

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL.	:	
Butler Township Board of Trustees	:	
	:	On Appeal from the
Relator-Appellant,	:	Montgomery County Court
	:	Of Appeals, Second Appellate
v.	:	District
	:	
Montgomery County Board	:	Court of Appeals
of County Commissioners, <i>et al.</i> ,	:	Case No. CA-022664
	:	
Respondents-Appellees.	:	Supreme Court Case No. 09-0186

**MERIT BRIEF OF
RELATOR-APPELLANT BUTLER TOWNSHIP BOARD OF TRUSTEES**

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 Notice of Appeal filed January 26, 2009

 Opinion filed December 12, 2008

 Final Entry filed December 12, 2008

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STATEMENT OF THE FACTS

A. Procedural Background

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, both 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 (hereafter "Township"), as was its right pursuant to R.C. 709.023, 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 filed its resolution with the Board of County Commissioners, pursuant to R.C. 709.023(D), prior to the Board's review of the subject annexation petition. The Board of County Commissioners thereafter passed a resolution approving the annexation. In its resolution, the Board specifically found that six of the seven statutory conditions had been met; however, it made no finding as to whether the seventh condition had been met. Nor did it make a finding that all conditions had been met.

The Township filed a petition seeking a writ of mandamus, pursuant to R.C. 709.023(G), which provides that "any party" may seek a writ of mandamus "to compel the board of county commissioners to perform its duties under this section." The basis for that petition was that the Board had improperly issued a resolution approving the annexation without having made a finding that all required conditions had been met. The Township asserted that the Board's Resolution was, therefore, 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, ruling that “any party” means only any owner. (Opinion, pp. 12, 13). It is this decision from which the Butler Township Board of Trustees has appealed. The Township filed its Notice of Appeal on January 26, 2009.

B. Statement Regarding Facts

There are no disputed facts in this case. The annexation petition that is the subject of this action was filed pursuant to R.C. 709.023. That section provides that such a petition can be approved only if the board of county commissioners with which the petition was filed reviews the petition and finds that all of the following seven conditions, set forth in R.C. 709.023(E), have been met:

- (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 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.

As is evident from the face of the Board's Resolution No. 07-2156 approving the annexation petition (Record - Exhibit C to Motion for Preliminary Injunction), the Board expressly found that the first six of the seven necessary statutory conditions had been met, but did not make a finding as to the seventh condition set forth in R.C. 709.023(E)(7). As noted above, it is the seventh condition that had been the subject of an objection filed by the Township, which objection was addressed prior to the Board's approval, by the Agent.

LEGAL ARGUMENT

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 an expedited procedure for annexation, an annexation under this section can be approved only if a board of county commissioners finds that all seven specific requirements have been met. This section provides that there cannot be an appeal from the county commissioners' decision. R.C. 709.023(G). However, that same subsection makes it clear that a board of county commissioners' rulings with regard to an annexation of this type is not completely without the possibility of review. Critical to this appeal is the portion of subsection (G) that, while "there is no appeal from the board's entry of any resolution under this

section,” “any party” may 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 issued a resolution approving the annexation of territory lying within Butler Township, Montgomery County, without having found that all required conditions had been met (as discussed in Proposition of Law No. 2). Accordingly, 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” as that term is used in R.C. 709.023(G), and, therefore, lacked standing to seek a writ of mandamus. (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. In fact, no party can challenge a board of county commissioners’ decision regarding a R.C. 709.023 annexation if that decision is to approve the annexation. The decision was in error and must be reversed.

This appeal hinges on the application of the term “any party,” as used in R.C. 709.023(G). Acknowledging that there is no statutory definition of “any party” for purposes of R.C. 709.023, the court below 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

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.

proposed for annexation, and the agent for the petitioners.’” The Township does not deny that this is the definition set forth in R.C. 709.021; however, that definition specifically applies only to R.C. 709.022 and 709.024. There is no definition of “party” for purposes of R.C. 709.023 – the section at issue in this appeal. The court’s review of the R.C. 709.021 definition of “party” should, therefore, have stopped there.

Nonetheless, in seeking support for its conclusion that a township is not “any party” who can seek a writ of mandamus to challenge an unlawful annexation of township territory, the court below 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. First, the “significance” is not explained. If the court was concluding that since a township and municipality are included in the definition of “party” for other sections, then they cannot be “any party” 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, like the city and the township, the petitioner is included in other sections but not in a R.C. 709.023 definition.

Moreover, had the General Assembly intended that only an owner could seek a writ of mandamus, it just as “surely” could have used the language “any owner,” as opposed to “any party.” Had the General Assembly intended that a writ of mandamus could be sought only when there was a denial of an annexation, then just as “surely” the General Assembly could have so stated. In fact, the General Assembly did take this approach in R.C. 709.024, another expedited method which also provides only limited judicial review. That section provides that only “an owner” may appeal a decision of the board of county commissioners, and that appeal can be only from a decision “denying the proposed annexation.” This approach was not taken for R.C. 709.023. Rather, the General Assembly chose to allow some judicial oversight if a board of

county commissioners was not performing its duties under R.C. 709.023—and it provided that “any party,” not just “any owner,” could seek a writ of mandamus for that purpose. The breadth of the language the General Assembly chose in R.C. 709.023 points in the direction opposite to that chosen by the court below. The court below ignored this clear intent, and further failed to apply basic statutory interpretation principles.

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. This principle of statutory construction was ignored by the court below. A plain and ordinary meaning can be found in the first definition of “party” in Black’s Law Dictionary, 5th Ed.: “A person concerned or having or taking part in any affair, matter, transaction or proceeding, considered individually.” The Township fits these definitions.² As the annexation petition is of territory within the Township, the township is certainly concerned; the Township also, by statutory design, takes part in the proceedings. And one need not turn to a dictionary to conclude that the term “any” does not mean only one party—an owner. It is completely obvious that a legislature that wanted only owners to have the right to seek a writ of mandamus would surely have chosen the term “any owner,” rather than “any party.”

The statutory procedures specific to a R.C. 709.023 annexation provide a better 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

² Other Black’s 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, therefore, seek a writ of mandamus.

(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 absolutely no basis on which to conclude that only the signing owner is “any party” as used in R.C. 709.023(G).

One of the “duties under this section” referred to in R.C. 709.023(G) is to approve only those annexations that meet the seven statutory conditions. It is clear from the language of the statute that, because specific conditions must be met before such an annexation can be approved, the legislature intended a limited remedy to keep a board of county commissioners from approving an annexation petition that does not meet the requirements of R.C. 709.023. In ruling that a mandamus can be sought “only in the case where the petition is denied,” and only by an owner, the court below erroneously interpreted “any party” in a way that turns the “duties under this section” into simply a duty to approve the annexation. Surely, and clearly, one of the board of county commissioners’ duties under the section is to deny an annexation petition if it has not found that all seven statutory conditions have been met.

Another principle of statutory construction ignored by the court below is that 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. A definition of “any party” that would allow the unreasonable, and indeed absurd, results illustrated

below—which the trial court’s definition clearly would allow—contravenes this basic principle of statutory construction.

One example of an absurd result that would result from the statutory interpretation of the court below is as follows. Suppose a board of county commissioners 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 that annexation would not seek a writ of mandamus to “compel the board of county commissioners to perform its duties under this section”—which duty would be to deny the annexation. Were the ruling of the court below to be upheld, there would be no recourse whatsoever if the board granted the 700-acre annexation petition under the expedited procedure. The “duty” becomes merely a request, a suggestion by the General Assembly.

Another example similarly illustrates the absurd result that would flow from the decision of the court below. Suppose a board of county commissioners had accepted for filing and was processing under R.C. 709.023 a petition of territory that was not contiguous to the municipality -- 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.

Surely the General Assembly’s inclusion of a mandamus remedy in R.C. 709.023 was to assure that boards of county commissioners could not wrongly approve, without any possible judicial 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 only to owners.

The issue of whether a township is “any party,” and therefore has statutory standing with regard to a R.C. 709.023 annexation petition was put to a test in the decision of another court of appeals issued after the decision of the court below. In *Lawrence Township Board of Trustees v. City of Canal Fulton*, Stark App. No. 2008CA00021, 2009-Ohio-759, the Fifth District Court of Appeals reviewed a decision from the Township’s action seeking a declaratory judgment, injunctive relief and a writ of mandamus. The underlying issue in that case was whether an owner of railroad right-of-way was an “owner,” as defined in R.C. 709.02(E), whose signature was therefore required in order for the R.C. 709.023 annexation petition to be approved. (One of the statutory requirements for a R.C. 709.023 annexation petition is that all of the owners had signed the petition.)

The Court of Appeals in that case 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. R.C. 709.023(G).” It went on to rule that in order to be entitled to a writ of mandamus, the Township was required to establish that the railroad owner was an “owner” as defined by R.C. 709.02(E) and that, therefore, the petition lacked one-hundred percent of the owners’ signatures. The court noted that it would be easier to conceptualize the Township’s challenge as being one seeking prohibition as opposed to mandamus given the board of commissioners’ resolution approving annexation. However, it went on to conclude that since it was “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 *** mandamus may lie.” *Id.* at ¶36.³ While the Township had standing, the court determined that there was not sufficient evidence in the record to determine the owner question, and remanded the case for further review on that issue. Even the dissenting judge, who disagreed as to the underlying owner question, agreed that the matter was properly before the court on the Township’s mandamus action, confirming that “R.C. 709.023(G) limits a township to a mandamus action when challenging a petition filed under R.C. 709.023***.”

Had the *Lawrence* court rejected the Township’s action on the ground it had no statutory standing to challenge the approval of an annexation petition that arguably did not contain the statutorily-required one-hundred percent of owner signatures, then the result would be much like the hypothetical scenarios discussed above. The limitation of the right to mandamus could result in approval of an annexation petition that requires that all owners have signed, when all owners had not signed—a finding that could issue with impunity. And a case such as the one ultimately decided by this Court in 2006—regarding whether certain property owners were “owners” for purposes of annexation, and therefore entitled to a voice in the annexation of their property—might also never have reached this Court on an important issue of statutory interpretation, a case in which this Court affirmed a reversal of the board of county commissioners and the trial court, both of which had ruled that the Township did not have standing. See *State ex rel. Butler*

³ See also *Washington Twp. Bd. of Trustees v. City of Mansfield City Council*, Richland App. Nos. 03CA85, 03CA97, 2004-Ohio-4299, an earlier Fifth District Court of Appeals decision in which the court rejected a township’s right to seek a declaratory judgment in conjunction with a R.C. 709.023 appeal but 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.

Township Board of Trustees v. Montgomery Cty. Board of Commrs. (2006), 112 Ohio St.3d 262, 2006-Ohio-6411, 858 N.E.2d 1193.⁴

The Township also rejects one of the factors relied upon by the court below in support of its statutory interpretation. The court reasoned that in a R.C. 709.023 annexation “the land annexed is not withdrawn from the township, and the township suffers no economic detriment by the approval of the annexation.” (Opinion, pp. 9-10). There was before the court no evidence – or real argument – on this issue, only the drumbeat of the city that a township is not harmed by annexation by virtue of the fact that the statute requires that when property is annexed pursuant to R.C. 709.023, the territory stays within the township, thus creating an area that is in both the township and the city. If a township suffers no detriment—economic or otherwise—then one must wonder why the township is a defined “party” for purposes of R.C. 709.022 and R.C. 709.024, why the township has the right to object to the annexation pursuant to R.C. 709.023, why the township is a “necessary party” in any hearing or appeal regarding an annexation petition filed pursuant to R.C. 709.032, a non-expedited annexation. There is, of course, considerable impact—detriment—to a township when territory within its borders is annexed. Amici Curiae Ohio Township Association and the Coalition of Large Ohio Urban Townships aptly describe in their amicus brief the impact, as follows:

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

⁴ Even though the Second District Court of Appeals then expressed doubt about the Township having “standing” to pursue the issue, that case went forward without the issue being decided because some of the owners whose properties had been included in the unlawful annexation petition without their having signed the petition had been included as plaintiffs in the action. However, it is an example of an important legal issue that might never receive judicial review were this Court to allow “any party” to be re-defined as “any owner.”

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.

(Amici Curiae Brief, pp. 4-5). To the extent the trial court’s decision was based upon its unsupported conclusion that a township suffers no economic detriment by the approval of a R.C. 709.023 annexation, such reasoning must be soundly rejected as a basis for determining whether a township is “any party” for purposes of R.C. 709.023(G).

The ruling of the court below, if affirmed, 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. This decision, without statutory or any other support, must be

reversed. Were it be affirmed, blatantly unlawful annexations could be approved with absolutely no possibility of challenge. And important issues of statutory interpretation regarding R.C. 709.023 annexations could be wrongly decided by boards of county commissioners 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 Butler Township Board of Trustees had a statutory role in the annexation, as explained above. It is clearly “any party,” a party important to assuring that a board of county commissioners “perform its duties under this section” not only in its denials of R.C. 709.023 annexation petitions but also, and perhaps more importantly, in its approvals. R.C. 709.023 is clear. Only those annexations that meet the statutory conditions can be approved. Were this Court to affirm the decision below, that basic requirement would be rendered merely discretionary – and certainly unenforceable.

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, noted above, 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.
- (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.

Given its decision on standing, 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 Twp.* does not support the ruling of the court below. The board of county commissioners' resolution at issue in this *Lawrence Twp.* 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 specific language in rejecting the township's argument that the board had not fulfilled its duties. It explained,

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, emphasis added. 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 while remaining silent as to the seventh condition, not even stating, as the Stark County Board had, that all conditions had been met.

This 2008 *Lawrence Twp.* 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, it 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 condition. Utilizing the legal principle that the expression of one is the exclusion of another, the only reasonable conclusion to be drawn from the Board's 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.

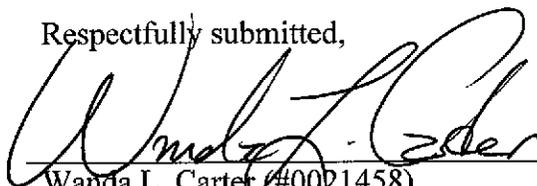
CONCLUSION

If the only "party" to have the statutory right 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 annexation that is unlawfully approved, no matter how blatantly unlawful, can be reviewed or overturned. Nor would there be any means by which issues of statutory interpretation or other legal issues arising out of R.C. 709.023—unless they are of interest to the owner—would ever receive court review. The decision of the court below on the question of whether a township is “any party” for purposes of R.C. 709.023 is not supported by the plain meaning of 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.

The Butler Township Board of Trustees urges this Court to rule in its favor on both of the important issues raised in this appeal: whether a township board of trustees is “any party” for purposes of seeking a writ of mandamus pursuant to R.C. 709.023(G), and whether a board of county commissioners’ expression of its finding as to six statutory conditions without making a finding as to the seventh can support the approval of an annexation petition. The decision of the court below should be reversed in both respects.

Respectfully submitted,



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Butler Township Board of Trustees

PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief of Relator-Appellant Butler Township Board of Trustees was sent by regular US Mail, postage prepaid, to:

John Cumming
Montgomery County Asst. Prosecutor
301 W. 3rd Street, 5th Floor
P.O. Box 972
Dayton, Ohio 45422

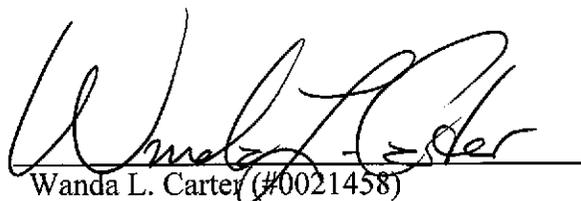
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John Gotherman
Ohio Municipal League
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Columbus, Ohio 43215

this 8th day of June, 2009.



Wanda L. Carter (#0021458)

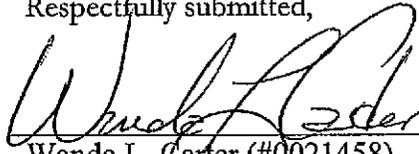
APPENDIX

NOTICE OF APPEAL OF RELATOR-APPELLANT
BUTLER TOWNSHIP BOARD OF TRUSTEES

Relator-Appellant hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in Court of Appeals Case No. CA-022664 on December 12, 2008.

This case is one of public or great general interest.

Respectfully submitted,



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Counsel for Relator-Appellant
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Appeal was sent by regular US Mail, postage prepaid, to:

John Cumming
Montgomery County Asst. Prosecutor
301 W. 3rd Street, 5th Floor
P.O. Box 972
Dayton, Ohio 45422

Catherine A. Cunningham
Plank & Brahm
145 E. Rich Street
Columbus, Ohio 43215

this 26th day of January, 2009.


Wanda L. Carter (#0021458)



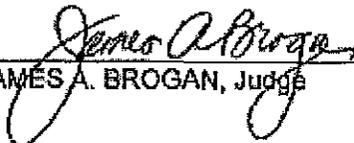
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COURT OF APPEALS
2008 DEC 12 AM 8:41
GREGORY A. BRUSH
CLERK OF COURTS
MONTGOMERY CO, OHIO
35

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 : FINAL ENTRY
COUNTY COMMISSIONERS, ET AL. :
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

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 : (Civil Appeal from
COUNTY COMMISSIONERS, ET AL. : 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

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 Commrs.*, 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)

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 RC. 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. Heller v. 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. *Sinoff v. Ohio Permanente Med. Group, Inc.*, 146 Ohio App.3d 732, 741, 767 N.E.2d 1251, 2001-Ohio-4186, ¶40.

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

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:

Wanda L. Carter
John A. Cumming
Catherine A. Cunningham
Hon. Mary Wiseman

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

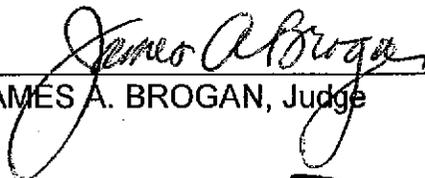
v. : T.C. NO. 2008-CV-0509

MONTGOMERY COUNTY BOARD OF : **FINAL ENTRY**
COUNTY COMMISSIONERS, ET AL. :
Respondents-Appellees :

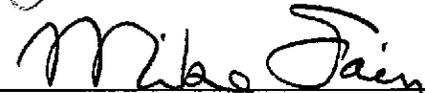
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Pursuant to the opinion of this court rendered on the 12th day of
December, 2008, the judgment of the trial court is affirmed.

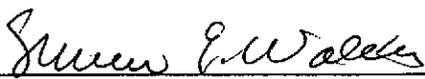
Costs to be paid as stated in App.R. 24.



JAMES A. BROGAN, Judge



MIKE FAIN, Judge



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

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C

Baldwin's Ohio Revised Code Annotated Currentness

Title VII. Municipal Corporations

▣ Chapter 709. Annexation; Detachment (Refs & Annos)

▣ Annexation on Application of Citizens

→ **709.02 Annexation of contiguous territory; petition; definition of "owner"**

(A) The owners of real estate contiguous to a municipal corporation may petition for annexation to a municipal corporation in the manner provided by sections 709.02 to 709.11 of the Revised Code.

(B) Application for annexation shall be made by a petition filed with the clerk of the board of county commissioners of the county in which the territory is located.

(C) The petition required by this section shall contain the following:

(1) The signatures of a majority of the owners of real estate in the territory proposed for annexation. The person who signs or the circulator of the petition also shall write the date the signature was made next to the owner's name. No signature obtained more than one hundred eighty days before the date on which the petition is filed shall be counted in determining the number of signers of the petition. Any owner who signed the petition may have the signature removed before the document is filed by delivering a signed statement to the agent for the petitioners expressing the owner's wish to have the signature removed. Upon receiving a signed statement, the agent for the petitioners shall strike through the signature, causing the signature to be deleted from the petition.

(2) An accurate legal description of the perimeter and an accurate map or plat of the territory proposed for annexation;

(3) The name of a person or persons to act as agent for the petitioners. The agent for the petitioners may be an official, employee, or agent of the municipal corporation to which annexation is proposed.

(D) At the time of filing the petition for annexation, the agent for the petitioners also shall file with the clerk of the board a list of all tracts, lots, or parcels in the territory proposed for annexation, and all tracts, lots, or parcels located adjacent to that territory or directly across the road from it when the road is adjacent to it, including the name and mailing address of the owner of each tract, lot, or parcel, and the permanent parcel number from the county auditor's permanent parcel numbering system established under section 319.28 of the Revised Code for each tract, lot, or parcel. This list shall not be considered to be a part of the petition for annexation, and any error on the list shall not affect the validity of the petition.

(E) As used in sections 709.02 to 709.21, 709.38, and 709.39 of the Revised Code, "owner" or "owners" means

any adult individual who is legally competent, the state or any political subdivision as defined in section 5713.081 of the Revised Code, and any firm, trustee, or private corporation, any of which is seized of a freehold estate in land; except that easements and any railroad, utility, street, and highway rights-of-way held in fee, by easement, or by dedication and acceptance are not included within those meanings; and no person, firm, trustee, or private corporation, the state, or any political subdivision, that has become an owner of real estate by a conveyance, the primary purpose of which is to affect the number of owners required to sign a petition for annexation, is included within those meanings. For purposes of sections 709.02 to 709.21, 709.38, and 709.39 of the Revised Code, the state or any political subdivision shall not be considered an owner and shall not be included in determining the number of owners needed to sign a petition unless an authorized agent of the state or the political subdivision signs the petition. The authorized agent for the state shall be the director of administrative services.

An owner is determined as of the date the petition is filed with the board of county commissioners. If the owner is a corporation, partnership, business trust, estate, trust, organization, association, group, institution, society, state, or political subdivision, the petition shall be signed by a person who is authorized to sign for that entity. A person who owns more than one parcel of real estate, either individually or as a tenant in common or by survivorship tenancy, shall be counted as one owner for purposes of this chapter.

CREDIT(S)

(2001 S 5, eff. 3-27-02 (*Thornton v. Salak*); 1978 H 732, eff. 3-14-79; 1969 H 491; 132 v S 220; 1953 H 1; GC 3548)

Current through 2009 File 1 of the 128th GA (2009-2010), apv. by 6/2/09 and filed with the Secretary of State by 6/2/09.

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Baldwin's Ohio Revised Code Annotated Currentness

Title VII. Municipal Corporations

▣ Chapter 709. Annexation; Detachment (Refs & Annos)

▣ Annexation on Application of Citizens

→ **709.021 Owners of real estate in unincorporated territory of township requesting annexation; application for annexation**

(A) When a petition signed by all of the owners of real estate in the unincorporated territory of a township proposed for annexation requests the annexation of that territory to a municipal corporation contiguous to that territory under one of the special procedures provided for annexation in sections 709.022, 709.023, and 709.024 of the Revised Code, the annexation proceedings shall be conducted under those sections to the exclusion of any other provisions of this chapter unless otherwise provided in this section or the special procedure section chosen.

(B) Application for annexation shall be made by a petition filed with the clerk of the board of county commissioners of the county in which the territory is located, and the procedures contained in divisions (C), (D), and (E) of section 709.02 of the Revised Code shall be followed, except that all owners, not just a majority of owners, shall sign the petition. To be valid, each petition circulated for the special procedure in section 709.022 or 709.023 of the Revised Code shall contain the notice provided for in division (B) of section 709.022 or division (A) of section 709.023 of the Revised Code, whichever is applicable.

(C) Except as otherwise provided in this section, only this section and sections 709.014, 709.015, 709.04, 709.10, 709.11, 709.12, 709.192, 709.20, and 709.21 of the Revised Code apply to the granting of an annexation described in this section.

(D) As used in sections 709.022 and 709.024 of the Revised Code, "party" or "parties" means 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.

CREDIT(S)

(2001 S 5, eff. 3-27-02 (*Thornton v. Salak*, (2006)))

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Title VII. Municipal Corporations

▣ Chapter 709. Annexation; Detachment (Refs & Annos)

▣ Annexation on Application of Citizens

→ **709.022 Special procedure of annexing land with consent of all parties**

(A) A petition filed under section 709.021 of the Revised Code that requests to follow this section is for the special procedure of annexing land with the consent of all parties. The petition shall be accompanied by a certified copy of an annexation agreement provided for in section 709.192 of the Revised Code or of a cooperative economic development agreement provided for in section 701.07 of the Revised Code, that is entered into by the municipal corporation and each township any portion of which is included within the territory proposed for annexation. Upon the receipt of the petition and the applicable agreement, the board of county commissioners, at the board's next regular session, shall enter upon its journal a resolution granting the annexation, without holding a hearing.

(B) 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.

The petition circulated to collect signatures for the special procedure in this section shall contain in boldface capital letters immediately above the heading of the place for signatures on each part of the petition the following: "WHOEVER SIGNS THIS PETITION EXPRESSLY WAIVES THEIR RIGHT TO APPEAL ANY ACTION ON THE PETITION TAKEN BY THE BOARD OF COUNTY COMMISSIONERS. THERE ALSO IS NO APPEAL FROM THE BOARD'S DECISION IN THIS MATTER IN LAW OR IN EQUITY."

(C) After the board of county commissioners grants the petition for annexation, the clerk of the board shall deliver a certified copy of the entire record of the annexation proceedings, including all resolutions of the board, signed by a majority of the members of the board, the petition, map, and all other papers on file, and the recording of the proceedings, if a copy is available, to the auditor or clerk of the municipal corporation to which annexation is proposed.

CREDIT(S)

(2001 S 5, eff. 3-27-02 (*Thornton v. Salak*))

Current through 2009 File 1 of the 128th GA (2009-2010), apv. by 6/2/09 and filed with the Secretary of State by 6/2/09.

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Title VII. Municipal Corporations

▣ Chapter 709. Annexation; Detachment (Refs & Annos)

▣ Annexation on Application of Citizens

→ **709.023 Special procedure of annexing of land into municipal corporation when land is not to be excluded from township**

(A) A petition filed under section 709.021 of the Revised Code that requests to follow this section is for the special procedure of annexing land into a municipal corporation when, subject to division (H) of this section, the land also is not to be excluded from the township under section 503.07 of the Revised Code. The owners who sign this petition by their signature expressly waive their right to appeal in law or equity from the board of county commissioners' entry of any resolution under this section, waive any rights they may have to sue on any issue relating to a municipal corporation requiring a buffer as provided in this section, and waive any rights to seek a variance that would relieve or exempt them from that buffer requirement.

The petition circulated to collect signatures for the special procedure in this section shall contain in boldface capital letters immediately above the heading of the place for signatures on each part of the petition the following: "WHOEVER SIGNS THIS PETITION EXPRESSLY WAIVES THEIR RIGHT TO APPEAL IN LAW OR EQUITY FROM THE BOARD OF COUNTY COMMISSIONERS' ENTRY OF ANY RESOLUTION PERTAINING TO THIS SPECIAL ANNEXATION PROCEDURE, ALTHOUGH A WRIT OF MANDAMUS MAY BE SOUGHT TO COMPEL THE BOARD TO PERFORM ITS DUTIES REQUIRED BY LAW FOR THIS SPECIAL ANNEXATION PROCEDURE."

(B) Upon the filing of the petition in the office of the clerk of the board of county commissioners, the clerk shall cause the petition to be entered upon the board's journal at its next regular session. This entry shall be the first official act of the board on the petition. Within five days after the filing of the petition, the agent for the petitioners shall notify in the manner and form specified in this division the clerk of the legislative authority of the municipal corporation to which annexation is proposed, the fiscal officer of each township any portion of which is included within the territory proposed for annexation, the clerk of the board of county commissioners of each county in which the territory proposed for annexation is located other than the county in which the petition is filed, and the owners of property adjacent to the territory proposed for annexation or adjacent to a road that is adjacent to that territory and located directly across that road from that territory. The notice shall refer to the time and date when the petition was filed and the county in which it was filed and shall have attached or shall be accompanied by a copy of the petition and any attachments or documents accompanying the petition as filed.

Notice to a property owner is sufficient if sent by regular United States mail to the tax mailing address listed on the county auditor's records. Notice to the appropriate government officer shall be given by certified mail, return receipt requested, or by causing the notice to be personally served on the officer, with proof of service by affidavit of the person who delivered the notice. Proof of service of the notice on each appropriate government of-

ficer shall be filed with the board of county commissioners with which the petition was filed.

(C) Within twenty days after the date that the petition is filed, the legislative authority of the municipal corporation to which annexation is proposed shall adopt an ordinance or resolution stating what services the municipal corporation will provide, and an approximate date by which it will provide them, to the territory proposed for annexation, upon annexation. The municipal corporation is entitled in its sole discretion to provide to the territory proposed for annexation, upon annexation, services in addition to the services described in that ordinance or resolution.

If the territory proposed for annexation is subject to zoning regulations adopted under either Chapter 303. or 519. of the Revised Code at the time the petition is filed, the legislative authority of the municipal corporation also shall adopt an ordinance or resolution stating that, if the territory is annexed and becomes subject to zoning by the municipal corporation and that municipal zoning permits uses in the annexed territory that the municipal corporation determines are clearly incompatible with the uses permitted under current county or township zoning regulations in the adjacent land remaining within the township from which the territory was annexed, the legislative authority of the municipal corporation will require, in the zoning ordinance permitting the incompatible uses, the owner of the annexed territory to provide a buffer separating the use of the annexed territory and the adjacent land remaining within the township. For the purposes of this section, "buffer" includes open space, landscaping, fences, walls, and other structured elements; streets and street rights-of-way; and bicycle and pedestrian paths and sidewalks.

The clerk of the legislative authority of the municipal corporation to which annexation is proposed shall file the ordinances or resolutions adopted under this division with the board of county commissioners within twenty days following the date that the petition is filed. The board shall make these ordinances or resolutions available for public inspection.

(D) Within twenty-five days after the date that the petition is filed, the legislative authority of the municipal corporation to which annexation is proposed and each township any portion of which is included within the territory proposed for annexation may adopt and file with the board of county commissioners an ordinance or resolution consenting or objecting to the proposed annexation. An objection to the proposed annexation shall be based solely upon the petition's failure to meet the conditions specified in division (E) of this section.

If the municipal corporation and each of those townships timely files an ordinance or resolution consenting to the proposed annexation, the board at its next regular session shall enter upon its journal a resolution granting the proposed annexation. If, instead, the municipal corporation or any of those townships files an ordinance or resolution that objects to the proposed annexation, the board of county commissioners shall proceed as provided in division (E) of this section. Failure of the municipal corporation or any of those townships to timely file an ordinance or resolution consenting or objecting to the proposed annexation shall be deemed to constitute consent by that municipal corporation or township to the proposed annexation.

(E) Unless the petition is granted under division (D) of this section, not less than thirty or more than forty-five days after the date that the petition is filed, the board of county commissioners shall review it to determine if

each of the following conditions has been met:

(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 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.

(F) Not less than thirty or more than forty-five days after the date that the petition is filed, if the petition is not granted under division (D) of this section, the board of county commissioners, if it finds that each of the conditions specified in division (E) of this section has been met, shall enter upon its journal a resolution granting the annexation. If the board of county commissioners finds that one or more of the conditions specified in division (E) of this section 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 petition.

(G) 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.

(H) Notwithstanding anything to the contrary in section 503.07 of the Revised Code, unless otherwise provided in an annexation agreement entered into pursuant to section 709.192 of the Revised Code or in a cooperative economic development agreement entered into pursuant to section 701.07 of the Revised Code, territory annexed into a municipal corporation pursuant to this section shall not at any time be excluded from the township under section 503.07 of the Revised Code and, thus, remains subject to the township's real property taxes.

(I) Any owner of land that remains within a township and that is adjacent to territory annexed pursuant to this section who is directly affected by the failure of the annexing municipal corporation to enforce compliance with any zoning ordinance it adopts under division (C) of this section requiring the owner of the annexed territory to provide a buffer zone, may commence in the court of common pleas a civil action against that owner to enforce compliance with that buffer requirement whenever the required buffer is not in place before any development of the annexed territory begins.

CREDIT(S)

(2005 S 107, eff. 12-20-05; 2001 S 5, eff. 3-27-02 (*Thornton v. Salak*))

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Title VII. Municipal Corporations

☐ Chapter 709. Annexation; Detachment (Refs & Annos)

☐ Annexation on Application of Citizens

→ 709.024 Special procedure of annexing land into municipal corporation for purpose of undertaking significant economic development project

(A) A petition filed under section 709.021 of the Revised Code that requests to follow this section is for the special procedure of annexing land into a municipal corporation for the purpose of undertaking a significant economic development project. As used in this section, "significant economic development project" means one or more economic development projects that can be classified as industrial, distribution, high technology, research and development, or commercial, which projects may include ancillary residential and retail uses and which projects shall satisfy all of the following:

(1) Total private real and personal property investment in a project shall be in excess of ten million dollars through land and infrastructure, new construction, reconstruction, installation of fixtures and equipment, or the addition of inventory, excluding investment solely related to the ancillary residential and retail elements, if any, of the project. As used in this division, "private real and personal property investment" does not include payments in lieu of taxes, however characterized, under Chapter 725. or 1728. or sections 5709.40 to 5709.43, 5709.73 to 5709.75, or 5709.78 to 5709.81 of the Revised Code.

(2) There shall be created by the project an additional annual payroll in excess of one million dollars, excluding payroll arising solely out of the retail elements, if any, of the project.

(3) The project has been certified by the state director of development as meeting the requirements of divisions (A)(1) and (2) of this section.

(B) Upon the filing of the petition under section 709.021 of the Revised Code in the office of the clerk of the board of county commissioners, the clerk shall cause the petition to be entered upon the journal of the board at its next regular session. This entry shall be the first official act of the board on the petition. Within five days after the filing of the petition, the agent for the petitioners shall notify in the manner and form specified in this division the clerk of the legislative authority of the municipal corporation to which annexation is proposed, the fiscal officer of each township any portion of which is included within the territory proposed for annexation, the clerk of the board of county commissioners of each county in which the territory proposed for annexation is located other than the county in which the petition is filed, and the owners of property adjacent to the territory proposed for annexation or adjacent to a road that is adjacent to that territory and located directly across that road from that territory. The notice shall refer to the time and date when the petition was filed and the county in which it was filed and shall have attached or shall be accompanied by a copy of the petition and any attachments or documents accompanying the petition as filed.

Notice to a property owner is sufficient if sent by regular United States mail to the tax mailing address listed on the county auditor's records. Notice to the appropriate government officer shall be given by certified mail, return receipt requested, or by causing the notice to be personally served on the officer, with proof of service by affidavit of the person who delivered the notice. Proof of service of the notice on each appropriate government officer shall be filed with the board of county commissioners with which the petition was filed.

(C)(1) Within thirty days after the petition is filed, the legislative authority of the municipal corporation to which annexation is proposed and each township any portion of which is included within the territory proposed for annexation may adopt and file with the board of county commissioners an ordinance or resolution consenting or objecting to the proposed annexation. An objection to the proposed annexation shall be based solely upon the petition's failure to meet the conditions specified in division (F) of this section. Failure of the municipal corporation or any of those townships to timely file an ordinance or resolution consenting or objecting to the proposed annexation shall be deemed to constitute consent by that municipal corporation or township to the proposed annexation.

(2) Within twenty days after receiving the notice required by division (B) of this section, the legislative authority of the municipal corporation shall adopt, by ordinance or resolution, a statement indicating what services the municipal corporation will provide or cause to be provided, and an approximate date by which it will provide or cause them to be provided, to the territory proposed for annexation, upon annexation. If a hearing is to be conducted under division (E) of this section, the legislative authority shall file the statement with the clerk of the board of county commissioners at least twenty days before the date of the hearing.

(D) 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. The clerk of the board shall proceed as provided in division (C)(1) of section 709.033 of the Revised Code.

(E) Unless the petition is granted under division (D) of this section, a hearing shall be held on the petition. The board of county commissioners shall hear the petition at its next regular session and shall notify the agent for the petitioners of the hearing's date, time, and place. The agent for the petitioners shall give, within five days after receipt of the notice of the hearing from the board, to the parties and property owners entitled to notice under division (B) of this section, notice of the date, time, and place of the hearing. Notice to a property owner is sufficient if sent by regular United States mail to the tax mailing address listed on the county auditor's records. At the hearing, the parties and any owner of real estate within the territory proposed to be annexed are entitled to appear for the purposes described in division (C) of section 709.032 of the Revised Code.

(F) Within thirty days after a hearing under division (E) of this section, the board of county commissioners shall enter upon its journal a resolution granting or denying the proposed annexation. The resolution shall include specific findings of fact as to whether or not each of the conditions listed in this division has been met. If the board grants the annexation, the clerk of the board shall proceed as provided in division (C)(1) of section 709.033 of the Revised Code.

The board shall enter a resolution granting the annexation if it finds, based upon a preponderance of the substantial, reliable, and probative evidence on the whole record, that each of the following conditions has been met:

(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 real estate located in the territory proposed to be annexed in the petition and constitute all of the owners of real estate in that territory.

(3) No street or highway will be divided or segmented by the boundary line between a township and the municipal corporation as to create a road maintenance problem, or if the street or highway will be so divided or segmented, the municipal corporation has agreed, as a condition of the annexation, that it will assume the maintenance of that street or highway. For the purposes of this division, "street" or "highway" has the same meaning as in section 4511.01 of the Revised Code.

(4) The municipal corporation to which the territory is proposed to be annexed has adopted an ordinance or resolution as required by division (C)(2) of this section.

(5) The state director of development has certified that the project meets the requirements of divisions (A)(1) and (2) of this section and thereby qualifies as a significant economic development project. The director's certification is binding on the board of county commissioners.

(G) An 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.

(H) Notwithstanding anything to the contrary in section 503.07 of the Revised Code, unless otherwise provided in an annexation agreement entered into pursuant to section 709.192 of the Revised Code or in a cooperative economic development agreement entered into pursuant to section 701.07 of the Revised Code, territory annexed into a municipal corporation pursuant to this section shall not at any time be excluded from the township under section 503.07 of the Revised Code and, thus, remains subject to the township's real property taxes.

(I) A municipal corporation to which annexation is proposed is entitled in its sole discretion to provide to the territory proposed for annexation, upon annexation, services in addition to the services described in the ordinance or resolution adopted by the legislative authority of the municipal corporation under division (C)(2) of this section.

CREDIT(S)

(2005 S 107, eff. 12-20-05; 2001 S 5, eff. 3-27-02 (*Thornton v. Salak*))

Current through 2009 File 1 of the 128th GA (2009-2010), apv. by 6/2/09 and filed with the Secretary of State by 6/2/09.

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Title VII. Municipal Corporations

▣ Chapter 709. Annexation; Detachment (Refs & Annos)

▣ Annexation on Application of Citizens

→ **709.032 Hearings; testimony (later effective date)**

< Note: See also version(s) of this section with earlier effective date(s).>

(A) As used in this section, "necessary party" means 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.

(B) The hearing provided for in section 709.03 of the Revised Code shall be public. The board of county commissioners may, or at the request of any necessary party shall, issue subpoenas for witnesses or for books, papers, correspondence, memoranda, agreements, or other documents or records relevant or material to the petition, directed to the sheriff of each county where the witnesses or documents or records are found, which subpoenas shall be served and returned in the same manner as those allowed by the court of common pleas in criminal cases. The fees of sheriffs shall be the same as those allowed by the court of common pleas in criminal cases. Witnesses shall be paid the fees and mileage provided for under section 1901.26 of the Revised Code. The fee and mileage expenses incurred at the request of a party shall be paid in advance by the party, and the remainder of the expenses shall be paid out of fees charged by the board for the annexation proceedings. In case of disobedience or neglect of any subpoena served on any person, or the refusal of any witness to testify to any matter regarding which the witness may be lawfully interrogated, the court of common pleas of the county in which the disobedience, neglect, or refusal occurs, or any judge of that court, on application of the board, any member of the board, or a necessary party, may compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from the court or a refusal to testify in the court. An owner of a company, firm, partnership, association, or corporation that is subpoenaed [*sic*] may have an agent or attorney appear before the board on that owner's behalf in response to the subpoena.

The board of county commissioners shall make, by electronic means or some other suitable method, a record of the hearing. If a request, accompanied by a deposit to pay the costs, is filed with the board not later than seven days before the hearing, the board shall provide an official court reporter to record the hearing. The record of the hearing need not be transcribed unless a request, accompanied by an amount to cover the cost of transcribing the record, is filed with the board.

(C) Any person may appear in person or by attorney and, after being sworn, may support or contest the granting of the petition. Affidavits presented in support of or against the petition shall be considered by the board, but only if the affidavits are filed with the board and served as provided in the Rules of Civil Procedure upon the necessary parties to the annexation proceedings at least fifteen days before the date of the hearing; provided that

the board shall accept an affidavit after the fifteen-day period if the purpose of the affidavit is only to establish the affiant's authority to sign the petition on behalf of the entity for which the affiant signed. Necessary parties or their representatives are entitled to present evidence, examine and cross-examine witnesses, and comment on all evidence, including any affidavits presented to the board under this division.

(D) At the hearing, any owner who signed the petition for annexation may appear and, after being sworn as provided by section 305.21 of the Revised Code, testify orally that the owner's signature was obtained by fraud, duress, misrepresentation, including any misrepresentation relating to the provision of municipal services to the territory proposed to be annexed, or undue influence. Any person may testify orally after being so sworn in support of or rebuttal to the prior testimony by the owner. Any witnesses and owners who testify shall be subject to cross-examination by the necessary parties to the annexation proceedings. If a majority of the county commissioners find that the owner's signature was obtained under circumstances that did constitute fraud, duress, misrepresentation, or undue influence, they shall find the signature to be void and shall order it removed from the petition as of the time the petition was filed.

CREDIT(S)

(2008 H 525, eff. 7-1-09; 2001 S 5, eff. 3-27-02 (*Thornton v. Salak*); 1984 H 175, eff. 9-26-84; 1979 S 151; 1969 H 491; 132 v S 220)

Current through 2009 File 1 of the 128th GA (2009-2010), apv. by 6/2/09 and filed with the Secretary of State by 6/2/09.

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