

IN THE SUPREME COURT OF OHIO

State of Ohio, *ex rel*, : Supreme Court Case No. 09-0186  
Butler Township Board of Trustees, :  
: :  
: :  
Relator-Appellant, : On Appeal from the  
: Montgomery County Court of Appeals  
v. : Second Appellate District  
: :  
Montgomery County Board of County :  
Commissioners, *et al.*, : Court of Appeals  
: Case No. CA 022664  
: :  
Respondents-Appellees. :

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MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLANT, THE  
MONTGOMERY COUNTY BOARD OF COUNTY COMMISSIONERS

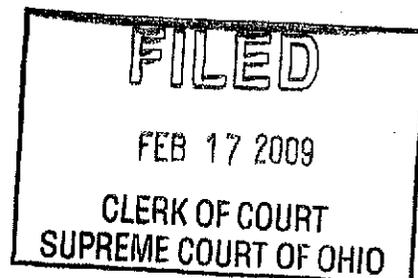
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**EXPLANATION OF WHY THIS CASE IS NOT  
A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

Appellee, the Board of County Commissioners of Montgomery County, Ohio (“Commissioners”) urges this Court to decline jurisdiction for the reason that this case does not involve a question of great or general public interest. Rather, this case involves the annexation of the property of a single owner to a municipality that utilized the special statutory procedures available where owners unanimously request annexation. The annexation petition met all of the statutory criteria for annexation and was granted by Appellee Commissioners as required by law. *See* R.C. 709.021 – R.C. 709.024. Both courts below affirmed the decision of Appellee Commissioners granting the annexation and the Appellant Township does not claim that any of the annexation criteria was not met on the merits. Appellee Commissioners urge this Court to decline to review the well-reasoned decision of the Second District Court of Appeals.

On October 31, 2007, Waterwheel Farms, Inc., the sole (100%) owner of 78.489 acres, through its statutory agent Joseph P. Moore, filed a petition to annex its entire property to the city of Union utilizing the special statutory process of R.C. 709.023, commonly referred to as an expedited type 2 annexation. Expedited type 2 annexations have objective criteria and the Commissioners’ duties to review and determine expedited annexation petitions are ministerial. The Appellee Commissioners performed all their statutory duties in this case: they accepted the petition for filing, received the city of Union’s resolution stating the services it would provide to the territory if annexed, received Butler Township’s objection to the annexation, reviewed the annexation petition, applied the statutory criteria, and granted Waterwheel’s annexation petition, all as required by law.

Appellant Butler Township does not dispute that Waterwheel Farms, Inc. is the sole owner of the annexation territory or that the expedited type 2 statutory criteria for annexation were met. It simply claims that: (1) the county commissioners have an affirmative duty to make express findings upon each of the R.C. 709.023(E)(1) to (E)(7) statutory criteria for annexation in their resolution *granting* an expedited type 2 annexation even when they are all satisfied; and (2) township trustees have standing to bring declaratory judgment, injunction and mandamus actions against county commissioners any time the commissioners grant an expedited type 2 annexation over the objection of a township. Neither of these issues is of public or great general interest. Both are addressed in the annexation statutes and were properly applied in the astute decision of the Montgomery County Court of Appeals below.

The interests of a property owner in annexations have long been recognized as paramount by this Court. See *Middletown v. McGee* (1988), 39 Ohio St.3d 284, 286, 530 N.E.2d 902, 904, *Smith v. Granville*, (1998), 81 Ohio St.3d 608, 614, 693 N.E.2d 219, 223. See also, *In re Annexation of 118.7 Acres in Miami Twp.* (1990), 52 Ohio St.3d 124, 127, 556 N.E.2d 1140, 1143. The only person with an undisputable interest in this case is Waterwheel Farms, Inc., the sole owner of the territory sought to be annexed and the only person with any property interest affected by the annexation. The rights of the petitioning property owner were recognized and affirmed by the court of appeals below in a decision that should stand without further review.

Annexation is strictly a statutory process and the procedures for annexation and for challenging an annexation must be provided for by the General Assembly. *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. The General Assembly recognized the importance of the choice of the property owner in annexation in 2001 when it created three new expedited procedures for annexation that may be

used when all (100%) of the owners of property within an annexation territory sign the petition for annexation. 2000 Am. Sub. S.B. No. 5 (“Senate Bill 5”) and R.C. 709.021, 709.022, 709.023, and 709.024.<sup>1</sup> In giving deference to the unanimous wishes of owners in special expedited annexations, the General Assembly limited: (1) the discretion of boards of county commissioners to decide the expedited annexations; (2) the participation of the state and its political subdivisions in the expedited annexation process; (3) the remedies available to challenge the decision of the county commissioners; and (4) when and to whom a remedy was available. The decision by the county commissioners’ in every expedited annexation is ministerial (and not discretionary). It is only in very limited circumstances that the decision of the commissioners in a special expedited annexation proceeding can be challenged. This case does not involve any of those circumstances, and no cause of action against the decision-maker, Appellee-Commissioners, or challenge to its decision is available in this case. The Commissioners’ decision granting the annexation is final, and should be permitted to stand.

Each of the three ‘expedited’ annexations created by the General Assembly in 2001 applies to different situations as described by this Court in *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 112 Ohio St.3d 262, 263, 2006-Ohio-6411. That case also involved the property now before this Court. In describing the “new” annexation processes available to unanimously petitioning owners, this Court stated at ¶5:

The first [type of expedited annexation] established by R.C. 709.022, commonly called an expedited type-1 annexation, applies when “all parties,” including the township and the municipality, agree to the annexation of property. The second, established by R.C. 709.023, is commonly called an expedited type-2 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,

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<sup>1</sup> There is also a fourth method of annexation provided for in R.C. 709.03 *et seq.* for annexations supported by a majority (but fewer than all) of the owners of the territory included in the annexation petition. The majority-petition process is not relevant in this action.

established by R.C. 709.024, is commonly called an expedited type-3 annexation and applies when the property to be annexed has been certified as “a significant economic development project.”

Each has a unique statutory procedure that prescribes the duties of the county commissioners, establishes the participants and their involvement in the proceedings, identifies the objective criteria for annexation, and narrowly limits the remedies available to challenge the decision of the commissioners and to whom any remedies are granted. In all expedited proceedings, it is only the unanimously consenting property owners who are granted the right to petition or challenge the decision of the county commissioners. All other issues were resolved by the statutory consequences of expedited annexations established by the General Assembly.

In an expedited type 1 annexation (annexation upon petition of the owners and agreement by the municipality and township), there is no statutory hearing or review and no remedy is provided. All of the owners must petition for the annexation of their property and the municipality and township must enter into an annexation agreement (R.C. 709.192) or cooperative economic development agreement (R.C. 701.07 “CEDA”) with regard to the annexation. Upon its receipt of the annexation petition and the applicable agreement, a board of county commissioners is required to “enter upon its journal a resolution granting the annexation” at its “next regular session” after the annexation petition is filed “without holding a hearing.” R.C. 709.022(A). There is no appeal in law or equity or any other challenge permitted by person to an expedited type 1 annexation and no writ of mandamus or other direct cause of action against the board of county commissioners.

In an expedited type 3 annexation (significant economic development project), the state director of development must certify that the project meets the development criteria of R.C. 709.024(A)(1) and (2). A municipality or township may consent or object to the

annexation. If neither objects (deemed consent) or both consent to the annexation, the commissioners are prohibited from holding a hearing and must grant the annexation at their next regular session. R.C. 709.024(D). There is no appeal or any other challenge permitted when the annexation is granted without objection. R.C. 709.024(D). If municipality or township object to an expedited type 3 annexation, the commissioners have a duty to hold a “hearing” on the petition and act on the petition within thirty days of the hearing.

Following the hearing, the commissioners are required to grant the petition if the statutory annexation criteria are satisfied and must include in their resolution granting or denying the proposed annexation “specific findings of fact as to whether or not each of the [R.C. 709.024(F)(1) to (5)] conditions listed in this division have been met.” R.C. 709.0241(E) and (F). If the annexation is granted the territory is required to remain in the township unless the township agrees it can be removed. R.C. 709.024(G).

It is only if an expedited type 3 annexation petition is *denied* by the board that the General Assembly has provided a remedy. “An *owner* who signed the petition may appeal a decision of the board of county commissioners denying the proposed annexation under section R.C. 709.07 of the Revised Code. No other person has standing to appeal the board’s decision in law or in equity.” R.C. 709.024(G). The permitted and necessary parties to an annexation appeal are identified in R.C. 709.07. While townships and municipalities are necessary parties to an appeal to the denial of an expedited type 3 petition, a board of county commissioners, the body whose decision is being challenged, is not a party. If the annexation is *granted* “there shall be no appeal in law or equity” and no remedy is available to any person, including a petitioning owner or an objecting township.

In an expedited type 2 annexation (property remains within the township despite the annexation), a board of county commissioners is required to grant an annexation petition that meets the seven objective criteria in R.C. 709.023(E)(1) – (7). Those statutory conditions include certain protections to the township and surrounding properties, including an obligation of the municipality to require buffering of any future land uses in the annexation territory that are incompatible with uses of adjacent land remaining in the township, a prohibition against the exclusion of the territory from the township following annexation, and an acknowledgment that the territory shall remain subject to the township's real property taxes. R.C. 709.023(C) and (H). If the municipality and township consent, or do not timely object to the annexation, "at its next regular session" \* \* \* "the board [of county commissioners] must enter upon its journal a resolution granting the proposed annexation" which is not subject to challenge. R.C. 709.023(D). If an objection is timely filed by the township or municipality in which the territory is and may be located, the commissioners have a duty to "review" the annexation within thirty (30) to forty-five (45) days after the petition is filed and determine if the conditions of R.C. 709.023(E)(1) to (7) have been met. If the commissioners find that each of the necessary annexation conditions has been met, the board "shall enter upon its journal a resolution granting the annexation." R.C. 709.023(F). If the commissioners finds that one or more of the R.C. 709.023(E)(1) – (7) conditions have not been met, "it shall enter upon its journal a resolution that states which of those conditions the board finds have not been met and that denies the annexation." R.C. 709.023(F).

There is no "appeal in law or equity from the board's entry of any resolution" in an expedited type 2 annexation whether it grants or denies the petition. However, the General Assembly has permitted a cause of action directly against the county commissioners only in an

expedited type 2 proceeding permitting any party to “seek a writ of mandamus to compel the board of county commissioners to perform its duties under this section.” R.C. 709.023(F). Neither the township nor a municipality is a statutory party to an expedited type 2 annexation. R.C. 709.021(D). The only parties with a petition pending or a right to compel the commissioners to act on that petition are the owners of the territory that is the subject of the annexation. It is for this reason that the commissioners must expressly identify the objective statutory conditions that are not met by the annexation – so that the owner and any court may make a determination of whether the commissioners had a duty to grant the annexation. As in the expedited type 3 annexation, it is only the owners who have the right to challenge the failure of the county commissioners to grant an expedited annexation petition.

In designing the expedited annexation processes, the General Assembly curtailed the discretion of county commissioners and required commissioners *to grant* unanimously supported annexation petitions in all three expedited processes when there was no objection made or when all the statutory conditions for annexation are met, even over the objection of townships or municipalities. It identified the “parties” to the expedited proceedings and permitted an appeal to only one person and only one circumstance: an owner has a statutory right of appeal only in an expedited type 3 annexation that was denied. *See* R.C. 709.021(D) and R.C. 709.07. It also recognized a direct action against a board of county commissioners (for the first time under the annexation statutes). In the expedited type 2 annexation process, the General Assembly permitted owners to bring a writ of mandamus against the county commissioners to compel them to perform their clear legal duty with regard to the owners’ property and its annexation. The General Assembly established statutory consequences of all expedited annexations and eliminated any appeal or challenge to an expedited annexation that was approved.

Although the General Assembly limited the discretion of county commissioners and the participation of and challenges by political subdivisions in special annexation proceedings supported by 100% of the owners of property in the annexation territory, Appellant Butler Township urges this Court to accept jurisdiction because a “board of county commissioners could approve a R.C. 709.023 annexation that does not meet the statutory requirements *knowing there would be no recourse for challenging the unlawfully approved annexation.*” Appellant’s Memorandum in Support of Jurisdiction, p. 4. First, that is not the case before this Court. In this case, all of the statutory criteria for annexation were met which the township has not denied. Second, the township asserts that this Court should take jurisdiction on the presumption that public officials will knowingly and intentionally commit unlawful acts. That is not the basis on which this Court should accept jurisdiction of this or any other case. County commissioners are presumed to act within the bounds of the law and if they act unlawfully with regard to an owners’ property, it is the owner whose rights are protected, not a political subdivision where the property will remain.

This case exemplifies the procedures the General Assembly sought to avoid. This is Waterwheel’s second attempt to annex its property to the city of Union. It first attempted to annex the same property in 2004. At that time, Waterwheel included in the annexation territory its 78.489 acre property along with an additional 1.351 acres of adjoining Jackson Road right-of-way in which the underlying fee was owned by other private owners abutting the road (to the centerline of the road) who did not sign the annexation petition. Some of the underlying fee owners of Jackson Road included in the annexation territory and Appellant, Butler Township filed an action for declaratory judgment, injunction, and mandamus against Appellee Commissioners. The owners of the fee underlying a road right-of-way asserted they were

owners who were required to sign the annexation petition on (under the R.C. 709.02(E) statutory definition of owner for the purposes of annexation) and the annexation could not be granted without their consent. In *State ex re. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 112 Ohio St.3d 262, 2006-Ohio-6411, ¶47, this Court held that “for the purposes of R.C. 709.02(E), when annexation of 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.” As the General Assembly provided by statute, it was the owners who had the right to challenge the act of the county commissioners and the owners’ property rights which were at issue.

Following this Court’s decision, in 2007 Waterwheel filed a new expedited type 2 annexation petition again including its 78.489 acre property located adjacent to and underlying Jackson Road, but this time excluding the adjoining 1.351 acres of Jackson Road right-of-way owned by others. Appellant, Butler Township objected to the annexation claiming the annexation of Waterwheel’s property included a portion property of Jackson Road and would cause road maintenance problems in violation of R.C. 709.023(E)(7), even though the city of Union had adopted and filed with the Commissioners a resolution, pursuant to R.C. 709.023(C), stating it would assume the maintenance of those portions of Jackson Road for which any maintenance problem was caused by the annexation or otherwise correct the problem.

When Appellant, Butler Township filed an objection to the Waterwheel annexation on the grounds that it failed to meet the R.C. 709.023(E)(7) criteria for annexation, Appellee Commissioners had a duty to review the annexation petition. The Commissioners performed their duty, reviewed the petition, found that the petition met all of the statutory criteria of

annexation, and on December 11, 2007, Appellee Commissioners approved the annexation petition by entering upon its journal Resolution No. 07-2156 granting the annexation.

The commissioners are not required to make express findings upon each of the criteria for annexation when the annexation is granted. By granting the annexation, they have found the conditions are met. R.C. 709.023(F). The commissioners must only make express findings upon the criteria for annexation when “one or more of the conditions specified in [R.C. 709.023](E) *have not been met.*” Only then must the board of commissioners “enter upon its journal a resolution that states which of those conditions the board finds have not been met” and deny the petition. R.C. 709.023(F). See *Lawrence Twp. Bd. of Trustees v. Canal Fulton*, 208-Ohio-2690 at ¶18-19. Appellant Butler Township seeks to have this Court accept jurisdiction to judicially impose upon county commissioners an obligation that the General Assembly and annexation statutes do not – a requirement that in every expedited type 2 annexation, boards of county commissioners are required to make express findings of findings and conclusions on each and every statutory criteria in an expedited annexation that is granted. There is no such requirement under the R.C. 709.023 and the court should not accept jurisdiction to create an obligation for county commissioners that is not prescribed by statute.

In expedited annexations, county commissioners are processing annexations supported by all of the owners of the property being annexed to a municipal corporation under three express scenarios prescribed by the General Assembly. The General Assembly has either eliminated or narrowly limited any challenges to a property owner’s desire to annex its property to a municipal corporation. County commissioners should not be required to defend their ministerial decisions in actions for injunction and declaratory judgment when they are not remedies prescribed or permitted in an expedited annexation. Mandamus is a remedy against the commissioners that is

only available to the owners of land that is included in an annexation territory who have a property right to protect and to whom the commissioners have a clear legal duty. The Montgomery County Commissioners have performed their clear legal duty and granted an annexation petition that met all of the conditions of an expedited type 2 annexation. This is not a case of general or great public interest. It is one annexation, filed by a single owner that desires its property to be located in a municipality.

### **ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW**

**Proposition of Law No. 1.** A board of trustees of a township, territory in 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)

In opposition to Proposition of Law No. 1, Appellee, Montgomery County Board of County Commissioners adopts and incorporates herein the legal arguments set forth by Appellees Waterwheel Farm, Inc., Joseph P. Moore Agent, and the City of Union in their Memorandum in Opposition to Jurisdiction.

**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 opposition to Proposition of Law No. 2, Appellee, Montgomery County Board of County Commissioners adopts and incorporates herein the legal arguments set forth by

Appellees Waterwheel Farm, Inc., Joseph P. Moore Agent, and the City of Union in their Memorandum in Opposition to Jurisdiction.

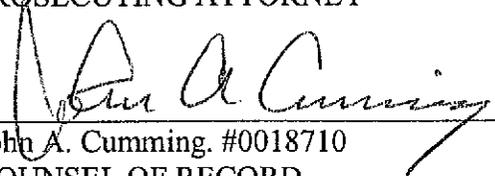
**CONCLUSION**

For the reasons discussed above, this case does not involve matters of public and great general interest. Both reviewing courts below have reviewed Waterwheel's petition for annexation, the expedited type 2 statutory conditions and the Appellee Commissioners' decision granting the annexation and found that all of the statutory conditions of annexation were met and the commissioners acted properly in granting the annexation. Those well reasoned decisions should be allowed to stand. The Appellee Montgomery County Board of County Commissioners requests that this Court refuse jurisdiction in this and allow the well-reasoned decision of the Montgomery County Court of Appeals to stand.

Respectfully submitted,

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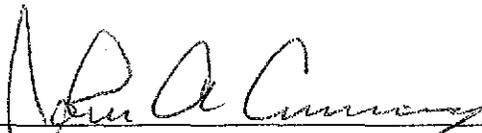
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served upon the following parties by regular U.S. mail, postage pre-paid, on the 12th day of February, 2009:

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