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.	: : : : : : : : : : :	Supreme Court Case No. 09-0186 On Appeal from the Montgomery County Court of Appeals Second Appellate District Court of Appeals Case No. CA 022664

MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEE, CITY OF UNION

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FILED
FEB 25 2009
CLERK OF COURT
SUPREME COURT OF OHIO

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APPELLEE CITY OF UNION'S
STATEMENT OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

There is no question that the State of Ohio, through its legislature, has the right to control the boundary lines of its political subdivisions. In 1998, the Ohio legislature began looking at bills to amend Ohio's annexation law that had been around since 1967 without major change. The old statutory framework allowing a majority of property owners to file an annexation petition and go through a full hearing before the board of county commissioners and ultimately a court review on indistinct standards was subject to abuses. Not the least of which were continued delays by townships seeking to keep control of "their property." The courts had long-established that a property owner should have a major say in the political jurisdiction he would like his property to be located in. This Court, in *Smith v. Granville* (1998), 81 Ohio St.3d 608, established that 100% of the property owners' desires to annex met the formerly used statutory definition of "general good of the territory to be annexed." The owner, in other words, has a major say in where his property would be best located.

In 2001, after three or more years of careful review of a number of bills for changing annexation, the General Assembly enacted Amended Substitute Senate Bill 5 ("Senate Bill 5") giving Ohio the statutory annexation scheme it currently enjoys. It was clear the townships and cities were on opposite sides of the annexation question. The property owners were caught in the middle and the county commissioners were thought to be the most impartial body to make annexation determinations. There were several considerations to be looked at – balancing the various interests of political subdivisions, the township, the city, and the property owners with processes that recognize what the legislature deemed to be the balance of interests in each process. Senate Bill 5 then established four different processes for annexation which attempted

to establish this balance. Three of the annexation processes are special "expedited" administrative proceedings that establish objective criteria for annexation and require the consent and petitions of 100% of the owners of the property being annexed. The fourth process is a quasi-judicial proceeding that only requires the support of a majority of the owners and more closely resembles the process under the former law.

The expedited type-1 process (R.C. 709.021, *et seq.*) provides for an expedited annexation where the township and city enter into an agreement and 100% of the property owners involved agree to the terms upon which the annexation would be allowed. The agreement between the township and the city could cover any number of topics as set out in R.C. 709.192 and R.C. 709.07. The expedited type-3 process allows for an expedited annexation that includes a "significant economic development project" certified by the state director of development. R.C. 709.024.

The expedited type-2 process requires 100% of the property owners to agree to annex, but does not require agreement of the township. In this process, the balance is established by setting out the areas of concern and specific requirements. The reason for that is simple – the legislature reviewed the complaints by the township and those of the owners. The owners complained that many near-frivolous lawsuits were brought to prevent the annexation of a logical piece of property causing delay and uncertainty. The old law standards of "general good of the territory" and "unreasonably large" were confusing and subject to individual court interpretation.

In the new expedited type-2 process, the legislature sought to balance the interests by requiring that expedited type-2 annexations have support of all of the property owners, requiring the petitioning property owners to give up their right of appeal of the decision of the county

commissioners, and requiring the property owners and municipality to agree to a buffer between the annexed property and the neighboring property remaining in the township if an incompatible use was established by the city zoning after annexation. R.C. 709.023(A) and (C). Expedited type-2 annexations also require that the property remain in the township so that the township continues to receive real estate taxes on the parcel. R.C. 709.023(H). The city has to identify the services that would be available to the property and the date upon which they will be provided. R.C. 709.023(C). The city must also assume the maintenance of any street or highway that is divided or segmented by the annexation boundary. R.C. 709.023(E)(7). Specifically defined criteria must be met. The county commissioners were deemed to be the body to make the determination of whether the factors are or are not met. R.C. 709.02, 709.021 and 709.023.

The city and township have been given the right to "object" to the annexation, but only before the county commissioners. R.C. 709.023(D). Any objection must be based solely upon the failure of the annexation petition to meet the conditions set forth in R.C. 709.023(E). If either objects, the board of county commissioners must review the petition under R.C. 709.023(E) not less than thirty or more than forty-five days after it is filed. If neither the municipality nor the township timely objects to the annexation, the board of county commissioners must grant it at its next regular session. R.C. 709.023(D). *See State ex rel. Butler Twp. Bd. of Trustees, et al. v. Montgomery Cty Bd. of Cty. Cmmrs.*, 112 Ohio St.3d 262, 2006-Ohio-6411, FN3. Neither governmental entity (township nor city) was given the right to proceed beyond the county commissioners. R.C. 709.021(D) and R.C. 709.023(A) and (G).

The legislature carefully balanced economic interests and zoning interests to be protected in the township in R.C 709.023, while at the same time, allowing 100% of the property owners to seek an annexation with known conditions. The owners' petition is to be "expedited." The

commissioners must decide it no later than forty-five days after it is filed. The process was to define rights, establish a set process which could be expeditiously concluded in a specific time. The very purpose was to cut down the continued unjustifiable delays, limit the numerous lawsuits by the townships whose interests had been protected to a degree determined to be appropriate by the Ohio legislature. To allow the township to have greater rights than the owners themselves puts the new annexation law right back where the old annexation law left off – little or no reason to protect claimed township interests not identified by the Ohio legislature. This Court should not buy into this rationale.

APPELLEE CITY OF UNION'S ARGUMENT IN OPPOSITION TO APPELLANT'S PROPOSED PROPOSITIONS OF LAW

Appellant's 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, City of Union adopts and incorporates herein the legal arguments set forth by Appellee Joseph P. Moore, Agent for Annexation Petitioner, Waterwheel Farm, Inc. in its Memorandum in Opposition to Jurisdiction.

Appellant's Proposed Proposition of Law No. 2. A board of county commissioners reviewing an annexation petition filed pursuit 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, City of Union adopts and incorporates herein the legal arguments set forth by Appellee Joseph P. Moore, Agent for

Annexation Petitioner, Waterwheel Farm, Inc., in its Memorandum in Opposition to Jurisdiction.

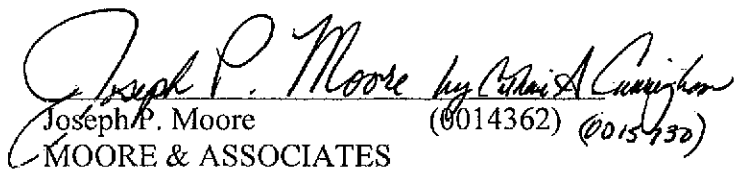
CONCLUSION

For the reasons discussed above, this case does not involve matters of public and great general interest. Both courts below reviewed Waterwheel's petition for annexation, the expedited type-2 statutory conditions and Appellee Commissioners' decision granting the annexation. Both courts 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. An owner should not be required to re-file a third annexation simply because a township erroneously claims the commissioners' resolution contains a technical error.

The property owner had the right to have its expedited type-2 petition determined in forty-five days. The property owner also had the right to bring a writ of mandamus against the county commissioners to compel them to perform their duties if necessary. The General Assembly did not grant townships those rights or remedies. Butler Township has not claimed any error on the merits of the petition. All of the harm it complains of are the legal consequences of every annexation.

Butler Township should not be permitted to continue to frustrate the annexation of territory that was clearly lawful and will remain in Butler Township in any event. Appellee, City of Union 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 25th day of February, 2008:

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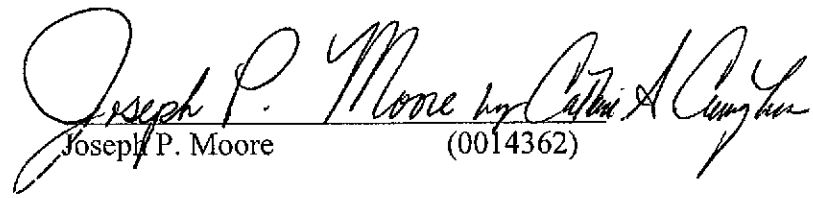

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