

IN THE SUPREME COURT OF OHIO

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

FILED
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 SUPREME COURT OF OHIO

**BRIEF OF *AMICUS CURIAE* BERLIN TOWNSHIP BOARD OF TRUSTEES ON
 BEHALF OF THE RELATOR-APPELLANT, BUTLER TOWNSHIP BOARD OF
 TRUSTEES**

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I. STATEMENT OF AMICUS INTEREST

Amicus Curiae Berlin Township Board of Trustees represent Berlin Township, which is located in Delaware County, Ohio, and adjoins the City of Delaware to the southeast. The township is mostly rural with residential properties and a total area of approximately 22.5 square miles. Delaware County is one of the fastest growing counties in Ohio, and Berlin Township's population of 5,100 has grown steadily. To accommodate this growth, the City of Delaware increasingly has annexed township property.

The hundreds of Ohio townships similarly situated to Berlin Township and the thousands of residents they represent will be affected by the outcome of this case. The lower Court's decision interpreting statutory language of "any party" to mean only "the owner" deprives townships their rights and remedies under the statute. Specifically, the decision below extinguishes a township's right to seek a writ of mandamus when a board of county commissioners refuses to reject a non-compliant expedited petition for annexation. In so doing, townships are barred from any remedy that restrains petitioners and predisposed boards of commissioners from annexing property when the petitions do not comply with the statutory safeguards imposed by the General Assembly in R.C. § 709.023. *Amicus Curiae* Berlin Township Board of Trustees respectfully urges this Court to reverse the decision of the Court of Appeals.

II. STATEMENT OF THE CASE AND FACTS

Amicus Curiae Berlin Township Board of Trustees adopts and incorporates the Statement of Case and Facts recited by Relator-Appellant, Butler Township Board of Trustees.

III. ARGUMENT

Proposition of Law No. 1: A board of trustees of a township, the territory of which is included in an annexation petition filed pursuant to R.C. 709.023, and that files an objection to the annexation petition, pursuant to R.C. 709.023(D), is “any party” as that term is used in R.C. 709.023(G), and, 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).

A. As an initial matter, Ohio townships have a right of access to state courts.

Ohio townships are creatures of statute with no common law or inherent power. *In re Petition for Incorporation of the Village of Holiday City* (1994), 70 Ohio St.3d 365, *Trustees of New London Twp. v. Miner* (1875), 26 Ohio St. 452, 456 (neither the township nor its trustees are invested with the general powers of a corporation; hence the trustees can exercise only those powers conferred by statute). Accordingly, this Court must look to the powers, rights, and remedies conferred upon townships by the General Assembly. “Each civil township is a body politic and corporate, for the purpose of enjoying and exercising the rights and privileges conferred upon it by law. It may sue and be sued, plead and be impleaded[.]” (emphasis added). R.C. § 503.01. Put simply, townships have the right to sue and to be sued when their statutory rights or privileges may be detrimentally affected.

The annexation of township territory may detrimentally affect a township’s rights and privileges. More specifically, the kind of expedited annexations at issue in this appeal, Type-2 annexations, can have dramatic negative effects on townships. For example, townships will no longer collect road and bridge millage within incorporated areas of the township; the inside millage previously received by the township will be reallocated and shared with the annexing municipality; 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; once the territory is annexed, 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; annexation removes a township’s ability to regulate the annexed area under its zoning process; and, property owners within the annexed territory will be eligible for services from both the municipality and the township, which can lead to confusion for purposes of fire or police services since both will be obligated to respond to emergency calls within the annexed area.

Accordingly, pursuant to R.C. § 503.01, townships have standing to pursue an action in Ohio courts if their rights and privileges are detrimentally affected by an annexation, including Type-2 annexations. It is through this prism of standing conferred upon townships that the annexation statute of R.C. § 709.023 must be analyzed to determine whether the General Assembly abolished a township’s right of redress conferred by R.C. § 503.01.

B. R.C. § 709.023(G) limits only a court’s jurisdiction to hear an appeal by a township in law or equity regarding Type-2 annexations.

As outlined above, townships have an interest in Type-2 annexations due to the detrimental effects they can have on township rights and privileges.¹ Further, the General Assembly expressly permits townships the right to participate in Type-2 annexation proceedings. R.C. § 709.023(B), for example, provides that the agent for the petitioners must notify affected townships when a petition for annexation is filed. R.C. § 709.023(D) provides that any affected

¹ Moreover, the Second District Court of Appeals, by its own admission, acknowledges that townships have an interest in annexation petitions. *State ex rel. Butler Township Board of Trustees v. Montgomery County Board of County Commissioners* (2008), 2008 WL 5196445 (Ohio App. 2 Dist.), 2008-Ohio-6542, *5.

township may object to the proposed annexation based upon the criteria set forth in R.C. § 709.023(E).

Once an objection is made, the board of county commissioners must review the petition to determine if the conditions in R.C. § 709.023(E) have been satisfied. However, absent the right of a township to bring a writ of mandamus action, the objection is utterly indefensible; a board of county commissioners may ignore the criteria of R.C. § 709.023(E) with impunity.

Once an annexation is approved pursuant to R.C. § 709.023, R.C. § 709.023(G) provides for post-annexation writ of mandamus actions:

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.

At most, R.C. § 709.023(G) alters court access to townships by limiting the court's jurisdiction to hear appeals in law or equity with respect to Type-2 annexations.² But a mandamus action is not an appeal in law or equity.³ Because the General Assembly did not abridge the township's right to file a mandamus action—in fact, it expressly preserves it—townships may seek redress of non-compliant Type-2 petitions by bringing writs of mandamus actions in accordance with R.C. § 503.01. Thus, regardless of whether townships are considered “any party” for purposes of R.C. § 709.023(G), they have standing to bring a writ of mandamus action.

² Construing the same “any party” language at issue in this appeal, the Fifth District Court of Appeals recently held that courts lack jurisdiction to consider appeals in law or equity filed by townships. The Court noted, however, *townships have standing to bring such actions and may pursue mandamus actions. Lawrence Township Board of Trustees v. Canal Fulton* (2009) 2009 WL 418752 (Ohio App. 5 Dist.), 2009-Ohio-759, *5.

³ *Cf.* definitions of “appeal” (“resort to a superior court to review the decision of an inferior court or administrative agency.”) with “mandamus” (“This is the name of a writ which issues from a court of superior jurisdiction, and is directed...to an administrative or judicial officer, or to an inferior court, commanding the performance of a particular act therein specified, and belonging to his or their public, official, or ministerial duty.”) at Black's Law Dictionary, 96 and 961 (6th Ed. 1990).

C. The term “any party” includes townships.

Beyond the right of a township to bring a writ of mandamus action pursuant to R.C. § 503.01, R.C. § 709.023(G) specifically preserves the right of “any party” to file a mandamus action, and the phrase “any party” includes townships. The lower Court determined that “any party,” as that phrase is used in R.C. § 709.023(G), includes only the owner of the property being annexed. The court stated that “while a board of township trustees or a municipal corporation may be interested persons,” they are not a party to the annexation having the right to seek a writ of mandamus under R.C. 709.023(G). *State ex rel. Butler Township Board of Trustees v. Montgomery County Board of County Commissioners* (2008), 2008 WL 5196445 (Ohio App. 2 Dist.), 2008-Ohio-6542, *5. The lower Court based its decision on a reading of R.C. § 709.021 that provides a township is a party to an expedited annexation, but only for the purposes of R.C. § 709.022 and R.C. § 709.024. The lower Court reasoned that if the General Assembly had wanted a township to be a party for purposes of R.C. § 709.023, it would have included townships in the definition of “party” in R.C. § 709.021.

The Court of Appeal’s reasoning fails, however, to follow the rules of statutory construction. R.C. § 1.42 requires:

Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

Id. Furthermore, this Court has observed:

[I]f such intent is clearly expressed therein, the statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged;...and in the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.

Wachendorf v. Shaver (1948), 149 Ohio St. 231, Syl. at 5 (emphasis added).⁴

In construing the term “party,” it is important to note the architecture of the expedited annexation statutes, R.C. §§ 709.021 – 709.024. For purposes of R.C. § 709.022 and R.C. § 709.024, the General Assembly specifically defines the term “party” and includes townships within that definition. Although the General Assembly does not include a definition for the term “party” in R.C. § 709.023, the annexation process itself along with the rules of statutory construction make it clear that townships are parties to the process.

Since there is no definition of the term “party” in R.C. § 709.023, and, consistent with R.C. 1.42 and *Wachendorf*, the term must be construed according to its common, ordinary, and accepted meaning, or, if the term has acquired a technical or particular meaning, it must be construed according to that meaning. But the court below did not do so. In the context of R.C. § 709.021 and the expedited annexation procedures, which references R.C. § 709.023, the term “party” has acquired a technical meaning and is defined to include townships. As such, the lower Court should have determined that for purposes of R.C. § 709.023, the term “party” includes townships.

Beyond the particular meaning of “party” for purposes of expedited annexations, the common, ordinary, and accepted meaning of the term “party” would include townships for purposes of R.C. § 709.023. Black’s Law Dictionary defines the term “party” as, “[A] person concerned or having taken part in any affair, matter, transaction, or proceeding...” Black’s Law Dictionary 775 (Abridged 6th Ed. 1991). And Merriam-Webster’s Online Dictionary defines

⁴ See also, *State ex. rel. Smith v. Columbus* (1968), 28 Ohio St.3d 94, 95; *State ex rel. McGraw v. Gorman* (1985), 17 Ohio St.3d 147, 149; *Lake County National Bank v. Kosydor* (1973), 36 Ohio St.2d 189; *In re Appropriation for Highway Purposes* (1969), 18 Ohio St.2d 214.

“party” as “a person or group participating in an action or affair. Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/party> (June 5, 2009). Furthermore, a township that either consents to or objects to an annexation petition by resolution is participating in the annexation process provided for by R.C. § 709.023, which the lower Court itself concedes.⁵ Accordingly, by its common, ordinary, and accepted meaning, a township is a “party” for purposes of R.C. § 709.023(G) and has a right to file a mandamus action.

D. Courts in the Fifth District acknowledge that townships have standing to file mandamus actions pursuant to R.C. § 709.023.

Courts in the Fifth District recognize that townships have standing to file mandamus actions pursuant to R.C. § 709.023(G). In *Washington Twp. Bd. Trustees v. City of Mansfield City Council* (2004), 2004 WL 1813916 (Ohio App. 5 Dist.), 2004-Ohio-4299, the Fifth District Court of Appeals recognizes a township’s right to file a writ of mandamus under the same circumstances present in this appeal:

a township may file a writ of mandamus to compel the board of county commissioners to perform its duties. However, a mandamus action is limited to the issues defined in R.C. 709.023(E).

Id., *5. Further, the Court acknowledges a township’s right to retained counsel when bringing the mandamus action:

The use of retained counsel [by the township] is limited by statute to either pursue a mandamus action under R.C. 709.023(G) or an administrative appeal under R.C. 709.07.

Id.

In *Berlin Township v. Delaware County Board of Commissioners, et al.*, (Del C. C. P. Case No. 05-CVH-08647), the Delaware County Court of Common Pleas specifically recognized

⁵ See FN 1.

that Berlin Township had standing pursuant to R.C. § 709.023(G) to file a mandamus action involving a Type-2 Annexation.⁶ Finally, in *Lawrence Township Board of Trustees v. Canal Fulton* (2009) 2009 WL 418752 (Ohio App. 5 Dist.), 2009-Ohio-759, a decision rendered on February 17, 2009, approximately two months after the lower Court's decision, the Fifth District Court of Appeals reaffirmed that townships have standing pursuant to R.C. § 709.023(G):

Therefore, in order to be entitled to a writ of mandamus, Lawrence Township is required to establish ... [that one of the conditions in R.C. 709.023(E) has not been met].

Id., *9 (emphasis added).

E. Public policy favors a township's right to file mandamus actions.

Courts construe statutes to avoid unreasonable or absurd results. *State ex rel. Mason v. State Employee Relations Bd.* (Franklin Cty. 1999), 133 Ohio App.3d 213, 219; *State ex rel. Dispatch Printing Co. v. Wells* (1985), 18 Ohio St.3d 382; *State ex rel. Haines v. Rhodes* (1958), 168 Ohio St. 165; *Mishr v. Board of Zoning Appeals of Village of Poland* (1996), 76 Ohio St.3d 238.

Under the Court of Appeal's reasoning, a mandamus action can be filed only by an owner when a petition for annexation is denied.⁷ But the lower Court's reasoning precludes any review of the county commissioners vote to approve a Type-2 annexation because the owner, who filed the petition, is not going to challenge his own petition. Thus, whether the petition and the vote that approves it complies with R.C. § 709.023 is not reviewable. The Court of Appeal's decision renders meaningless the General Assembly's conditions under which a Type-2 annexation may

⁶ See Judgment Entry Granting Relator Berlin Township's Complaint in Mandamus dated November 22, 2005, attached as Exhibit 1.

⁷ *State ex rel. Butler Township Board of Trustees v. Montgomery County Board of County Commissioners* (2008), 2008 WL 5196445 (Ohio App. 2 Dist.), 2008-Ohio-6542, *7.

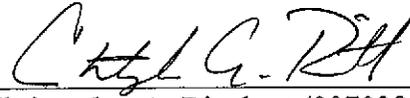
be approved (R.C. § 709.023(E)), and the township's right to object when those conditions are not met. Under the lower Court's decision, there is no mechanism to enforce proper objections based on compliance with R.C. § 709.023(E). As a result, boards of county commissioners become a rubber stamp of Type-2 petitions instead of a stamp of approval that the conditions imposed under R.C. § 709.023(E) are satisfied.

The decision of the Court of Appeals, if not reversed, effectively rescinds the duty imposed by the General Assembly upon a board of county commissioners to comply with the statute when reviewing Type-2 annexations because the decision eliminates any meaningful oversight. Townships, such as *Amicus Curiae* Berlin Township Board of Trustees, are typically the only parties with an interest in challenging a Type-2 annexation, and under the Court of Appeal's decision, townships are left with no remedy when those annexations do not comply with the law.

IV. CONCLUSION

In *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery County Board of County Commissioners* (2006), 112 Ohio St.3d 262, this Court acknowledged that townships play a significant role in ensuring that Type-2 annexations are conducted in compliance with Ohio law by upholding an objection raised by an Ohio township made pursuant to R.C. § 709.023(E). Courts in the Fifth District have continued to uphold this important principle by permitting townships the right to bring mandamus actions to safeguard the protections afforded through R.C. § 709.023(E). *Amicus Curiae* Berlin Township Board of Trustees respectfully requests an Order from this Court reversing the decision of the Second District Court of Appeals.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Amicus Curiae Berlin Township Board of Trustees is being mailed to all parties entitled to service under Rule 5 of the Ohio Rules of Civil Procedure on the 8th day of June, 2009.



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EXHIBIT 1

W

IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

BERLIN TOWNSHIP,

RELATOR,

vs.

DELAWARE COUNTY BOARD OF COMMISSIONERS, et al.,

RESPONDENTS.

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36b-364

CASE No. 05-CV-H-08-647

JUDGE EVERETT H. KRUEGER

AN ANTONIO
CLERK

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COMMON PLEAS COURT
DELAWARE COUNTY OHIO
FILED

JUDGMENT ENTRY GRANTING RELATOR BERLIN TOWNSHIP'S
COMPLAINT IN MANDAMUS

This case arises out of two expedited Petitions for annexation of property in Berlin Township, Delaware County, filed by Intervenor-Respondent Dominion Homes, Inc. ("Dominion Homes"). Relator Berlin Township ("Berlin Township") objected to the Petitions and Respondent Delaware County Board of Commissioners ("BOC"), despite the objections, considered and approved the Petitions.

Berlin Township brought this Complaint in Mandamus on August 26, 2005, asserting that the BOC violated various sections of the Ohio Revised Code. On November 4, 2005, the First Petition for Annexation ("First Petition") was withdrawn by Dominion Homes, rendering several issues before the Court moot. The remaining issues are 1) whether Berlin Township has standing to bring this action for a Writ of Mandamus, 2) whether the BOC properly allowed Dominion Homes to amend its Second Petition for annexation and approve the amended Petition, pursuant to R.C. 709.023, and 3) if the amendment to the Second

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Petition was proper, whether the amended Second Petition violated R.C. 709.023.

I. STANDING

In order to establish a claim for a Writ of Mandamus, Berlin Township must prove that it has a clear legal right to the relief prayed for; that respondent has a clear legal duty to perform the acts requested; and that Berlin Township has no plain and adequate remedy in the ordinary course of law. *State ex rel. Mason v. Morris* (1993), 66 Ohio St. 3d 440.

R.C. 709.023 states in pertinent part 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.

To determine if Berlin Township has a legal right to the relief sought, the Court must first determine if Berlin Township falls within the definition of "any party".

Berlin Township asserts that it is a proper party to bring this mandamus action. The Fifth District Court of Appeals held in *Washington Township Board of Trustees v. City of Mansfield City Council* (August 11, 2004), Richland Co. App. Nos. 03CA85 and 03CA97, 2004 Ohio 4299, that townships have the ability to retain counsel to pursue a mandamus action under R.C. 709.023(G). Neither the City of Delaware nor Dominion Homes disputes Berlin Township's standing to bring this action. Based upon the findings of the Fifth District and the provisions

of R.C. 709, this Court finds that Berlin Township has a legal right to seek this Mandamus action.

Additionally, Revised Code 709.023 specifically requires that both Dominion Homes and the BOC comply with the requirements in filing and approving expedited petitions for annexation. Thus, the BOC had a clear legal duty to review the annexation petition in compliance with the R.C. 709.023. Furthermore, R.C. 709.023 limits Berlin Township's remedy solely to this Mandamus action, as there is no other remedy available in the ordinary course of law. Therefore, this Court finds that Berlin Township does have standing to bring this Complaint in Mandamus.

II. AMENDMENT OF THE SECOND PETITION

R.C. 709.021(A) states that

[w]hen 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.

(Emphasis added.) R.C. 709.021(C) goes on to state

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.

Also, R.C. 709.031(B) sets forth the procedures for amending a non-expedited petition for annexation.

It is clear from the language contained in R.C. 709.021(A) and R.C. 709.021(C) that expedited petitions for annexations filed pursuant to R.C. 709.023, like the Petition before the Court, shall proceed as outlined by R.C. 709.023 and no other provisions of chapter 709 shall apply. R.C. 709.023 does not provide any procedures for amending an expedited petition for annexation. The Legislature intended that petitioners could not amend expedited petitions filed under R.C. 709.023. The amendment section, R.C. 709.031, does not apply to expedited petitions for annexation, as the Legislature has specifically excluded this section from R.C. 709.021(A), R.C. 709.021(C), and R.C. 709.023. Therefore, no amendments to an expedited petition brought pursuant to R.C. 709.023 are permitted.

It is important to note that Dominion Homes amended its Second Petition after the BOC had denied the Second Petition. According to R.C. 709.023, the proceedings on the Second Petition should have ended at that time. The only remedy available to Dominion Homes after the denial of its Second Petition was to seek a writ of mandamus to compel the BOC to perform its duties.

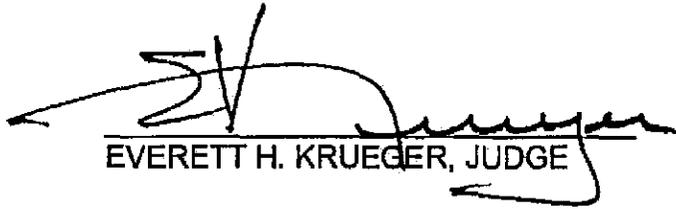
The Court finds that Dominion Homes improperly amended its Second Petition and that the BOC improperly heard evidence to allow the amendment and improperly approved the amended Second Petition.

II. CONCLUSION

The Court hereby GRANTS Berlin Township's Complaint in Mandamus and instructs the Board of Commissioners to deny the amended Second Petition and to consider only the Second Petition as it was originally filed.

As the Court finds that the amended Second Petition was improperly approved and considered, it is unnecessary for the Court to address the remaining issue.

Dated: November 22, 2005


EVERETT H. KRUEGER, JUDGE

cc: Emily A. Smith, 366 East Broad Street, Columbus, Ohio 43215, Attorney for Berlin Township
J. Jeffrey McNealey, 41 S. High Street, Columbus, Ohio 43215, Attorney for Dominion Homes
Dan Bennington, 1 South Sandusky Street, Delaware, Ohio 43015, Attorney for City of Delaware
Leah Sellers, 140 N. Sandusky Street, Delaware, Ohio 43015, Attorney for the Delaware County Board of Commissioners

The Clerk of this Court is hereby ORDERED to serve a copy of this Judgment Entry upon all parties or counsel by Regular U.S. Mail attorney mailbox at the Delaware County Courthouse Facsimile transmission.

This document sent to each attorney/party by:

ordinary mail
 fax
 attorney mailbox
 certified mail

Date: 11-22-05 By: JW