

ORIGINAL

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

Defendants-Appellants.

SUPREME COURT OF OHIO
CASE NO.: 2009-0186

ON APPEAL FROM THE
MONTGOMERY COUNTY COURT
OF APPEALS, SECOND
APPELLATE DISTRICT

COURT OF APPEALS
Case No. CA-022664

BRIEF OF *AMICI CURIAE* THE OHIO TOWNSHIP ASSOCIATION AND THE
COALITION OF LARGE OHIO URBAN TOWNSHIPS ON BEHALF OF THE
RELATOR-APPELLANT BUTLER TOWNSHIP BOARD OF TRUSTEES

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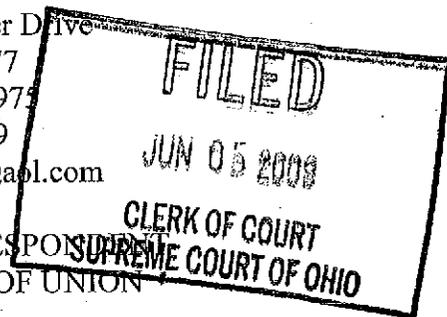
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I. STATEMENT OF AMICI INTEREST

Amici curiae The Ohio Township Association (“OTA”) and The Coalition of Large Ohio Urban Townships (“CLOUT”) respectfully request this Court to reverse the decision of the Second District Court of Appeals.

Amicus curiae OTA is a statewide professional organization dedicated to the promotion and preservation of township government in Ohio. OTA, founded in 1928, is organized in eighty-seven (87) counties and has over 5,200 active members comprised of elected township trustees and township fiscal officers (clerks) from Ohio’s 1,308 townships. OTA has an additional 3,000 associate members.

Amicus curiae CLOUT is a group of large, urban townships in Ohio that have formed a committee under the auspices of the OTA for the purpose of providing its members with a forum for the exchange of problems, issues and solutions unique to large urban townships. CLOUT also provides input to the OTA. Membership in CLOUT is limited to those townships having either a population of 15,000 or more in the unincorporated area, or a budget over \$3,000,000.00.¹

¹ CLOUT consists of the following members; Anderson Township/Hamilton County, Austintown Township/Mahoning County, Bainbridge Township/Geauga County, Batavia Township/Clermont County, Bath Township/Summit County, Boardman Township/Mahoning County, Butler Township/Montgomery County, Clearcreek Township/Warren County, Colerain Township/Hamilton County, Columbia Township/Hamilton County, Concord Township/Lake County, Deerfield Township/Warren County, Delhi Township/Hamilton County, Fairfield Township/Butler County, Genoa Township/Delaware County, Green Township/Hamilton County, Hamilton Township/Warren County, Harrison Township/Montgomery County, Howland Township/Trumbull County, Jackson Township/Stark County, Jefferson Township/Franklin County, Lake Township/Stark County, Liberty Township/Butler County, Liberty Township/Delaware County, Liberty Township/Trumbull County, Madison Township/Franklin County, Madison Township/Lake County, Miami Township/Clermont County, Miami Township/Hamilton County, Miami Township/Montgomery County, Mifflin Township/Franklin County, Orange Township/Delaware County, Perkins Township/Erie County, Perry Township/Lake

As the form of government closest to the citizens of Ohio, townships have significant statutory duties and responsibilities to their residents, which include providing adequate services. These services include safety services, road maintenance and land use planning and zoning controls. Annexation of township property adversely impacts the ability of a township to fund and maintain adequate service levels and to preserve the quality of life for its residents.

With the 2002 annexation amendments, the State Legislature provided for three types of expedited annexation procedures. This Court described the three expedited types of annexation as follows:

The first, 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, 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.” *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery County Board of County Commissioners* (2006), 112 Ohio St.3d 262, 2006-Ohio-6411.

The instant case revolves around the right of a township to seek a writ of mandamus in an expedited type-2 annexation and the duties of the board of county commissioners in regards to an expedited type-2 annexation.

County, Perry Township/Stark County, Perrysburg Township/Wood County, Pierce Township/Clermont County, Plain Township/Stark County, Prairie Township/Franklin County, Russell Township/Geauga County, Springfield Township/Hamilton County, Springfield Township/Summit County, Sugarcreek Township/Greene County, Sycamore Township/Hamilton County, Sylvania Township/Lucas County, Symmes Township/Hamilton County, Union Township/Clermont County, Violet Township/Fairfield County, Washington Township/Franklin County, Washington Township/Montgomery County, Weathersfield Township/Trumbull County, West Chester Township/Butler County.

The Court of Appeals' decision in this case interpreted the provisions of R.C. 709.023(G), in particular, the phrase "any party" and adopted a definition of the term "any party" that leads to results unintended by the State Legislature. The decision of the Court of Appeals, if allowed to remain intact, effectively removes any duty of a board of county commissioners to follow the letter of the law when reviewing an expedited type-2 annexation, even when an annexation petition does not meet the requirements of R.C. 709.023. More importantly, the decision eliminates any meaningful oversight over actions taken by a board of county commissioners in an expedited type-2 annexation. This is the aspect most troubling to *Amici curiae*, as, in most cases, only the township has any interest in challenging an improperly approved annexation.

Amici curiae OTA and CLOUT are strong proponents of the 2002 annexation amendments and played active roles in the work leading to the enactment of the amendments. However, neither OTA nor CLOUT ever imagined that R.C. 709.023 would be interpreted in such a way that would remove a township's right to seek a statutorily guaranteed writ of mandamus in cases where a board of county commissioners does not comply with its duties under Ohio law.

This Court should reverse the erroneous decision of the Second District Court of Appeals and ensure that townships continue to have the ability to seek a writ of mandamus in cases where the decisions of the board of county commissioners in expedited type-2 annexations pursuant to R.C. 709.023 are counter to the statute.

II. STATEMENT OF THE CASE AND FACTS

For purposes of this brief, OTA and CLOUT hereby adopt the Statement of the Case and Facts as set forth by the Relator-Appellant, Butler Township Board of Trustees, and incorporates the same by reference as if fully rewritten herein.

III. ARGUMENT

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, therefor, 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).

Annexations have a tremendous and typically adverse impact on townships. The expedited annexation process and, in particular, the expedited type-2 procedure, is no exception to this rule and will, in many instances, have a more negative effect upon a township than that of a regular annexation. The Respondent-Appellee has claimed that there is no real impact upon a township when property is annexed to a city under the expedited type-2 annexation, in that the property still remains part of the township. Quite frankly, nothing could be further from the truth.

Property annexed under the expedited type-2 annexation results in a loss of unincorporated area to the township. The transference of township territory from an unincorporated area to an incorporated area decreases township tax revenue in numerous ways. First, townships will no longer collect their road and bridge millage within incorporated areas of the township. Second, the inside millage previously received by the township in the area annexed must now be reallocated and shared with the annexing municipality. Third, if a township provides safety or road services through a township

fire, police or road district, any voted levies funding these districts will cease being collected within the annexed territory, thereby reducing district revenues. Fourth, once territory is annexed into a municipality, it is not uncommon for the annexing municipality to “TIF” or abate the real estate taxes generated within the recently annexed area, thereby converting township revenues to its own use.

The negative impacts of an expedited type-2 annexation are not limited to the financial realm. These annexations remove a township’s ability to regulate the annexed area under its zoning process. Also, property owners within the annexed territory are now eligible for services from both the municipality and township. In the case of fire or police services, confusion will likely result in that each will be obligated to respond to calls for emergency service within the annexed area. Moreover, the overlapping jurisdictional boundaries created under the expedited type-2 process create an entirely new voting block within the annexed area. Persons residing in the annexed territory will be residents of both the township and the municipality. As a result of this dual residency, these residents will be far less likely to support, let alone vote for, township levies for fire or police services when they are receiving these services from the municipality.

The expedited annexation process crafted by the State Legislature and, in particular, the expedited type-2 procedure, was the result of a compromise among competing interests. More to the point, R.C. 709.023 represents an attempt to strike a balance among townships, municipalities and property owners by providing for a more streamlined approach to annexations in which all owners consent, **provided** that the seven specific conditions set forth in R.C. 709.023(E) are met. If the conditions set forth in R.C. 709.023 are satisfied, OTA, CLOUT and their respective members recognize and

accept that the annexation petition will and must be granted. Conversely, it is also the expectation of OTA, CLOUT and their members, that townships may avail themselves of the mandamus remedy negotiated as part of the expedited type-2 procedure in cases such as the one at hand. Simply stated, the decision of the Court of Appeals undermines the plain meaning of the statute and the intent of the State Legislature to permit townships to compel a board of county commissioners to perform the duties conferred upon them.

The Court of Appeals examined R.C. 709.023(G) and determined that the Butler Township Board of Trustees did not have standing to seek a writ of mandamus. Following the approval of Waterwheel Farm's annexation petition over Butler Township's written objection, Butler Township sought a writ of mandamus relying on the language of R.C. 709.023(G) which provides that "any party may seek a writ of mandamus", as there was a legitimate question of fact regarding whether the board of county commissioners had found that one of the conditions provided for by R.C. 709.023(E) had been met, as required by that section.

The Court of Appeals determined that "any party," as that term is used in R.C. 709.023(G), means only an owner of the property being annexed. The court stated that "while a board of township trustees or a municipal corporation may be interested persons", they are not a party to the annexation having the right to seek a writ of mandamus under R.C. 709.023(G). *State ex rel. Butler Township Board of Trustees v. Montgomery County Board of County Commissioners* (2008), 2008 WL 5196445 (Ohio App. 2 Dist.), 2008 -Ohio- 6542 at ¶24. The Court of Appeals based this decision on its reading of R.C. 709.021, which provides that a township is a party to an expedited annexation, but only for the purposes of R.C. 709.022 and R.C. 709.024. The court

reasoned that if the State Legislature had wanted a township to be a party under R.C. 709.023, it would have included townships in the definition of party in R.C. 709.021. However, this Court has determined on many occasions that “[I]f such intent is clearly expressed therein, the statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged; ... and in the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.” *Wachendorf v. Shaver* (1948), 149 Ohio St. 231; See also, *State ex rel. Smith v. Columbus* (1986), 28 Ohio St.3d 94, 95; *State ex rel. McGraw v. Gorman* (1985), 17 Ohio St.3d 147, 149. This Court has also consistently ruled that words in a statute are to be given their plain meaning, unless legislative intent indicates otherwise. *Lake County National Bank v. Kosydor* (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.

Black’s Law Dictionary defines the term “party” as, “[A] person concerned or having taken part in any affair, matter, transaction, or proceeding...” “Party” Black’s Law Dictionary 775 (Abridged 6th Ed. 1991). Further, Merriam-Webster’s Online Dictionary’s third definition for the term “party” is, “a person or group participating in an action or affair.” “party” (2009). In *Merriam-Webster Online Dictionary*. Retrieved May 28, 2009, from <http://www.merriam-webster.com/dictionary/party>. By its own admission, the Court of Appeals acknowledges that townships have an interest in annexation petitions. *State ex rel. Butler Township Board of Trustees v. Montgomery County Board of County Commissioners* (2008), 2008 WL 5196445 (Ohio App. 2 Dist.), 2008 -Ohio- 6542 at ¶24. And clearly, a township, which either consents or objects to an

annexation petition by resolution, is taking part or participating in the annexation process provided for under R.C. 709.023 and meets the definition of “any party.” By the plain meaning of the term, a township is a party to the annexation and has the right to seek a writ of mandamus. The Court of Appeals for the Fifth District has accepted the plain reading of the statute that a township is a party under R.C. 709.023(G) and found a mandamus action to be the proper remedy of a township under the statute. *Lawrence Township Board of Trustees v. Canal Fulton* (2009), 2009 WL 418752 (Ohio App. 5 Dist.), 2009-Ohio-759.

The Court of Appeals also failed to follow the principles of statutory construction by ignoring the plain meaning of the term “any party” and instead looked outside of the statute to find a definition of the term. The Court of Appeals determined that because the State Legislature failed to include R.C. 709.023 in the definition of “party” in R.C. 709.021, the intent was to preclude a township from having standing for a mandamus action pursuant to R.C. 709.023(G). However, the Court of Appeals failed to reconcile its interpretation of the words “any party” with the language of R.C. 709.024(G). R.C. 709.024(G) states that, “[A]n owner who signed the petition may appeal a decision of the board of county commissioners...” Logic dictates that if the State Legislature intended to limit the mandamus rights of R.C. 709.023(G) to only the owner, it would have used the term “owner” rather than the term “any party.”

The State Legislature intentionally used the words “any party” in order to permit any party to the annexation to “compel the board of county commissioners to perform its duties.” Further, it is clear from the language of R.C. 709.023 that a township is a party to the annexation, as R.C. 709.023(B) requires that the township be notified of the filing

of an annexation petition and, pursuant to the provisions of R.C. 709.023(D), a township is permitted to either consent or oppose an expedited type-2 annexation by resolution. The State Legislature enacted R.C. 709.023(G) with a check and balance system in mind, giving a township the right to seek a writ of mandamus to compel the board of county commissioners to do its duty under the code in the case of an improperly approved annexation petition. By ignoring the plain meaning of the statute, the Court of Appeals has single-handedly removed the check and balance system crafted by the State Legislature.

The Court of Appeals' failure to follow the plain meaning of the statute leads to results that the State Legislature surely did not intend. It is well established that courts are to construe statutes to avoid unreasonable or absurd results. *State ex rel. Mason v. State Employee Relations Bd.* (Franklin Cty. 1999), 133 Ohio App.3d 213, 219, 727 N.E.2d 181, 185; See also *State ex rel. Dispatch Printing Co. v. Wells* (1985), 481 N.E.2d 632; *State ex rel. Haines v. Rhodes*, (1958), 151 N.E.2d 716; *Mishr v. Board Of Zoning Appeals Of Village Of Poland* (1996), 76 Ohio St.3d 238, 1996 -Ohio- 400, 667 N.E.2d 365. However, the Court of Appeals' decision makes no sense from a statutory construction perspective or a practical and common sense standpoint. If only an owner of property has standing to seek a writ of mandamus, then presumably (and, according to the court below) this remedy would be applicable solely in instances when an annexation petition is denied. If, however, an annexation petition is approved, it is hard to imagine a circumstance whereby an owner would essentially seek to overturn the approval sought by and obtained for the owner. Under the ruling of the lower court, an owner could request the annexation of property which fails to comply with the criteria of the expedited

type-2 procedure and, if approved, would have no worry of a challenge. This situation could well lead to the annexation of noncontiguous property, property in excess of 500 acres, and the creation of isolated township areas now completely surrounded by the newly annexed territory – all of which is forbidden in an expedited type-2 annexation. If a township does not have standing to seek a writ of mandamus to compel a board of county commissioners to perform its duties under R.C. 709.23 (which, in this case, is approve a petition only if it complies with all seven statutory criteria), the real result of the Court of Appeal’s decision is that the State Legislature’s conditions of approval become meaningless and the board of county commissioners only duty becomes to “rubber stamp” annexation petitions as submitted.

In *Lawrence Township Board of Trustees v. Canal Fulton*, 2009 WL 418752 (Ohio App. 5 Dist.), 2009-Ohio-759, the Stark County Board of Commissioners approved an annexation petition under R.C. 709.023 when there was a question as to whether an individual who did not sign the petition, but whose property was included in the annexation, was an owner. The Court of Appeals for the Fifth District ruled that “[A] writ of mandamus is an appropriate remedy should a board of county commissioners fail to perform its statutory duty in regards to a type-2 annexation petition.” *Id.* at ¶30. The Fifth District stated that in order to be entitled to a writ of mandamus, the township must establish that one of the conditions was not met. In the case, the court found that there was a legitimate issue as to whether the individual was an owner for purposes of the statute and that approval of the annexation was improper. The Fifth District determined that:

Although it is easier to conceptualize Appellant's challenge as being one seeking prohibition as opposed to mandamus given the board of commissioners' resolution approving annexation, it is conceivable to frame Appellant's mandamus complaint as one to compel the board of commissioners to reject the annexation petition because of the lack of signatures of the owners of the property to be annexed. Therefore, mandamus may lie. The crux of the issue becomes whether board of commissioners had a clear legal duty to approve [or reject] the petition. *Id.* at ¶36.

As in the instant case, the township was and is the only party with an interest to insure that all conditions of R.C. 709.023(E) have been met. Unlike the Fifth District, the Court of Appeals, in this case, failed to recognize the absurd result that occurs by removing the right of a township to seek for a writ of mandamus when a board of county commissioners has failed to comply with its statutory duties.

This Court should reject the Court of Appeals' determination that a township is not "any party" for purposes of R.C. 709.023(G) in order to preserve the intent of the State Legislature. By rejecting the decision of the Court of Appeals, this Court would also avoid the absurd results that will undoubtedly occur if the Court of Appeals' precedent is allowed to stand.

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.

Before a board of county commissioners approves an annexation petition filed under R.C. 709.023, the board must find that the seven conditions of R.C. 709.023(E) have been met. Those conditions are:

(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.

(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 percent 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.

If the petition does not meet one or more of the above conditions, the board of county commissioners must deny the petition. R.C. 709.023(F).

The Court of Appeals determined that a board of county commissioners has no duty to address all of the conditions of R.C. 709.023(E) in order to approve an annexation petition. *State ex rel. Butler Township Board of Trustees v. Montgomery County Board of County Commissioners* (2008), 2008 WL 5196445 (Ohio App. 2 Dist.), 2008 -Ohio-6542 at ¶36. The Court of Appeals relies upon another decision of the Fifth District

Court of Appeals, which concurred with a lower court ruling that a board of county commissioners is not required to make express findings that analyze how each condition was met. *Lawrence Township Board of Trustees v. Canal Fulton* (2008), 2008 WL 2572612 (Ohio App. 5 Dist.), 2008-Ohio-2690. However, the Fifth District stated that:

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. As the trial court correctly noted, the statute only requires “reasons” when it rejects a petition. *Id.* at ¶30. (*emphasis added*)

Clearly, the Fifth District found, as controlling, that the Stark County Board of County Commissioners’ resolution made a determination that all seven conditions had been met. It can be taken from the Fifth District’s ruling that a board of county commissioners is not required to give reasons for approval, but that a board is required, in order to fulfill its duties under R.C. 709.023, to provide a statement in its resolution finding that all conditions have been met. The Fifth District determined that a writ of mandamus was not appropriate as the board of county commissioners had stated that it had found that all conditions of R.C. 709.023 had been met, but did note that mandamus was not precluded if appropriate. *Id.* at ¶22.

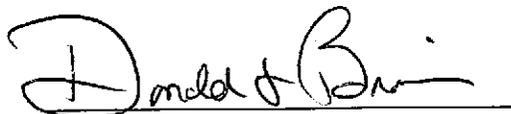
The Court of Appeals misinterpreted the decision of the Fifth District. The Fifth District Court clearly concluded that the Stark County Commissioners found that all statutory conditions had been met. Unlike their Stark County counterparts, the Montgomery Board of County Commissioners specifically stated that the first six conditions had been met, but was silent as to any determination that the seventh condition had been met.

Without a clear determination that all conditions were met, it must be concluded that the board of county commissioners did not fulfill its duties under the statute. Alternatively, silence on the part of a board of county commissioners as to one or more conditions leads one to the conclusion that the unaddressed condition(s) have not been met and that the annexation was improperly approved. Even if a board of county commissioners was not required to explicitly explain how each condition was met, a board of county commissioners must, at the very least, state that all seven conditions were met in order to fulfill its statutory obligation. The Montgomery Board of County Commissioners failed to meet the requirements of the statute, and the Court of Appeals failed to issue a writ of mandamus requiring that the resolution approving the annexation petition be rescinded.

IV. CONCLUSION

Amici curiae OTA and CLOUT respectfully request this Court to reverse the decision of the Court of Appeals. R.C. 709.023(G) permits any party to seek a writ of mandamus to compel the board of county commissioners to perform its duty under the statute. The duties of a board of county commissioners include determining whether an annexation petition filed as an expedited type-2 annexation meets the requirements of R.C. 709.023 and journalizing a resolution stating whether or not the seven conditions were met. Removing a township's ability to seek a writ of mandamus effectively removes the power to compel a board of county commissioners to approve only those annexation petitions for which a board has found that all statutory requirements have been met.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Amici Curiae The Ohio Township Association and The Coalition of Large Ohio Urban Townships is being mailed to all parties entitled to service under Rule 5 of the Ohio Rules of Civil Procedure on the 5th day of June, 2009.



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