

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. \_\_\_\_\_

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF AMICUS CURIAE THE OHIO TOWNSHIP ASSOCIATION

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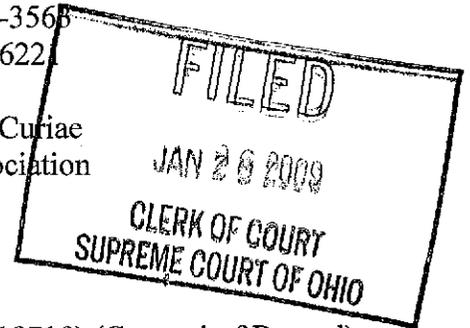
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## **EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

After many years of work to amend the annexation laws of this State in ways that would balance the interests of property owners, townships, municipalities, and counties, and serve the best interests of the state of Ohio, the General Assembly amended the annexation laws effective March 2002. This *amicus curiae*, the Ohio Township Association, played an active role in the work leading to those amendments. Never, in its wildest dreams, would the Association have expected an interpretation of R.C. 709.023 that would allow no party to seek a writ of mandamus against a board of county commissioners that was approving an annexation that did not meet the statutory requirements. That would be the result of the decision of the Second District Court of Appeals that is the subject of this appeal, if its decision is allowed to stand.

This appeal raises a legal issue of critical importance to the townships of this state, and thus to the Ohio Township Association. The question before this Court is whether, in a R.C. 709.023 expedited annexation, township boards of trustees have standing to “seek a writ of mandamus to compel the board of county commissioners to perform its duties under this section”—a right provided by statute to “any party.” R.C. 709.023(G). The Second District Court of Appeals has ruled that they do not. If that decision is allowed to stand, the statutory scheme establishing specific conditions for one-hundred-percent owner annexations will be rendered meaningless. If the only person with standing to seek a writ of mandamus to compel a board of county commissioners to perform its duties under R.C. 709.023 is a property owner/petitioner (as the court below ruled), a board of county commissioners’ approval of an annexation that is not in compliance with the law will never be subject to court review no matter how unlawful.

Among the most significant of the 2002 amendments to the annexation laws was the creation of three “expedited” methods of petitioning for annexation. The commonality among the three methods is that they all require the approval of every owner of property within the annexation territory. However, each of these methods serves very different interests and circumstances. The first of these methods, found at R.C. 709.022, is designed for instances when not only all property owners have agreed to annexation, but also the municipality and township(s) involved have entered into a formal agreement establishing—prior to filing—their agreement to the annexation. As long as the territory is contiguous, and all have agreed to the annexation, a board of county commissioners must approve, without regard to circumstances or conditions. The third of the expedited methods, found at R.C. 709.024, can be utilized only when a petition for annexation involves “significant economic development projects,” requiring proof that the annexation will result in investments in excess of ten million dollars.

The remaining method, found at R.C. 709.023, is the method for annexation that is the subject of the appeal now sought by Relator-Appellant Butler Township Board of Trustees. It is the method now most often used in this State. This method was designed to allow a simpler method of annexation when all property owners agree, but only if the petition for annexation meets seven very specific conditions. Those conditions are found at R.C. 709.023(E).

In this case, the Township Board of Trustees sought a writ of mandamus to compel the board of county commissioners to perform its duties under R.C. 709.023 on the ground that the board had specifically ruled that six of the seven conditions had been met, but had not ruled as to the seventh condition, or even ruled, more generally, that all seven conditions had been met. Relying on the statutory right of “any party” to the annexation to petition for a writ of

mandamus, the Township filed its mandamus petition. The court below has held that the Township is not “any party,” and therefore does not have standing to seek a writ of mandamus.

The court’s ruling that “any party” under the statute means only “any owner” strips the meaning from the term “any party.” Surely had the General Assembly meant 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” or “any petitioner”—which under R.C. 709.023 mean the same thing. The court’s ruling also renders meaningless the phrase “compel the board of county commissioners to perform its duties under this section.” If the right to seek a writ goes only to the annexation-seeking owner, then the only duty that would be compelled would be a duty to approve the annexation—there would be no need to have language compelling a board of county commissioners to perform “its duties under this section.”

The statutory construction analysis used by the court below does not withstand scrutiny under the principles of statutory construction, as discussed in greater detail in the memorandum in support of jurisdiction being filed by the Butler Township Board of Trustees. The court’s interpretation, in contravention of rules of statutory construction, strips the language analyzed of any real meaning. It leads to an unsound result.

If this decision stands, a board of county commissioners will be able to approve, with impunity, a R.C. 709.023 annexation that does not meet the statutory requirements. For example, R.C. 709.023(E) requires that an annexation under this section can be approved only if the annexation “does not exceed five hundred acres.” What about an annexation filed under this section—and accepted for the expedited process by the board of county commissioners—that is 600 acres? Neither the board of county commissioners’ processing of that annexation under the

R.C. 709.023 procedure nor its approval could ever be challenged by any person or entity. Certainly the owner (the now “any party” according to the court below) would not challenge the approval. The same would be true with a petition to annex territory that does not even touch the annexing municipality—or one that had less than five percent of the perimeter touching (another R.C. 79.023 requirement)—or one that contains within its territory an island of township territory. All would be blatantly unlawful – none could be challenged.

It is clear from the overall statutory scheme for annexations that only annexation petitions of a limited type 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 provides for no appeal. It is in the public interest—and it certainly was the intent of the General Assembly—that only those annexation petitions that meet the very specific statutory requirements for a specific expedited method can be approved under such a method. All others must be subject to an administrative process that does include an evidentiary hearing—in which a township has the right to present evidence and objection—and a right to administrative appeal.

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 not only irrelevant to the decision, but, more importantly, is not correct. Once territory is annexed, even if it remains a part of the Township, the township loses any road and bridge millage it would otherwise have collected. Moreover, the township loses its right to determine land use issues in the annexed territory, which decisions can have a significant impact upon the remaining township.

The decision of the court below can have far-reaching detrimental impact on the townships on this state. Even more importantly, 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 of the Relator-Appellant Butler Township Board of Trustees, the Ohio Township Association 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 AMICUS INTEREST**

The Ohio Township Association is a state-wide professional organization dedicated to the promotion and preservation of township government in Ohio. The Association, founded in 1928, is organized in 87 Ohio counties. It has over 5,200 active members, comprised of elected township trustees and township fiscal officers from Ohio's 1,309 townships. The Ohio Township Association has an additional 3,000 associate members who are dedicated to supported the interests of townships through the work of the Association.

#### **STATEMENT OF THE CASE AND FACTS**

##### **A. Procedural History**

The annexation petition that is the subject of this action was filed with the Montgomery County Board of Commissioners, pursuant to R.C. 709.023. The Court of Common Pleas dismissed Appellant Township's petition for a writ of mandamus, filed pursuant to R.C. 709.023(G), on the ground that the Board of County Commissioners had failed to find that all seven required conditions had been met. On December 12, 2008, the Court of Appeals affirmed

the dismissal on the same ground. Further detail regarding the procedural history is set forth in the Township's Memorandum in Support of Jurisdiction, which is incorporated herein.

**B. Statement of Facts**

There are no disputed facts in this case. The questions before this Court are purely questions of law, and the detailed Procedural History and Statement of Facts set forth in Butler Township's Memorandum in Support of Jurisdiction sets forth the facts necessary to a resolution of this case. Those sections are incorporated herein.

**ARGUMENTS 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, is, pursuant to R.C. 709.023(D), "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).**

In support of the first Proposition of Law, *Amicus Curiae* Ohio Township Association adopts and incorporates herein the legal arguments set forth by Relator-Appellant Township in its Memorandum in Support of Jurisdiction.

**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.**

In support of the second Proposition of Law, *Amicus Curiae* Ohio Township Association adopts and incorporates herein the legal arguments set forth by Relator-Appellant Township in its Memorandum in Support of Jurisdiction.

## CONCLUSION

The decision of the court below undermines the careful construction of the statutory scheme for allowing petitions to annex territory into municipalities as established by the General Assembly in 2002. The Ohio Township Association urges this Court to accept jurisdiction over this appeal and to reverse the decision of the court below.

Respectfully submitted,



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## PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum in Support of Jurisdiction of Amicus Curiae Ohio Township Association was sent by regular US Mail, postage prepaid, to:

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this 26th day of January, 2009.



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