of the road) of the property over which the roadway passes, subject to an easement for the right of way. The County Commissioners granted the petition to annex, finding that all of the property owners had joined in the petition. A declaratory judgment action was then filed by the township and the property owners. Ultimately, the Ohio Supreme Court determined that "for purposes of R.C. 709.02(E), when annexation of a roadway into a municipality is sought, landholders who own the property over which a roadway easement exists are 'owners' of the roadway and therefore must be included in determining the number of owners needed to sign the annexation petition." *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Comms.*, 112 Ohio St.3d 262, 2006-Ohio-6411, ¶ 47.

The petition filed herein excluded the 1.351 acres of roadway, and was signed by the only owner of the real estate sought to be annexed. After the filing of the petition, Butler Township again filed a resolution with the Board of County Commissioners, objecting to the new petition on the basis that the annexation did not comply with the seventh condition of annexation, set forth in R.C. 709.023(E)(7). The basis for this objection was that the township claimed that the annexation of property adjacent to the unannexed portion of Jackson Road would cause road maintenance problems since the township and the city had not entered into an agreement regarding the maintenance of that portion of the roadway. However, prior to the action of the Board of County Commissioners, the City of Union adopted a resolution, pursuant to R.C. 709.023(C)

THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

stating if and to any extent any maintenance problem was created by the annexation, the city would "assume the maintenance of those portions of Jackson Road for which a maintenance problem was caused by the annexation or to otherwise correct the problem."

On December 11, 2007, the Board of County Commissioners approved the annexation petition by Resolution Number 07-2156.

Subsequently, Butler Township filed a complaint for a writ of mandamus, declaratory judgment and injunctive relief. The trial court granted a motion to dismiss filed by the City of Union. The trial court, determining that Butler Township was not a party to the annexation under R.C. 709.023, found that it had no standing to bring the within action. The trial court further found that even if the Township had standing to bring the mandamus action, it would have granted the respondents' motion for judgment on the pleadings as the condition that the township raised was not implicated since the roadway was not divided or segmented by the boundary line of the annexation.

From this decision, Butler Township has appealed, setting forth four assignments of error for our review.

"First Assignment of Error

"The court below erred in holding that a township in which territory sought to be annexed lies cannot be considered 'any party,' pursuant to R.C. 709.023(G), thereby giving it standing to bring a mandamus action to compel the board of county commissioners to perform its duties under R.C. 709.023."

"Standing is a threshold test that, if satisfied, permits the court to go on to decide whether the plaintiff has a good cause of action, and whether the relief sought can or should be granted to plaintiff." *Tiemann v. Univ. of Cincinnati* (1998), 127 Ohio App.3d

312, 325, 712 N.E.2d 1258. Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court. *State ex rel. Ralkers, Inc. v. Liquor Control Comm.*, Franklin App. No. 04AP-779, 2004-Ohio-6606, ¶35. When an appellate court is presented with a standing issue, it is generally a question of law, and we therefore apply a de novo standard of review. See *Cleveland Elec. Illuminating. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 521, 523, 668 N.E.2d 889.

Butler Township points to R.C. 709.023(G), which provides that "any party" can seek a writ of mandamus "to compel the board of county commissioners to perform its duties under this section." The township then argues that it is a party because the statute permits the township to file objections to the annexation, and because if the township is not considered a party for purposes of mandamus, then it has no recourse for an adverse ruling on its objections.

The respondents argue that the General Assembly specifically determined that only the petitioners were to be parties for the purposes of mandamus under an expedited type II annexation. They point to the two other types of expedited annexation proceedings, type I (R.C. 709.022) and type III (R.C. 709.024), which both specifically provide that townships and municipal corporations, as well as the petitioners, are "parties." In the expedited type II proceedings (R.C. 709.023) there is no specific inclusion of the township and the municipal corporation within the definition of parties.

The trial court, applying the statutory interpretation principle of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), determined that the legislature's exclusion of R.C. 709.023 from the definition of a "party" as including the township and the municipal corporation meant that that definition did not apply to R.C.

709.023. The trial court then dismissed the action because it found that Butler Township lacked standing to bring the action.

In *Lawrence Twp., Stark Cty., Ohio, Bd. of Twp. Trustees v. Canal Fulton*, Stark App. No. 2007 CA 00010, 2007-Ohio-6115, ¶21, the Fifth District, discussing a similar issue pointed out that "[m]anifestly, townships are creatures of statute and have no inherent power. They, like the Zoning Board of Appeals, as creatures of statute, have only those powers expressly authorized or necessarily implied from the expressed grant of statutory power and the mode prescribed for the exercise of that power is itself the limit upon that power." (citing *American Sand & Gravel, Inc. v. Fuller* (Mar. 16, 1987), Stark App. Nos. CA-6952, CA-7067.)

In *State ex rel. Overholser Builders, L.L.C. v. Clark Cty. Bd. of Commrs.*, 174 Ohio App.3d 631, 2007-Ohio-7230, ¶ 5, we pointed out that "[A]nnexation is strictly a statutory process." (quoting *In re Petition to Annex 320 Acres to S. Lebanon* (1992), 64 Ohio St.3d 585, 591, 597 N.E.2d 463, 1992-Ohio-134). Consequently, the procedures for annexation and for challenging an annexation must be provided by the General Assembly. *Id.*

"Since 2001, R.C. Chapter 709 has provided four procedures for the annexation of property. 2000 Am.Sub.S.B. No. 5 ('Senate Bill 5'). Three of those procedures are expedited procedures that may be used when all of the owners of property within the annexation territory sign the petition for annexation. See R.C. 709.021, 709.022, 709.023, and 709.024. Under each of these procedures, the owners of real estate contiguous to a municipal corporation may petition for annexation to that municipal corporation. R.C. 709.02(A)." *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Cty. Commrs.*, 162 Ohio App.3d 394, 833 N.E.2d 788, 2005-Ohio-3872, ¶ 9, affirmed by *State*

ex rel. Butler Twp., 112 Ohio St.3d 262, 858 N.E.2d 1193, 2006-Ohio-6411.

The first, established by R.C. 709.022, commonly called an expedited type I annexation, applies when "all parties," including the township and the municipality, agree to the annexation of the property and they all execute a written annexation agreement. The second, established by R.C. 709.023, is commonly called an expedited type II annexation and applies when the property to be annexed to the municipality will remain within the township despite the annexation. The third type of special annexation, established by R.C. 709.024, is commonly called an expedited type III annexation, and it applies when the property to be annexed has been certified as "a significant economic development project." See *State ex rel. Butler Twp.*, 112 Ohio St.3d 262, ¶ 5.

R.C. 709.07, which authorizes appeals under R.C. Chapter 2506, does not apply to any of the expedited annexations. R.C. 709.021(C). Rather, each of the expedited procedures has specific provisions limiting challenges to decisions by the board of county commissioners.

In an expedited type I annexation, R.C. 709.022(B) provides : "Owners who sign a petition requesting that the special procedure in this section be followed expressly waive their right to appeal any action taken by the board of county commissioners under this section. There is no appeal from the board's decision under this section in law or in equity."

As for expedited type III annexations, R.C. 709.024(D) provides: "If all parties to the annexation proceedings consent to the proposed annexation, a hearing shall not be held, and the board, at its next regular session, shall enter upon its journal a resolution granting the annexation . There is no appeal in law or in equity from the board's entry of

a resolution under this division." However, "[a]n owner who signed the petition may appeal a decision of the board of county commissioners denying the proposed annexation under section 709.07 of the Revised Code." R.C. 709.024(G). "No other person has standing to appeal the board's decision in law or in equity. If the board grants the annexation, there shall be no appeal in law or in equity." *Id.*

The owners who sign a petition for an expedited type II annexation also "expressly waive their right to appeal in law or equity from the board of county commissioners' entry of any resolution under this section." R.C. 709.023(A). They also waive any rights "to sue on any issue relating to a municipal corporation requiring a buffer as provided in this section" and "to seek a variance that would relieve or exempt them from that buffer requirement." *Id.* R.C. 709.023(G) further provides: "If a petition is granted under division (D) or (F) of this section, the clerk of the board of county commissioners shall proceed as provided in division (C)(1) of section 709.033 of the Revised Code, except that no recording or hearing exhibits would be involved. There is no appeal in law or equity from the board's entry of any resolution under this section, but any party may seek a writ of mandamus to compel the board of county commissioners to perform its duties under this section."

While R.C. 709.023 expresses that any "party" may seek a writ of mandamus to compel the board of county commissioners to perform its duties under this section, it does not define party. Looking at R.C. 709.021(D), we find that the legislature has defined "party" as: "the municipal corporation to which annexation is proposed, each township any portion of which is included within the territory proposed for annexation, and the agent for the petitioners." However, R.C. 709.021 specifically provides that that definition is only

applicable to R.C. 709.022 and 709.024. Surely, the omission of this definition from R.C. 709.023 was deemed significant by the General Assembly.

Black's Law Dictionary, 6th Ed. defines "party" in the following terms: "[a] party is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or in equity, the party plaintiff or defendant, whether composed of one or more individuals and whether natural or legal persons; *all others who may be affected by the suit, indirectly or consequently, are persons interested but not parties.*" (emphasis supplied.) While an annexation proceeding is not, in strict legal terms, a legal suit, it is a legal proceeding brought by and in the name of the petitioners only, and before the board of county commissioners. And, while a board of township trustees or a municipal corporation may be interested persons, they are not, by general definition, "parties" to an annexation proceeding.

What is significant in attempting to reconcile the appellate rights applicable to all three of these expedited annexation proceedings, is that in all three, the statutory scheme sets forth specific requirements, and if those requirements are met, then the action by the board of county commissioners is merely ministerial and not discretionary.

Furthermore, in all three proceedings, all of the owners of the land to be annexed must agree and participate in the petition process. In all three proceedings, the municipal corporation to which the land is to be annexed must indicate their consent by the filing of a resolution or ordinance indicating what services it will provide to the annexed land. In a type I proceeding, the township must indicate their consent by approving an annexation agreement or a cooperative economic development agreement; in both type II and type III proceedings, the land annexed is not withdrawn from the township, and the township

suffers no economic detriment by the approval of the annexation.

Finally, in all three proceedings, it is contemplated that there is only very narrowly limited appeal, if any, from the board's action. In R.C. 709.022(B), it is provided that "[t]here is no appeal from the board's decision under this section in law or in equity." In R.C. 709.023(G), it is provided that "[t]here is no appeal in law or equity from the board's entry of any resolution under this section, but any party may seek a writ of mandamus to compel the board of county commissioners to perform its duties under this section." And, in R.C. 709.024(G), it is provided that "[a]n owner who signed the petition may appeal a decision of the board of county commissioners denying the proposed annexation under section 709.07 of the Revised Code. No other person has standing to appeal the board's decision in law or in equity. If the board grants the annexation, there shall be no appeal in law or in equity."

If we were to construe the Butler Township Trustees as a party to this expedited type II annexation, such as to give them standing to contest the granting of the application, we would be extending to them a greater right than they would have under either a type I or a type III expedited annexation, where the legislature has expressly chosen to define them as parties. And, if we were to find that the township has the right to file a declaratory judgment action, the township's rights would be greater than the affected property owners. In none of these expedited proceedings is it contemplated or provided that any person has the standing to contest the grant of an annexation petition that meets the statutory criteria.

Finally, consistent herewith, we determine that the township lacks standing to file a declaratory judgment action herein as well. This very issue was litigated in *Washington Twp. Bd. of Trustees v. Mansfield City Council*, Richland App. Nos. 03 CA 85 and 03 CA

97, 2004-Ohio-4299. We agree with the analysis and disposition of this issue therein. The Fifth District Court of Appeals reasoned that because townships are creatures of statute and they have no inherent powers, and because " * * * [W]here the law provides a statutory scheme for review of an issue, injunction or declaratory action does not lie outside of that scheme. * * * [Therefore] [A]ll of the trustees' rights and claims are limited to the statutory scheme for annexation contained in Title VII of the Revised Code." *Id.* at ¶ 34, quoting *Violet Twp. Bd. of Twp. Trustees v. City of Pickerington*, Fairfield App. No. 02-CA-41, 2003-Ohio-845.

And, even assuming, arguendo, that Butler Township does meet the definition of a "party" for purposes of R.C. 709.023(G), and therefore has standing to file a mandamus action, we note that a relator seeking a writ of mandamus must demonstrate: "(1) that he has a clear legal right to the relief prayed for, (2) that respondents are under a clear legal duty to perform the acts, and (3) that relator has no plain and adequate remedy in the ordinary course of the law." *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 29, 451 N.E.2d 225, citing *State ex rel. Hellerv. Miller* (1980), 61 Ohio St.2d 6, 399 N.E.2d 66, paragraph one of the syllabus.

In *Lawrence Twp., Stark Cty., Ohio, Bd. of Twp. Trustees v. Canal Fulton*, *supra*, at ¶ 22, the Fifth District Court of Appeals determined that R.C. 709.023(D), permitting the township to file an objection to the annexation, provided them with a plain and adequate remedy in the ordinary course of law. Additionally, the trial court herein determined that Butler Township did not have a clear legal right to the relief sought, and that the Montgomery County Board of Commissioners did not have a clear legal duty to deny the petition because no street or highway was divided or segmented, and because in spite of

that, the City of Union had passed a resolution requiring it to assume any required maintenance for the roadway in question if a problem existed. This finding was based upon uncontroverted evidence.

For these reasons, the first assignment of error is overruled.

"Second Assignment of Error

"The court below erred in holding that the board of county commissioners reviewing the annexation did not have a clear legal duty to address one of the required elements, specifically, R.C. 709.023(E)(7), unless it found that the splitting of highways caused by the proposed annexation would cause a maintenance problem, when there is no evidence in the record as to whether the board did or did not make such a finding."

Based upon our resolution of the first assignment of error, this assignment of error is moot. Nonetheless, we will address it briefly. This is the issue raised in Butler Township's request for declaratory judgment.

Recently, the Fifth District Court of Appeals, addressing this identical question, determined that R.C. 709.023(E) and (F) do not require the Board of County Commissioners to make express findings that analyze how all seven conditions in R.C. 709.023(E) have been met. The statute only requires the Commissioners to identify, and not to thoroughly explain and/or discuss, the conditions that have not been met when a petition has been denied. *Lawrence Twp. Bd. of Trustees v. Canal Fulton*, Stark App. No. 2007CA00308, 2008-Ohio-2690, at ¶¶ 18-19.

We agree with this conclusion as it is consistent with a clear reading of the statute. We agree with the Fifth District that it is consistent with the "longstanding common law that individual property owners are entitled to the free alienation of their property if specific

conditions are met." *Id.* at ¶ 19. We also find that it is consistent with our determination that only the property owner has any recourse from a decision of the board of county commissioners under R.C. 709.023, and that is only in the case where the petition is denied. If the petition is denied, the property owner is entitled to know upon which ground a petition is denied, which aids in the exercise of his mandamus remedy.

The second assignment of error is overruled.

"Third Assignment of Error

"The court below erred in denying Relator a preliminary injunction in order to maintain the status quo and avoid the claims before it from becoming moot on the grounds that Relator Township could not prevail on its substantive claims."

Based upon our determination of the first and second assignments of error, the issues raised in this assignment of error are also moot. If, as we have found, the Butler Township Trustees do not have standing to seek mandamus, and if they are not entitled to the declaratory judgment that they seek, then they have no basis upon which to ask for a preliminary injunction. When a court determines that an action must fail for lack of standing, there is nothing left for the court to do, but to dismiss the action. The trial court has no further authority to grant any relief sought by any party. *Brunswick Hills Twp. v. Cleveland*, Medina App. No. 06CA0095-M, 2007-Ohio-2560.

Additionally, in ruling on a motion for preliminary injunction, a trial court must consider whether (1) the moving party has shown a substantial likelihood that he or she will prevail on the merits of the underlying substantive claim; (2) the moving party will suffer irreparable harm if the injunction is not granted; (3) issuance of the injunction will not harm third parties; and, (4) the public interest would be served by issuing the preliminary

injunction. *Siroff v. Ohio Permanente Med. Group, Inc.*, 146 Ohio App.3d 732, 741, 767 N.E.2d 1251, 2001-Ohio-4186, ¶140.

Therefore, the purpose of a preliminary injunction is to preserve the status quo of the parties pending a decision on the merits. *Dunkelman v. Cincinnati Bengals, Inc.*, 158 Ohio App.3d 604, 821 N.E.2d 198, 2004-Ohio-6425. The party seeking the preliminary injunction must establish each of the elements by clear and convincing evidence. *Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co., Gen. Commodities Div.* (1996), 109 Ohio App.3d 786, 790, 673 N.E.2d 182.

The decision whether to grant or deny injunctive relief is within the trial court's sound discretion and its decision will not be disturbed on appeal absent a clear abuse thereof. *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590, 604, 653 N.E.2d 646, 1995-Ohio-301.

Because the trial court had already determined that Butler Township could not prevail upon the merits, and because that decision is in accord with our determination as to the second assignment of error, the trial court's denial of the preliminary injunction was not an abuse of discretion.

The third assignment of error is overruled.

"Fourth Assignment of Error

"The court below erred in finding that Relator's motion to amend the complaint to change the caption from 'City Council' to 'City' on the ground that the motion was moot."

Finally, because the township's complaint was dismissed on other grounds, which we have sustained, the amendment of the complaint, even though it would have been otherwise proper, would have been a vain act, which the court will not require. It is well

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accepted that the law will not require a vain act. *Gerhold v. Papathanasion* (1936), 130 Ohio St. 342, 199 N.E. 353.

The fourth assignment of error is overruled.

Having overruled all of Appellant's assignments of error, we affirm the judgment of the trial court.

.....

BROGAN, J. and FAIN, J., concur

(Hon. Sumner E. Walters, retired from the Third District Court of Appeals sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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Hon. Mary Wiseman

THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT