

ORIGINAL

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
v.	:	Montgomery County Court of Appeals
	:	Second Appellate District
Montgomery County Board of County	:	
Commissioners, <i>et al.</i> ,	:	Court of Appeals
	:	Case No. CA 022664
Respondents-Appellees.	:	

---

**MERIT BRIEF OF  
APPELLEE, MONTGOMERY COUNTY BOARD OF COUNTY COMMISSIONERS**

---

Wanda L. Carter, Esq. (0021458)  
 NEWHOUSE, PROPHATER,  
 LETCHER & MOOTS, LLC  
 5025 Arlington Centre Blvd., Suite 400  
 Columbus, OH 43220  
 (614) 255-5441  
 Fax: (614) 255-5446  
 E-mail: [wcarter@nplmlaw.com](mailto:wcarter@nplmlaw.com)

COUNSEL FOR RELATOR-  
 APPELLANT,  
 BUTLER TOWNSHIP BOARD OF  
 TRUSTEES

Mathias H. Heck, Jr., Esq.  
 MONTGOMERY COUNTY PROSECUTING  
 ATTORNEY

John A. Cumming, Esq. (0018710)  
 (COUNSEL OF RECORD)  
 MONTGOMERY COUNTY ASSISTANT  
 PROSECUTOR  
 301 W. Third Street  
 PO Box 972  
 Dayton, OH 45402  
 (937) 496-7797  
 Fax: (937) 225-4822  
 E-mail: [cummingj@mcohio.org](mailto:cummingj@mcohio.org)

COUNSEL FOR RESPONDENT-APPELLEE,  
 MONTGOMERY COUNTY BOARD OF  
 COUNTY COMMISSIONERS

**FILED**

JUL 07 2009

CLERK OF COURT  
 SUPREME COURT OF OHIO

Donald L. Brosius, Esq. (0007925)  
LOVELAND & BROSIUS  
50 W. Broad Street, Suite 3300  
Columbus, OH 43215-5921  
(614) 464-3563  
Fax: (614) 224-6221

COUNSEL FOR AMICUS CURIAE,  
OHIO TOWNSHIP ASSOCIATION

Christopher A. Rinehart, Esq. (0070382)  
RINEHART & RISHIEL, LTD.  
300 E. Broad Street, Suite 190  
Columbus, OH 43215  
(614) 221-0717  
Fax: (614) 343-1549  
E-mail: crinehart@rrgovlaw.com

COUNSEL FOR AMICUS CURIAE  
BERLIN TOWNSHIP BOARD OF  
TRUSTEES

Stephen D. Brown, Esq. (0069791)  
BROWN LAW LIMITED  
414 E. Main Street  
PO Box 244  
Lancaster, OH 43130  
(740) 689-9620  
Fax: (888) 533-5007  
E-mail: sbrown@brownlawlimited.com

COUNSEL FOR AMICUS CURIAE  
BERLIN TOWNSHIP BOARD OF  
TRUSTEES

Catherine A. Cunningham, Esq. (0015730)  
(COUNSEL OF RECORD)  
Richard C. Brahm, Esq. (0009481)  
PLANK & BRAHM  
*A Legal Professional Association*  
145 E. Rich Street  
Columbus, OH 43215  
(614) 228-4546  
Fax: (614) 228-1472  
E-mail: ccunningham@plankbrahm.com  
E-mail: rbrahm@plankbrahm.com

COUNSEL FOR RESPONDENTS-  
APPELLEES,  
JOSEPH P. MOORE, AGENT FOR  
PETITIONER WATERWHEEL FARMS, INC.

Joseph P. Moore, Esq. (0014362)  
MOORE & ASSOCIATES  
400 Corporate Center Drive  
Vandalia, OH 45377  
(937) 898-3975  
Fax: (937) 898-5859  
E-mail: jospmoore@aol.com

LAW DIRECTOR AND COUNSEL FOR  
RESPONDENT-APPELLEE, CITY OF  
UNION

John E. Gotherman, Esq. (0000504)  
THE OHIO MUNICIPAL LEAGUE  
175 S. Third Street, Suite 510  
Columbus, OH 43215-7100  
(614) 221-4349  
Fax: (614) 221-4390  
E-mail: jgotherman@columbus.rr.com

GENERAL COUNSEL FOR AMICUS  
CURIAE,  
THE OHIO MUNICIPAL LEAGUE

COUNSEL FOR AMICUS CURIAE,  
OHIO MUNICIPAL LEAGUE

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	iii
STATEMENT OF FACTS .....	1
ARGUMENT .....	4

Appellee, Montgomery County Board of County Commissioners’  
Proposition of Law No. I:

Butler Township is an instrumentality of the state of Ohio with powers conferred upon it only as provided by the General Assembly and does not have standing as “any party” under R.C. 709.023(G) to seek a writ of mandamus to compel the board of county commissioners to do a futile act.....4

- A. There is No Need for a Remedy Beyond the Statutory Provision Allowing Townships to Object to an Expedited Type-2 Annexation..... 4
- B. Mandamus is not an Appropriate Remedy in this Case. .... 8
- C. There is no Underlying Factual Support for the Township’s Claimed Need for a Remedy in This Case. .... 9

Appellee, Montgomery County Board of County Commissioners’  
Proposition of Law No. II:

In reviewing an R.C. 709.023 one hundred percent (100%) owner-supported annexation, the board of county commissioners has a duty to review and approve or deny the annexation but has no duty to specifically set out the elements of the statute as a basis of the decision unless it denies the petition. ....10

CONCLUSION.....	12
PROOF OF SERVICE.....	14

APPENDIX Appx. Page

Decision, Order and Entry of the Montgomery County Court of Common Pleas (Mar. 13, 2008) .....	1
Opinion of the Montgomery County Court of Appeals (Dec. 12, 2008), 2008-Ohio-6542.....	20

**TABLE OF AUTHORITIES**

**CASES:**

*In re Petition to Annex of 320 Acres to Village of South Lebanon* (1992),  
64 Ohio St.3d 585 .....7

*Lawrence Twp., Stark County, Ohio, Bd. of Twp. Trustees v. Canal Fulton*,  
Stark App. No. 2007 CA00010, 2007-Ohio-6115.....9

*Lawrence Twp. Board of Trustees v. Canal Fulton*, Stark App. No.  
2007CA00308, 2008-Ohio-2690 .....10

*Middletown v. McGee* (1988), 39 Ohio St.3d 284 .....7

*State ex rel. Overholser Builders, L.L.C. v. Clark Cty. Bd. of Commissioners*,  
174 Ohio App.3d 631, 2007-Ohio-7230 .....9

**CONSTITUTIONAL PROVISIONS; STATUTES:**

R.C. 503.07 .....6

R.C. 519.18 .....6

R.C. 709.02 .....4

R.C. 709.021 .....10

R.C. 709.021(D)(4).....7, 10

R.C. 709.022 .....5, 7, 8, 10

R.C. 709.023 ..... *passim*

R.C. 709.023(A).....9

R.C. 709.023(C).....6, 7

R.C. 709.023(D).....5, 8

R.C. 709.023(E) .....2, 3, 5, 8, 10, 13

R.C. 709.023(E)(1) – (E)(7).....7, 8, 12

R.C. 709.023(E)(7) .....2, 3, 11

R.C. 709.023(F) .....8, 10, 11, 12

R.C. 709.023(G).....4, 7, 8, 9

R.C. 709.023(H).....6

R.C. 709.023(I) .....6

R.C. 709.024 .....7, 10

R.C. 709.03 .....5

R.C. 709.033(C)(1) .....8, 9

SESSION LAWS:

Amd. Sub. S. B. No. 5, 149 Ohio Laws 621 .....4

## STATEMENT OF THE FACTS

On October 31, 2007, the Montgomery County Board of County Commissioners (“Commissioners”) received an annexation petition signed by one hundred percent (100%) of the owners of the 78.489 acres of property in Butler Township seeking annexation to the city of Union. (Record, Transcript of County Commissioners’ Proceedings, Annexation Petition). The annexation petition was filed pursuant to R.C. 709.023 (expedited type-2 annexation). The annexation petition as filed contained the name of the petitioner’s agent and the signature of the sole owner of the property and contained the statutory warning:

**“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.”**

An accurate map or plat and description accompanied the petition. (Record, Transcript of County Commissioners’ Proceedings, Annexation Petition).

On November 13, 2007, within twenty (20) days after the date the annexation petition was filed with the Commissioners, the city of Union passed Ordinance No. 1438 stating the services that the municipal corporation would provide and an approximate date by which it would provide them. (Answer of Agent, Exhibit A, City of Union Ordinance No. 1438). Since the territory was zoned in the township, the city of Union also in its ordinance confirmed and committed that if the territory were annexed and became subject to zoning by the city of Union and the city’s zoning permits uses in the annexed territory that the city determined are clearly incompatible with the uses permitted under the current county or township zoning regulations in the adjacent land remaining within the township from which the territory is annexed, the city would require in the zoning ordinance permitting the incompatible use that the owner of the

annexation territory provide a buffer separating the use of the annexation territory and the adjacent land remaining within the territory. (R.C. 709.023, Answer of Agent, Exhibit A, City of Union Ordinance No. 1438). The City of Union Ordinance No. 1438 also provided in Section III as follows (emphasis added):

The annexation territory includes property owned in fee by the annexation petitioner underlying the Jackson Road right of way. To the extent that Jackson Road is divided or segmented by the boundary line between Butler Township and the City of Union as to create a maintenance problem, the City of Union agrees to and shall 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 November 26, 2007, Butler Township passed Resolution No. 07-075 objecting to the petition to annex the 78.489 acres of territory in Butler Township, Montgomery County, to the city of Union. (Record, Transcript of County Commissioners Proceedings, Butler Twp. Resolution No. 07-075). The township objected to the annexation on two grounds.<sup>1</sup> Butler Township's resolution claimed that the annexation would cause a road maintenance problem and claimed that the municipal corporation did not agree to assume maintenance of the street or highway. (Butler Twp. Resolution No. 07-075).

Within the time frame established by R.C. 709.023, the Commissioners passed Resolution No. 07-2156 on December 11, 2007 accepting and approving the annexation of the 78.489 acres, more or less, in accordance with R.C. 709.023, *et seq.* (Complaint Exhibit 1 Montgomery County Commissioners Resolution No. 07-2156). In the resolution, the Commissioners expressed that each section of R.C. 709.023(E) was met. The resolution did not make a specific finding on paragraph (7) of R.C. 709.023(E) relating to possible road maintenance issues.

---

<sup>1</sup> One of the objections of the township was outside the statutory criteria and is not an issue here.

Butler Township then filed an action for injunction, declaratory judgment, and mandamus in the Common Pleas Court of Montgomery County. (Complaint). The township claimed that the Commissioners had not made a specific finding that no road maintenance problems would be created by the annexation under R.C. 709.023(E)(7), and, therefore, the annexation was improper. (Complaint, ¶1, ¶16). Cross-claims were filed by the petitioner's agent and property owner against the Commissioners in essence claiming that if a mistake had been made, the Commissioners should correct it.<sup>2</sup> In response to the cross-claims, the Commissioners admitted that they had reviewed R.C. 709.023(E)(7) and found that no finding had to be made on the subject because the "segmented roadway" did not create a road maintenance problem. (Record Answer to Cross-claim, ¶1, 3, 5, and 6). Therefore, there was no need to seek a commitment from the city to solve the problem. (Record, Answer to Cross-claim, ¶5, 6). In addition, had a road maintenance problem been found, the city of Union had agreed in its service resolution to assume the maintenance of that street or highway or to otherwise correct the problem. (Record, Answer to Cross-claim, ¶7). The Commissioners granted the annexation only after they found all of the criteria of R.C. 709.023(E) had been met.

Thereafter, the trial court found that Butler Township did not have standing to bring the action and that the township had no reasonable chance of success on the merits had standing been granted. (Trial Court Decision filed March 13, 2008, attached as Appendix). The trial court also found, even if the Township did have standing, the township cannot prevail upon its claims challenging the granting of the annexation. The court of appeals affirmed the trial court's decision, and the matter is now before this Court.

---

<sup>2</sup> (Record, Answer of Respondent, Joseph P. Moore, Agent and Cross-claim for Mandamus by Relator Joseph P. Moore, Agent against Respondent, Montgomery County Commissioners).

## ARGUMENT

### Appellee Montgomery County Board of County Commissioners Proposition of Law No. I

Butler Township is an instrumentality of the state of Ohio with powers conferred upon it only as provided by the General Assembly and does not have standing as “any party” under R.C. 709.023(G) to seek a writ of mandamus to compel the board of county commissioners to do a futile act.

The briefs of the Appellant and Amicus Ohio Township Association both argue that this Court should expand the strict statutory controls provided by R.C. 709.023 *et seq.* and allow a township as a party to a R.C. 709.023 one hundred percent (100%) owner-supported annexation. The argument is incorrect for a number of reasons.

#### **A. There is No Need for a Remedy Beyond the Statutory Provision Allowing Townships to Object to an Expedited Type-2 Annexation.**

Underlying the briefs of the Appellant and the Amicus is a false sense that the “balance” established by the General Assembly with the passage of Am. Sub. S.B. No. 5 (“Senate Bill 5”) in 2001, 149 Ohio Laws, Part I, 621, in enacting the new procedures for annexation under R.C. 709.023 was done to make sure that the township had standing to contest 100% owner-supported annexations. That is simply not the case.

Senate Bill 5 which enacted R.C. 709.02, *et seq.* sought to create a balance in creating different types of annexations. As this Court is well aware from the numerous decisions issued prior to the enactment of Senate Bill 5 that replaced former R.C. 709.02, *et seq.*, the courts of the state of Ohio were often clogged with cases that had little merit, delayed property owners’ rights to annex to the municipality of their choosing, and caused loss of development opportunities throughout the state. While indeed the state General Assembly sought a balance in the passage of Senate Bill 5 enacting the four new methods of annexation, that balance was determined in each separate procedure. The balance went from few requirements but agreement of all the

parties with no appeal (R.C. 709.022, expedited type-1 process) to a court-like process and appeals by everyone. (R.C. 709.03, a majority owner-supported petition process).

As it relates to an expedited type-2 process (R.C. 709.023, one hundred (100%) owner-supported), the legislature carefully balanced the rights of its political subdivisions along with the property owners' rights and set a number of limitations. The state's interest was addressed by a set of specific requirements of the statute, R.C. 709.023(E), which, if met, meant the annexation was required to be approved. The General Assembly determined that when the conditions were found to have been met there was no valid objection or course of action that would otherwise delay the decision. In exchange for a quick resolution of the issue, the property owner had to give up specific rights it would otherwise have. If the owner sought to take advantage of an R.C. 709.023 expedited type-2 annexation, all of the property owners had to sign the petition and the property owner had to give up his right to appeal in law or equity upon the board of county commissioners' decision. A specific waiver had to be placed on the petition itself recognizing this waiver. The owner had to agree to a buffer zone should it be requested and the property zoned to a use incompatible with surrounding township territory. The owner had to meet the seven criteria of R.C. 709.023(E) to be approved over a township's objections. Because the "owner" is the only one to have true property rights in the annexation, only the owner had the right to file a mandamus action if his annexation was improperly denied.

The township has only "governmental rights" (those the legislature has given or limited). The township's rights in this case, as balanced by the General Assembly, were for the township to be able to file an objection by way of resolution with the Commissioners prior to the conclusion of the 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." R.C. 709.023(D). Thus, not only were the criteria established but the basis for any objection by

either the city or the township was limited to the areas enumerated. The township was not included in the definition of “any party” because the legislature had considered and addressed the township’s governmental interests which the legislature gave the township in the first place. The township’s interests were protected to the extent provided by the legislature.

In recognition of any township’s remaining governmental interests, the General Assembly provided that unless agreed to by the township, the territory annexed could not at any time be excluded from the township’s boundaries and thus remained subject to the township’s real property taxes. R.C. 709.023(H). As a limitation on the city, it could not use R.C. 503.07 to remove the territory from the township. Thus, as to the aspects of the operation of governmental entities, the legislature provided both a remedy and an amelioration of any effects that the township would have. In other words, the state of Ohio by statute weighed any township interests, defined and balanced them, and limited the township’s right to object to an annexation by allowing the township to object before the county commissioners.

While the township argues that it is affected because it may lose zoning control, the General Assembly addressed that concern as well. Upon annexation, the township zoning regulations remain effective (and enforced by the township) until the municipal legislative authority zones the territory. R.C. 519.18. Should a municipal corporation zone the property and permit an incompatible use of the property being annexed, a buffer to the adjacent unincorporated territory in the township must be provided and the property owner is precluded from asking for a variance. R.C. 709.023(C). The township’s zoning concerns have thus been addressed by the legislature and the township’s interests established. R.C. 519.18 and R.C. 709.023(C). In fact, the right to enforce such a provision remains with any owner of land within the township that is adjacent to the territory annexed and who is directly affected by the failure of the annexing municipal corporation to enforce compliance. R.C. 709.023(I).

Contrary to the township's arguments, the relative interests of the township, the owner, and the municipality were carefully weighed in a R.C. 709.023 annexation and the remedies also carefully provided. The term "party" is a defined term in expedited annexation proceedings. See R.C. 709.021(D)(4). Municipal corporations and townships are only "parties" in expedited type-1 (R.C. 709.022) and expedited type-3 (R.C. 709.024) annexations. They are *not* defined as "parties" in expedited type-2 (R.C. 709.023) annexations. R.C. 709.021(D)(4). This Court should not set aside the careful balance of interests set out by the legislature. The reference to "any party" in R.C. 709.023(G) annexation statutes refers to property owners who signed the petition, whose property rights are being affected, and who had been required to waive the right of appeal in law or equity and acknowledged their right to bring mandamus. This Court has continually found that the bundle of rights of an owner includes the right to choose which governmental entity where its property is located. See *Middletown v. McGee* (1988), 39 Ohio St.3d 284 and *In re Petition to Annex 320 Acres to S. Lebanon* (1992), 64 Ohio St.3d 585, 591.

Expanding the rights of townships to go beyond the scheme of the statute in an attempt to create a remedy not provided for by the General Assembly is a mistake. While the township has espoused the idea that every wrong should have a remedy, there is no wrong here. The rights of the township come from the legislature as do the limitations placed on townships. The General Assembly created an objective administrative process for petitioning property owners who unanimously desire to annex their land before the county commissioners identifying and limiting the action that could be considered in an expedited type-2 annexation (and any objection) to seven factors. R.C. 709.023(E)(1)-(E)(7). The legislature found no reason to provide the township any further remedy beyond its right to file an objection to an annexation before the county commissioners and subject to specific limitations. R.C. 709.023(C).

**B. Mandamus is not an Appropriate Remedy in this Case.**

The General Assembly prescribed the duties of the county commissioners in granting or denying the owner's petition for annexation in an expedited type-2. If no objection to the owners' annexation petition is timely filed, the municipality and township(s) are deemed to have consented to the annexation, as a matter of law, and the board of county commissioners is required ("shall") to "enter upon its journal a resolution granting the annexation" at the board's next regular session twenty-five days after the date the annexation petition is filed. R.C. 709.023(D).

However, if an authorized political subdivision timely files an objection to a 100% owner supported annexation petition in an expedited type-2 proceeding, the commissioners have a duty to "review" the annexation petition, within a prescribed period, and "determine" if the petition has met each of the seven objective conditions for annexation.<sup>3</sup> If the board determines that all the necessary conditions are met for annexation, the board "shall enter upon its journal a resolution granting the annexation." R.C. 709.023(F). If the board finds that one or more of the R.C. 709.023(E)(1) – (7) conditions have not been met by the annexation petitioners, the board "shall enter upon its journal a resolution that states which of those conditions have not been met and that denies the petition." R.C. 709.023(F). Once a board of county commissioners' have adopted a resolution granting or denying the annexation, they have preformed all of their duties required by law.<sup>4</sup> They have no other clearly legal duty to act and mandamus cannot lie.

---

<sup>3</sup> When an objection is filed the commissioners' must review the petition not less than thirty nor more than forty-five days after the date the petition is filed. R.C. 709.023(D) and (E).

<sup>4</sup> If the annexation petition is *granted* under R.C. 709.023(D) (by journal entry without objection) or R.C. 709.023(E) (by resolution following an objection and review), the *clerk* of the board of county commissioners must forward the record of the board to the auditor or clerk of the municipality for processing. R.C. 709.023(G) and R.C. 709.033(C)(1).

The General Assembly has provided “there is no appeal is law or equity from the board’s entry of any resolution” in an expedited type-2 annexation proceeding and all petitioning owners must, and do expressly waive any right they may have to appeal on the annexation petition itself. R.C. 709.023(G). All petitioning owners must also acknowledge their right to seek a writ of mandamus to “compel the board to perform its duties required by law for this special [expedited type-2 annexation procedure.” R.C. 709.023(A) and (G).

**C. There is no Underlying Factual Support for the Township’s Claimed Need for a Remedy in This Case.**

Mandamus actions as argued by the township would include and require the Commissioners to be a party to every claim made with or without merit. In this case, determining the township has mandamus as a remedy is even more problematic. Here there is no question that the element the township complained about, a maintenance issue created by a road split, had no merit. The criteria that the township seeks to enforce was never triggered in the first instance. Should the court find that the township has standing and grants to the township a statutory remedy it does not have, it will result once again in lawsuits with little or no merit causing delays and economic hardship to owners. The very result the amendment to the annexation laws was meant to solve.

It is axiomatic that townships have only such rights as are granted by the legislature.<sup>5</sup> The township has “governmental rights,” not constitutionally protected property rights. The township’s governmental rights are defined by and also limited by the legislature. It is clear here that the legislature did not believe the township was being deprived of anything that it would be legally able to receive that was not considered by the legislature in the balancing of the rights of

---

<sup>5</sup> See *Lawrence Twp., Stark County, Ohio, Bd. of Twp. Trustees v. Canal Fulton*, Stark App. No. 2007 CA00010, 2007-Ohio-6115, ¶21; *State ex rel. Overholser Builders, L.L.C. v. Clark Cty. Bd. of Commissioners*, 174 Ohio App.3d 631, 2007-Ohio-7230, ¶5.

the property owners and the state's governmental entities. The township has no mandamus rights under R.C. 709.023. It is not a party, plain and simple.<sup>6</sup>

As to the balance of the argument, Appellee, the Montgomery County Board of County Commissioners adopts the arguments of the Appellee, Joseph P. Moore, Agent For Petitioner and Waterwheel Farms, Inc . The Montgomery County Board of County Commissioners' urges this Honorable Court to affirm the well-reasoned decision of the Court of Appeals of Montgomery County, Ohio in its entirety.

**Appellee Montgomery County Board of County Commissioners**  
**Proposition Of Law No. II**

In reviewing an R.C. 709.023 one hundred percent (100%) owner-supported annexation, the board of county commissioners has a duty to review and approve or deny the annexation but has no duty to specifically set out the elements of the statute as a basis of the decision unless it denies the petition.

In this case, the Commissioners reviewed the annexation petition, found that it met all of the terms and conditions of the Ohio Revised Code, and approved the annexation. By statute, the Commissioners can only approve an R.C. 709.023 annexation petition when all the conditions are met. This is all that is required under R.C. 709.023(E) and (F). See *Lawrence Twp. Board of Trustees v. Canal Fulton*, Stark App. No. 2007CA00308, 2008-Ohio-2690 at ¶18 and ¶19. Specifically, R.C. 709.023(F) provides (emphasis added.):

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

---

<sup>6</sup> R.C. 709.021 includes general provisions that apply only to the special expedited type-1, 2 and 3 annexation proceedings (R.C. 709.022 - 709.024). In R.C. 709.021(D)(4), "party" is defined as a "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." The more specific provision of R.C. 709.021(D)(4), however, specifically provides that the definition is only applicable to proceedings under R.C. 709.022 and 709.024, not the expedited type-2 process of R.C. 709.023. It would have been easy for the General Assembly to include townships as a party in R.C. 709.023 had it wanted to or saw the need to do so.

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 these conditions the board finds have not been met and that denies the petition.

There is no duty placed on a board of county commissioners by the statute to make specific findings as to any of the elements set out if it intends to and does approve the annexation. The Commissioners' duty is simply to "[shall] enter upon its journal a resolution granting the annexation." Other than "grant" the annexation, the resolution has no other required components. Thus, in the first instance, the Commissioners did not have an obligation to specifically identify any of the elements of the section that were not met because the Commissioners, by their simple approval, found they were all met. The Commissioners are also creatures of statute. The obligation placed on them in reviewing a R.C. 709.023 annexation is to identify only those areas which caused them to deny the petition so that the property owner, the only party with the right to seek mandamus, has a basis for deciding to proceed or not. It is only when an expedited type-2 annexation is denied that R.C. 709.023(F) imposes a duty upon the commissioners to include express findings in their resolution denying the petition. R.C. 709.023(F).

There is a second reason why in this case there was no reason to make a finding on R.C. 709.023(E)(7) dealing with the division of a highway. R.C. 709.023(E)(7) has a two-step process for determining if the statutory criteria have been met. First, the Commissioners must determine whether or not any road split creates a road "maintenance" problem. In this case, the Commissioners did not find a road maintenance problem, and, therefore, the second portion of the criteria was irrelevant. It is only if a road maintenance problem is determined that the municipal corporation to which annexation is proposed must agree as a condition of the

annexation to assume the maintenance of that street or highway or otherwise correct the problem. It is uncontested here that the service resolution of the city of Union did exactly that. The city of Union agreed that if a maintenance problem were found, it would take over maintenance of the road or otherwise correct it. Therefore, both on the plain reading of the statute and the facts in this case, the Commissioners correctly approved this annexation. In approving an R.C. 709.023 one hundred percent (100%) owner-supported annexation, the Commissioners do not have to set out a specific finding of each subsection.

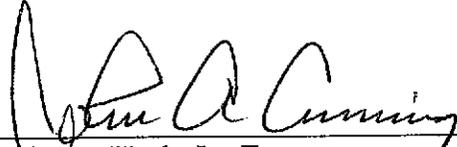
As to the balance of the argument, Appellee, the Montgomery County Board of County Commissioners adopts the arguments of the Appellee, Joseph P. Moore, Agent For Petitioner Waterwheel Farms, Inc. The Montgomery County Board of County Commissioners' urges this Honorable Court to affirm the well-reasoned decision of the Court of Appeals of Montgomery County, Ohio in its entirety, including its finding that a board of county commissioners has no duty to specifically set out the elements of R.C. 709.023(E)(1) - (E)(7) as a basis of the decision unless it denies the petition.

### CONCLUSION

For the reasons set forth herein, the Commissioners urge this Court to affirm the well-reasoned decision of the court of appeals and find the Butler Township Board of Trustees has no standing in this action. Even if this Court finds the board of trustees has standing, the Commissioners urge this Court to affirm the decision of the court of appeals and find that a board of county commissioners is not required to make specific findings on each of the seven conditions in R.C. 709.023(E)(1) -- (E)(7). Express findings are only required on the conditions that are not met when a petition for annexation is denied. R.C. 709.023(F). By granting the

annexation as required by statute, the board of county commissioners has found that all of the R.C. 709.023(E) conditions have been met.

Respectfully submitted,



Mathias H. Heck, Jr., Esq. (0014171)  
MONTGOMERY COUNTY PROSECUTING  
ATTORNEY

John A. Cumming, Esq. (0018710)  
(COUNSEL OF RECORD)

MONTGOMERY COUNTY ASSISTANT  
PROSECUTOR

P.O. Box 972  
301 W. Third Street  
Dayton, OH 45422  
(937) 496-7797  
Fax: (937) 225-4822  
E-Mail: cummingj@mcohio.org

COUNSEL FOR APPELLEE,  
MONTGOMERY COUNTY BOARD OF  
COUNTY COMMISSIONERS

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of this merit brief was sent by ordinary U.S. mail to the following counsel of record on the 7<sup>th</sup> day of July, 2009:

Wanda L. Carter, Esq.  
NEWHOUSE, PROPHATER, LETCHER &  
MOOTS, LLC  
5025 Arlington Centre Blvd., Suite 400  
Columbus, OH 43220

Catherine A. Cunningham, Esq.  
Richard C. Brahm, Esq.  
PLANK & BRAHM  
*A Legal Professional Association*  
145 E. Rich Street  
Columbus, OH 43215

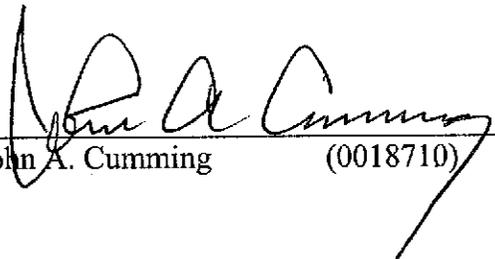
Joseph P. Moore, Esq.  
MOORE & ASSOCIATES  
400 Corporate Center Drive  
Vandalia, OH 45377

Donald L. Brosius, Esq.  
LOVELAND & BROSIUS  
50 W. Broad Street, Suite 3300  
Columbus, OH 43215-5921

John E. Gotherman, Esq.  
THE OHIO MUNICIPAL LEAGUE  
175 S. Third Street, Suite 510  
Columbus, OH 43215-7100

Christopher A. Rinehart, Esq.  
RINEHART & RISHEL, LTD.  
300 E. Broad Street, Suite 190  
Columbus, OH 43215

Stephen D. Brown, Esq.  
BROWN LAW LIMITED  
414 E. Main Street  
PO Box 244  
Lancaster, OH 43130

  
\_\_\_\_\_  
John A. Cumming (0018710)

FILED  
COMMON PLEAS  
03 MAR 13 PM 4:03  
CLERK OF COURT  
MONTGOMERY COUNTY, OHIO  
JO

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO  
CIVIL DIVISION

STATE OF OHIO EX REL.  
BUTLER TOWNSHIP BOARD OF  
TRUSTEES,

: Case No. 2008 CV 509  
: Judge Mary Wiseman

Relator,

: DECISION, ORDER AND ENTRY  
: GRANTING RESPONDENT CITY OF  
: UNION CITY COUNCIL'S MOTION  
: TO DISMISS

v.

MONTGOMERY COUNTY BOARD  
OF COUNTY COMMISSIONERS, ET  
AL.,

: DECISION, ORDER AND ENTRY  
: DENYING RESPONDENT CITY OF  
: UNION CITY COUNCIL'S MOTION  
: FOR JUDGMENT ON THE  
: PLEADINGS AS MOOT

Respondents.

: DECISION, ORDER AND ENTRY  
: DENYING RESPONDENT  
: MONTGOMERY COUNTY BOARD  
: OF COMMISSIONERS' MOTION  
: FOR JUDGMENT ON THE  
: PLEADINGS AS MOOT

: DECISION, ORDER AND ENTRY  
: DENYING RELATOR BUTLER  
: TOWNSHIP BOARD OF TRUSTEES'  
: MOTION FOR A PRELIMINARY  
: INJUNCTION AS MOOT

: DECISION, ORDER AND ENTRY  
: DENYING RELATOR BUTLER  
: TOWNSHIP BOARD OF TRUSTEES'  
: MOTION TO FILE AN AMENDED  
: COMPLAINT AS MOOT

FINAL APPEALABLE ORDER

This matter comes before the Court on Relator Butler Township Board of Trustees' complaint, motion for a preliminary injunction, and motion to amend the complaint. Likewise, Respondent City of Union City Council's motion to dismiss and motion for judgment on the pleadings, as well as Respondent Montgomery County Board of Commissioners' motion for judgment on the pleadings also await this Court's adjudication. For the reasons that follow, the City Council's motion to dismiss is granted, the City Council's motion for judgment on the pleadings is denied as moot, and the Board's motion for judgment on the pleadings is denied as moot, the Township's motion for a preliminary injunction is denied as moot, and the motion to amend the complaint is moot.

#### I. FACTUAL AND PROCEDURAL HISTORY

This case arose from Waterwheel Farms, Inc.'s petition to annex approximately 79 acres of land from the Township to the City of Union. The Township asserts claims for a writ of mandamus, declaratory judgment and injunctive relief. Cmplt. at 2. Joseph P. Moore, agent for the Board, petitioned to annex 78.489 acres situated in the Township next to the City of Union. *Id.* at 4. The petition, filed pursuant to R.C. 709.023, was expedited with no evidentiary hearing. *Id.* The Township objected to the annexation, and filed a resolution with the Board. *Id.* The Board held a hearing and approved the annexation. *Id.* Pursuant to R.C. 709.033(C)(1), the City Council's first opportunity to accept the annexation fell on February 25, 2008. *Id.*

The Township seeks a writ of mandamus, alleging that the Board failed to make findings on all seven conditions required under R.C. 709.023(F). *Id.* at 5. The Township asserts that the

Board has a clear legal duty to rescind the resolution. *Id.* Further, the Township claims it has a clear legal right to have the resolution rescinded. *Id.* The Township also contends that it has no adequate remedy at law within the context of the annexation proceedings. *Id.* Second, the Township seeks declaratory judgment, as it claims that the time span for annexation approval allotted by R.C. 709.04 would render the Township's causes of action moot. *Id.* at 6. Third, the Township contends that a preliminary injunction is necessary to prevent it from suffering irreparable harm. *Id.* at 7.

The Board answered, admitting certain allegations and denying others, and asserted several affirmative defenses. Board Ans. at 1-2. The City Council answered, also admitting some and denying the remaining allegations and asserting affirmative defenses. City Council Ans. at 1-2. Further, the City Council cross-claims for a writ of mandamus against the Board to compel the Board to issue an amended resolution making specific findings that the City Council would be responsible for any road maintenance issue arising from the annexation. *Id.* at 8. To that end, the City Council attached a certified copy of City Ordinance 1438, passed November 17, 2007. *Id.* at Ex. A. Ordinance 1438 indicates that should a maintenance problem arise from annexing the subject property and segmenting a major roadway, the City shall assume the maintenance of the portions of the roadway where the maintenance problem caused by annexation occurs. *Id.*

This Court held a telephone conference, at which attorneys for all parties were present. As a result, this Court issued an agreed stay, preventing the annexation from proceeding until after March 13, 2008 to allow this Court to decide the motions on their merits. This Court also issued an expedited briefing schedule to facilitate a decision prior to the expiration of the stay.

*Preliminary Injunction*

Contemporaneously with its complaint, Butler Township moved this Court for a preliminary injunction, asserting that the annexation resolution is void because the Board failed to make a determination on the seventh statutory factor. *Mtn. Prelim. Injunct.* at 4. The Township argues that a preliminary injunction is necessary to preserve the status quo pending full and final judicial determination. *Id.* at 5. The Township contends that it has a substantial likelihood of success on the merits because the Board did not address the seventh statutory factor required. *Id.* The Township proffers that it has no adequate remedy at law because it does not have the right to appeal the resolution, even if the resolution is unlawful. *Id.* at 6. The Township further argues that the public good would be served by issuing the requested injunction. *Id.* at 7. Accordingly, the Township requests that this Court issue a preliminary injunction in its favor. *Id.*

The City Council opposes the Township's motion for a preliminary injunction, arguing that the Township's motion must be denied for several reasons. *Memo. in Opp. Prelim. Injunct.* at 2. First, the City Council alleges that the Township lacks standing to bring the instant action. *Id.* Second, the City Council contends that the Township failed to state a claim upon which relief may be granted. *Id.* Third, the City Council argues that this Court lacks subject matter jurisdiction over the instant action. *Id.* Fourth, the City Council claims that the Township has no likelihood of prevailing on the merits. *Id.* Fifth, according to the City Council, the Township will not suffer irreparable harm if the annexation proceeds. *Id.* Sixth, the City Council urges that the Township has no rights with respect to the annexation. *Id.* Seventh, the City Council asserts that the annexation process in this case complied with the statutory requirements, leaving nothing for this Court to

mandate. *Id.*

Additionally, the City Council claims that the Township does not face any irreparable harm because the Township will still be able to levy and collect taxes. *Id.* at 6. Further, the City Council asserts that the Ohio Supreme Court held that loss of zoning, taxes, or control over the property, without more, does not impart a township with a legal interest in property subject to annexation. *Id.* Likewise, the City Council argues that the public interest will not be served by issuing a preliminary injunction because the property owner has the freedom to choose the governmental subdivision in which he desires his property to be located. *Id.* Accordingly, the City Council requests that this Court deny the Township's motion for a preliminary injunction. *Id.* at 7-8.

*Motion to Dismiss*

The City Council moves this Court to dismiss, arguing that the City Council is not *sui juris* and therefore may not be sued. *Mtn. Dismiss* at 2. Similarly, the City Council argues that the Township has neither common law nor inherent powers, and is only entitled to whatever statutory rights and remedies the General Assembly affords. *Id.* at 4-5. The City Council asserts that the relevant statutes governing this dispute do not afford the Township any right to challenge an expedited annexation except where the annexation petition fails to meet the conditions specified by statute. *Id.* at 5-6. Further, the City Council claims that the Board is required by statute to approve an expedited annexation if all of the property owners agree and all of the seven factors are met. *Id.* at 7. Also, the City Council contends that the Township has no standing because declaratory judgment actions are inappropriate procedural vehicles to challenge annexation proceedings. *Id.* at 8. Like the Board claims in its answer, the City Council opines that the

Township's interests in taxes and zoning are not sufficient legal interests in the property to afford the Township standing to challenge the annexation. *Id.* at 10.

The City Council cites several cases from this Court for the proposition that a township lacks standing to bring an action in mandamus, declaratory judgment, or injunctive relief to challenge an annexation. *Id.* at 11. The City Council contends that the Township is not a party under the statutory definition. *Id.* at 12. In addition, the City Council argues that the Township does not have a clear legal right to the relief requested. *Id.* at 14. As such, the City Council urges this Court to dismiss the Township's claims. *Id.* at 15. The Board also moves for judgment on the pleadings, incorporating the City Council's motion to dismiss by reference. Board Mtn. Jdmt. Pleadings at 2.

The Township responded to the City Council's motion to dismiss, arguing that the Board does not make any specific findings regarding road maintenance, nor does its resolution provide any indication that such was considered. Memo. Contra Mtn. Dismiss at 2. The Township asserts that the City Council's citations indicate that there must be some manner in which a township may appropriately challenge an expedited annexation. *Id.* at 4-5. The Township asserts that this Court should find that mandamus is the appropriate remedy, and obviate the need to determine the declaratory judgment action. *Id.* at 5. The Township asserts that a preliminary injunction is necessary to maintain the status quo while awaiting final judicial determination, and that the City Council incorrectly argues that injunctive relief is unavailable due to statutory omission. *Id.* at 6. The Township contends that because the statute says that any party may petition for a writ of mandamus, the Township has sufficient standing to survive the City Council's requested dismissal.

*Id.* at 13. Therefore, because the Township has a clear legal right to relief, the Township asks that this Court deny the motion to dismiss. *Id.* at 15.

The City Council re-asserts that it is not amenable to suit. Reply Mtn. Dismiss at 2. Likewise, the City Council reargues that the statute provides the Township no remedy, however styled. *Id.* at 5. Even so, the City Council re-alleges that the Township lacks standing to sue under any claim of relief because the statute and the cases provide no measure of relief. *Id.* at 7-8. Only the property owners fit into the statutory definition of parties with standing to challenge the annexation process. *Id.* at 9. Again, the City Council requests that this Court dismiss the Township's claims. *Id.* at 11.

*Motion for Judgment on the Pleadings*

The City Council also moves for judgment on the pleadings, asserting that it is entitled to judgment as a matter of law. City Council Mtn. Jdmt. Pleadings at 2. The City Council proffers that the single narrow issue this Court must address is whether a board of commissioners is required to make a specific finding on each of the seven statutory factors when an expedited annexation is approved. *Id.* The City Council asserts that, as a matter of law, the Board was not required to specify its findings on all seven factors. *Id.* Alternatively, the City Council contends that if such a finding were required, this Court should issue a writ of mandamus to compel the Board to correct the resolution, as sought in the City Council's cross-claim. *Id.* The Board, as the City Council points out, admits in its answer to the cross-claim that it had considered the seventh factor and found that it weighed in favor of the annexation. *Id.* Therefore, the City Council requests this Court grant it judgment on the pleadings against the Township, or alternatively grant it a writ of

mandamus against the Board. *Id.* at 14.

The Township responds to the City Council and the Board's motions for judgment on the pleadings, arguing that there is nothing in the Board's resolution to support their conclusion that statutory annexation factors were met. Memo. Contra Jdmt. Pleadings at 2-3. The Township urges that the case law does not support the City Council's contention that the Township has no recourse to challenge the annexation. *Id.* at 3. The Township alleges that the City Council frames the legal issue too narrowly, and that the Court must consider whether the Board was obligated to make a specific finding to each statutory element of the annexation or alternatively make a specific finding that all of the elements were met. *Id.* The Township claims that the City Council's statutory interpretation would allow the Board to approve an annexation without the necessary elements being met, and in the absence of any requirement on the Board to make such findings in the resolution, it would be impossible to review whether the Board's decision complied with the statute. *Id.* at 5.

The Township further argues that if the City Council has no basis to assert what the Board found because it is not in the resolution. *Id.* at 7. Procedurally, the Township claims that judgment on the pleadings cannot be granted because the facts this Court must take as true are those in the Township's complaint, not those found in the City Council's cross-claim and the Board's answer. *Id.* at 8. The Township contends that the City Council's alternative request for a writ of mandamus for a *nunc pro tunc* resolution constitutes an admission that the Board's resolution was legally insufficient. *Id.* at 9. The Township asserts that it should be included in the definition of a party for the purposes of the annexation proceedings because to hold to the contrary would lead to an absurd

result. *Id.* at 9. Further, the Township alleges that the plain language of the statute includes the Township in its definition of a party to the proceedings. *Id.* at 10. As such, the Township requests that this Court deny the motion for judgment on the pleadings. *Id.* at 10.

In reply, the City Council argues that the Township cannot be entitled to a writ of mandamus because the Board does not have a clear legal duty awaiting performance. City Council Reply Mtn. Jdmt. Pleadings at 2. Conversely, if the Board did fail to perform a clear legal duty in evaluating the annexation petition, the City Council contends that it, rather than the Township, is entitled to a writ of mandamus to compel the Board to perform the omitted duty. *Id.* The City Council alleges that the resolution need not contain specific factual findings because the statute does not so require. *Id.* at 5. The City Council urges that the Township challenges the annexation on highly technical rather than substantive grounds. *Id.* at 7. Accordingly, the City Council renews its request that this Court allow the annexation to stand, or alternatively compel the Board to correct the resolution to render it statutorily compliant. *Id.* at 7-8. In its reply, the Board incorporates the arguments previously tendered. Board Reply Mtn. Jdmt. Pleadings at 1.

*Motion to Amend the Complaint*

Contemporaneously with the City Council's reply, the Township moves for leave to amend its complaint. Mtn. Amend at 1. Specifically, the Township seeks to change the caption to reflect that the City of Union, rather than the City of Union City Council, is the party against whom the Township seeks injunctive relief. *Id.* at 2. The Township claims that the complaint and subsequent pleadings refer correctly to the City as a party rather than the City Council. *Id.*

## II. LAW AND ANALYSIS

### *A. Motion to Dismiss*

A motion to dismiss made pursuant to Civ. R. 12(B)(6) may only be sustained if it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle it to relief. *York v. Ohio St. Hwy. Patrol* (1991), 60 Ohio St.3d 143, 144, 573 N.E.2d 1063, 1064. A complaint should not be dismissed for failure to state a claim merely because the allegations do not support the legal theory on which the plaintiff relies. *Stanfield v. AMVETS Post No. 88*, 2007-Ohio-1896, Miami App. No. 06CA35, ¶10. Instead, a trial court must examine the complaint to determine if the allegations provide for relief on any possible theory. *Fahnbulleh v. Strahan*, 73 Ohio St.3d 666, 667, 1995-Ohio-295, 653 N.E.2d 1186. If there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss. *York v. Ohio State Highway Patrol* (1991), 60 Ohio St.3d 143, 145, 573 N.E.2d 1063.

When construing such a motion, all factual allegations set forth in the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753. A motion to dismiss for failure to state a claim upon which relief may be granted is procedural and tests the sufficiency of the complaint. *Assn. for the Defense of the Washington Local School Dist. v. Kiger* (1989), 42 Ohio St.3d 116, 117, 537 N.E.2d 1292. Thus, the movant may not rely on allegations or evidence outside the complaint. Civ. 12(B); *State ex rel. Natalina Food Co. v. Ohio Civ. Rights Comm.* (1990), 55 Ohio St.3d 98, 99, 562 N.E.2d 1383.

*B. Motion for Judgment on the Pleadings*

Judgment on the pleadings may not be granted unless the court determines that there exist no material factual issues and the movant is entitled to judgment as a matter of law. *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 570, 1996-Ohio-459, 664 N.E.2d 931. In analyzing a motion for judgment on the pleadings, the court must construe the pleadings liberally and in the light most favorable to the nonmoving party along with all reasonable inferences drawn therefrom. *Burnside v. Leimbach* (1991), 71 Ohio App.3d 399, 402, 594 N.E.2d 60.

*C. Writ of Mandamus*

In order to be entitled to the requested writ of mandamus, relator must establish a clear legal right, a clear legal duty on the part of that court to perform the requested acts, and the lack of an adequate remedy in the ordinary course of the law. *State ex rel Smith v. Cuyahoga County Court of Common Pleas*, 106 Ohio St.3d 151, 153, 2005-Ohio-4103, 832 N.E.2d 1206, 1209, ¶13, citing *State ex rel. Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 105 Ohio St. 3d 177, 2005-Ohio-1150, 824 N.E.2d 68, ¶13. These requirements are conjunctive; the failure of one requirement will preclude relief in mandamus. See *Id.*

*D. Preliminary Injunction*

The purpose behind a preliminary injunction is to preserve the status quo between the parties pending a trial on the merits. *Proctor & Gamble Co. v. Stoneham* (2000), 140 Ohio App.3d 260, 267, 747 N.E.2d 268. An injunction is an equitable remedy which should only be used when there is not an adequate remedy available at law. *Premier Health Care Services, Inc. v. Scheiderman*, 2001-Ohio-7087, Montgomery Ap. No. 18795, citing *Garono v. State* (1988), 37

Ohio St. 3d 171, 173, 524 N.E.2d 496. One does not have a right to an injunction, but a trial court may in its discretion grant an injunction to prevent a future wrong which the law is unable to do. *Id.* An appellate court will review a trial court's decision to grant or deny a preliminary injunction using the abuse of discretion standard. *P&G v. Stoneham*, 140 Ohio App.3d at 269.

In order to obtain an injunction, the moving party must show by clear and convincing evidence that immediate and irreparable injury, loss or damage will result to the applicant and that no adequate remedy at law exists. *Dayton Metro Housing Authority v. Dayton Human Relations Council* (1989), 63 Ohio App.3d 436, 442, 611 N.E.2d 384, 388, citing *Zavakos v. Zavakos Ent., Inc.* (1989), 63 Ohio App.3d 100, 577 N.E.2d 1170. In determining whether to grant injunctive relief, the court considers the following factors: (1) the likelihood or probability of a plaintiff's success on the merits; (2) whether the issuance of the injunction will prevent irreparable harm to the plaintiff; (3) what injury to others will be caused by the granting of the injunction; and (4) whether the public interest will be served by the granting of the injunction. *TGR Enterprises, Inc v. Kozhev*, 167 Ohio App.3d 29, 32, 2006-Ohio-2915, \*\*P11, 853 N.E.2d 739, (internal citations omitted). These factors, considered together, "must be balanced," as "no one factor is dispositive." *Escape Enterprises, Ltd. v. Gosh Enterprises, Inc.*, 2005-Ohio-2637, \*P48, Franklin App. Nos. 04AP-834 and 04AP-857, citing *Cleveland v. Cleveland Elec. Illum. Co.* (1996), 115 Ohio App.3d 1, 14, 684 N.E.2d 343. It has been held that "when there is a strong likelihood of success on the merits, preliminary injunctive relief may be justified even though a plaintiff's case of irreparable injury may be weak." *Id.*

*E. Expedited Annexation*

Annexation is strictly a statutory process. *Petition to Annex 320 Acres to South Lebanon v. Doughman* (1993), 64 Ohio St.3d 585, 591, 597 N.E.2d 463. Accordingly, when interpreting an annexation issue, the court must construe the statute to determine what remedies the General Assembly provided the party seeking relief. *Id.* In enacting the statutes governing annexation, one of the intentions of the legislature was to give an owner of property freedom of choice as to the governmental subdivision in which he desires his property to be located. *City of Middletown v. McGee* (1988), 39 Ohio St.3d 284, 286, 530 N.E.2d 902.

Land owners may seek special annexation where their land would not be excluded from the township from which it was annexed. R.C. 709.023(A). All property owners who agree shall waive any right to appeal or to seek other legal action based on the annexation. *Id.* If the township from which the land would be annexed files a resolution objecting to the annexation, the board of the county commissioners shall review the annexation petition to ensure that all of the necessary conditions have been satisfied. R.C. 709.023(E). The last condition listed reads as follows:

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.

R.C. 709.023(E)(7).

The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent in enacting the statute. *State v. Lowe*, 112 Ohio St.3d 507, 508, 2007-Ohio-606, ¶9, 861 N.E.2d 512, 514, citing *Brooks v. Ohio State Univ.* (1996), 111 Ohio App.3d 342, 349, 676 N.E.2d 162. The court must first look to the plain language of the statute itself to determine the legislative intent. *Id.*, citing *State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78, 81, 1997-Ohio-310, 676 N.E.2d 519. Generally, the word "shall" is mandatory, and implies that the actor referenced is obligated to do or refrain from doing the act discussed. *Moore v. Youngstown State University* (1989), 63 Ohio App.3d 238, 242, 578 N.E.2d 536. The word "if" is conditional, and when interpreting the plain meaning of a statute, implies that the clause following is only applicable under certain prescribed circumstances. *Montgomery v. Montgomery*, 2003-Ohio-4558, ¶37, Pike App. No. 02CA687.

#### *F. Standing*

Standing is defined as a party's right to make a legal claim or seek judicial enforcement of a duty or right. *Ohio Pyro, Inc v. Ohio Dept. Of Commerce*, 115 Ohio St.3d 375, 381, 2006-Ohio-5024, ¶27, 875 N.E.550. Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue. *Id.*, citing *Ohio Contrs. Assn. v. Bickling* (1994), 71 Ohio St.3d 318, 320, 1994-Ohio-183, 643 N.E.2d 1088. The question of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. *Id.*

A township board of trustees has no standing to challenge a city council's acceptance of an

expedited annexation petition because R.C. 709.023 provides no right to appeal the decision. *Washington Township Board of Trustees v. City of Mansfield City Council*, 2004-Ohio-4299, ¶32-34, Richland App. Nos. 03 CA 85, 03 CA 97. Similarly, the Second District Court of Appeals has questioned in *dicta* whether a township has standing to seek an injunction, declaratory relief, or mandamus in an expedited annexation pursuant to R.C. 709.023. *State ex rel. Butler Twp. Bd. Of Trs. v. Montgomery County Bd of Co. Cmmrs.*, 162 Ohio App.3d 394, 402, 2005-Ohio-3872, ¶32, 833 N.E.2d 788 (affd. at 112 Ohio St.3d 262, 2006-Ohio-6411, 858 N.E.2d 1193).

While there is no appeal in law or in equity if the petition is granted, any party may seek a writ of mandamus to compel the board to perform its duties under this section. R.C. 709.023(G). This section does not define who is a party. Therefore, this Court must look elsewhere in the statute for a definition of party. As used in sections 709.022 [709.02.2] and 709.024 [709.02.4] 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. R.C. 709.021(D). Even when borrowing a definition from a neighboring statute, the Court must be mindful of the Latin phrase *expressio unis est exclusio alternius*, meaning that the inclusion of a specific thing implies the exclusion of those not mentioned. *Helberg v. Natl. Union Fire Ins. Co.* (1995), 102 Ohio App. 3d 679, 683, 657 N.E.2d 832.

#### *F. Analysis*

In this case, the Township cannot be afforded any of its claims of relief for several reasons. Most significantly, the Township lacks standing to challenge the annexation proceedings before the

Board. While R.C. 709.023 does not define who is a party, its sister statute R.C. 709.021(D) defines party to include the property owners via their petitioning agent, the municipality annexing the property, and the township from which the property is being annexed. Normally, reading this definition and R.C. 709.023 in pari materia, this Court would be required to find that the township fit the definition of a party that may bring a claim for mandamus. However, R.C. 709.021(D) states that this definition applies to R.C. 709.022 and R.C. 709.24, but does not state that it applies to R.C. 709.023. Applying the statutory canon *expressio unis*, this Court must presume that the General Assembly specifically excluded R.C. 709.023 because it did not want this definition to apply to that section.

Looking at R.C. 709.023 to define who is a party that may bring a petition for a writ of mandamus, the statute indicates the types of recourse available. Subsection (A) indicates that the property owners who bring such an annexation waive their right to appeal to the trial court. The statute neither confers nor rescinds a right to appeal for townships. The only recourse the statute specifically provides for townships is the right to file a resolution objecting to an expedited annexation resolution. In light of a township's statutory nature and considering that townships possess no rights not directly conferred by statute, this Court concludes that the Township's only recourse to challenge this type of annexation is to file a resolution objecting to the annexation with the Board. Therefore, a township would not be a party able to petition for a writ of mandamus.

Case law supports this construction. The Fifth District held in *Washington Township* that a township lacks any right to appeal to the trial court when a county board of commissioners adopts a unanimous annexation petition pursuant to R.C. 709.023. Moreover, the Second District in *dicta*

similarly questioned whether a township could assert claims for injunctive relief, declaratory relief, or mandamus, the three claims the Township asserts in the instant action.<sup>1</sup> Having found that the Township's only recourse is that expressly provided by R.C. 709.023, namely to object to the annexation resolution, the Township does not have a right to make a legal claim or seek judicial enforcement of a duty or right related to this annexation.

Looking just at the complaint and the arguments related to the motion to dismiss, as well as construing all facts as true and all inferences in the Township's favor, the Township has failed to state claims upon which this Court could grant relief. Therefore, the Township's claims must be dismissed for want of standing. Because this Court grants the City Council's motion to dismiss, the City's motion for judgment on the pleadings is moot.

However, even if the Township was a party under R.C. 709.023 with standing to assert its claims, it could not prevail. As discussed above, the statute only allows the parties to bring an action for mandamus, so the Township's declaratory judgment action would not lie. Moreover, a writ of mandamus shall issue only if the relator has a clear legal right to the requested relief, the respondent has a clear legal duty to perform a certain action, and the relator lacks an adequate remedy at law. Here, R.C. 709.023 requires the Board to address the seventh factor only if the annexation segments or otherwise divides a roadway and causes a maintenance problem. Thus, the Board would only have a clear legal duty to address this factor if it found such a problem. If a problem existed, the City would be required to assume the maintenance for the troublesome

---

<sup>1</sup> The Township is certainly aware of this case because it was the relator in that action. Moreover, that case involved a different substantive challenge to the annexation of the very same parcel discussed herein as asserted against some of the same respondents.

roadway, as the statute indicates that the city annexing such territory shall do so. Despite the Board not finding that a maintenance problem existed, the City enacted Ordinance 1438, which obligated the City of Union to perform any required maintenance.

Accordingly, if the Township had standing because it fit into the statutory definition of a party, this Court would be required to grant the City Council and the Board judgment as a matter of law. Taking into consideration the complaint, the answers, and the arguments for and against judgment on the pleadings, construing such liberally and in the light most favorable to the Township, the Township could not assert a claim for declaratory judgment, nor could it establish right to a writ of mandamus. Therefore, if the Township had standing, this Court would grant the City Council and the Board's motions for judgment on the pleadings.

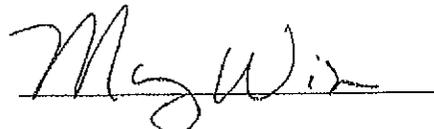
As this Court has decided that the Township cannot prevail on its substantive claims, there is no status quo to preserve for trial. Therefore, the Township's motion for a preliminary injunction is denied. Similarly, as the City Council's cross-claim seeks alternative relief in the event that the annexation was invalidated, this decision renders that claim moot as well.

Lastly, the City Council is *non sui juris*. See *Mollette v. Portsmouth City Council*, 169 Ohio App.3d 557, 559, 2006-Ohio-6289, ¶1, 863 N.E.2d 1092. However, even if the City Council were *sui juris*, this would not alter this Court's above determination that the Township lacks standing and cannot state a claim upon which relief may be granted. Therefore, the Township's motion to amend the complaint to assert claims against the City rather than the City Council is moot, as the amendment would not afford the Township the ability to proceed with its claims.

III. CONCLUSION

Based on the foregoing, the City Council's motion to dismiss is granted, the City Council's motion for judgment on the pleadings is denied as moot, and the Board's motion for judgment on the pleadings is denied as moot, the Township's motion for a preliminary injunction is denied as moot, and the motion to amend the complaint is moot. **THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NOT JUST REASON FOR DELAY FOR PURPOSES OF CIV. R. 54. PURSUANT TO APP. R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.**

SO ORDERED:



JUDGE MARY WISEMAN

To the Clerk of Courts:

Please serve the attorney for each party and each party not represented by counsel with Notice of Judgment and its date of entry upon the journal.

Wanda L. Carter  
3600 Olentangy River Road  
Columbus, OH 43214-3913  
Attorney for Relator Butler Township Board  
of Trustees

John A. Cumming  
301 West Third Street  
Dayton, OH 45402  
Attorney for Respondent Montgomery  
County Board of Commissioners

Sasha Alexa M. VanDeGrift, Staff Attorney (937) 496-6586

Catherine A. Cunningham  
Plank & Brahm  
145 East Rich Street  
Columbus, OH 43215-5240  
Attorney for Respondent and Cross-claimant  
Joseph P. Moore, agent and Respondent City  
of Union City Council

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Montgomery County. STATE of Ohio, ex rel., BUTLER TOWNSHIP BOARD OF TRUSTEES, Relator-Appellant v. MONTGOMERY COUNTY BOARD OF COUNTY COMMISSIONERS, et al., Respondents-Appellees. No. 22664.

Decided Dec. 12, 2008.

Background: Township board of trustees brought action against board of county commissioners and others for a writ of mandamus, declaratory relief, and injunctive relief, relating to an annexation petition by a city for 78.489 acres of property in the township. The Common Pleas Court, Montgomery County, dismissed trustees' complaint, and they appealed.

Holdings: The Court of Appeals, Montgomery County, Walters, J., held that:

- (1) township had no standing to bring a mandamus action regarding expedited type II annexation; (2) township lacked standing to file declaratory judgment action regarding county commissioners' duties; (3) mandamus was not available remedy even assuming arguendo that township had standing to bring such an action; and (4) statute does not require commissioners to make express findings analyzing how all statutory conditions justifying annexation have been met.

Affirmed.

West Headnotes

[1] Municipal Corporations 268 ¶33(9)

268 Municipal Corporations 268I Creation, Alteration, Existence, and Dissolution 268I(B) Territorial Extent and Subdivisions,

Annexation, Consolidation, and Division 268k26 Alteration and Creation of New Municipalities 268k33 Proceedings 268k33(9) k. Proceedings to Prevent or Contest Annexation in General. Most Cited Cases Township in which territory sought to be annexed was located was not "any party" under statute governing "expedited type II annexation" which applied when the property to be annexed to a municipality would remain within township despite annexation, and township thus had no standing to bring a mandamus action to compel the board of county commissioners to deny the annexation petition; statute on expedited type II annexation provided that "[i]f the board grants the annexation, there shall be no appeal in law or in equity." R.C. § 709.023(G).

[2] Declaratory Judgment 118A ¶302.1

118A Declaratory Judgment 118AIII Proceedings 118AIII(C) Parties 118Ak302 Government or Officers as Parties 118Ak302.1 k. In General. Most Cited Cases Township in which territory sought to be annexed under statute governing "expedited type II annexation" was located lacked standing to file a declaratory judgment action regarding county commissioners' duties; township was creature of statute with no inherent powers, and statute provided scheme for review of issue, so that township trustees' rights and claims were limited to the statutory scheme for annexation. R.C. § 709.023(G).

[3] Municipal Corporations 268 ¶33(9)

268 Municipal Corporations 268I Creation, Alteration, Existence, and Dissolution 268I(B) Territorial Extent and Subdivisions, Annexation, Consolidation, and Division 268k26 Alteration and Creation of New Municipalities 268k33 Proceedings

268k33(9) k. Proceedings to Prevent or Contest Annexation in General. Most Cited Cases Mandamus was not available remedy for township trustees, in their action to compel county commissioners to deny annexation petition in expedited type II annexation proceedings, even assuming arguendo that township was "any party" under statute governing expedited type II annexation and thus had standing to bring a mandamus action; statute which permitted township to file objection to annexation provided a plain and adequate remedy, and commissioners had no clear legal duty to deny petition on grounds asserted by trustees regarding highway maintenance after annexing city agreed to assume that responsibility. R.C. § 709.023(D) and (G).

[4] Municipal Corporations 268 33(7)

268 Municipal Corporations

268I Creation, Alteration, Existence, and Dissolution

268I(B) Territorial Extent and Subdivisions, Annexation, Consolidation, and Division

268k26 Alteration and Creation of New Municipalities

268k33 Proceedings

268k33(7) k. Judgment or Order.

Most Cited Cases

Statute governing procedure of annexing land into a municipal corporation when the land is not to be excluded from the township, which provides conditions for the county commissioners to review in making their determination, does not require the commissioners to make express findings that analyze how all seven conditions justifying annexation have been met, but simply requires the commissioners to identify, and not to thoroughly explain or discuss, the conditions that have not been met when a petition has been denied. R.C. § 709.023(E) and (F).

Civil Appeal from Common Pleas Court. Wanda L. Carter, Columbus, OH, for Relator-Appellant.

John A. Cumming, Asst. Prosecuting Attorney, Dayton, OH, for Respondent-Appellee, Montgomery Co. Bd of County Commissioners.

Catherine A. Cunningham, Columbus, OH, for Respondents-Appellees, Joseph P. Moore, Agent and City Council, City of Union.

WALTERS, J. (by assignment).

\*1 ¶ 1 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.

¶ 2 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.

¶ 3 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.

¶ 4 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.

¶ 5 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, 858 N.E.2d 1193, 2006-Ohio-6411, ¶ 47.

{¶ 6} 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."

\*2 {¶ 7} On December 11, 2007, the Board of County Commissioners approved the annexation petition by Resolution Number 07-2156.

{¶ 8} 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 plead-

ings 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.

{¶ 9} From this decision, Butler Township has appealed, setting forth four assignments of error for our review.

"First Assignment of Error

[1]{¶ 10} "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."

{¶ 11} "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.

{¶ 12} 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.

{¶ 13} 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 town-

ships 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.

\*3 {¶ 14} 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.

{¶ 15} 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.)

{¶ 16} In *State ex rel. Overholser Builders, L.L.C. v. Clark Cty. Bd. of Comms.*, 174 Ohio App.3d 631, 884 N.E.2d 71, 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.*

{¶ 17} "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. Comms.*, 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.

{¶ 18} 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, 858 N.E.2d 1193.

\*4 {¶ 19} 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.

{¶ 20} 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."

{¶ 21} As for expedited type I II 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 stand-

ing 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.*

{¶ 22} 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."

{¶ 23} 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 R.C. 709.022 and 709.024. Surely, the omission of this definition from R.C. 709.023 was deemed significant by the General Assembly.

\*5 {¶ 24} 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 peti-

tioners 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.

{¶ 25} 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.

{¶ 26} 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.

{¶ 27} 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."

{¶ 28} 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.

\*6 [2]{¶ 29} 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 VI I 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.

[3]{¶ 30} 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.

{¶ 31} 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.

{¶ 32} For these reasons, the first assignment of error is overruled.

#### “Second Assignment of Error

{¶ 33}“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.”

\*7 {¶ 34} 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.

[4]{¶ 35} 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.

{¶ 36} 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 “long-standing 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.

{¶ 37} The second assignment of error is overruled.

“Third Assignment of Error

{¶ 38} “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.”

{¶ 39} 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.

{¶ 40} 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.

\*8 {¶ 41} 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.

{¶ 42} 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.

{¶ 43} 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.

{¶ 44} The third assignment of error is overruled.

“Fourth Assignment of Error

{¶ 45} “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.”

{¶ 46} 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.

{¶ 47} The fourth assignment of error is overruled.

{¶ 48} 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).

Ohio App. 2 Dist., 2008.

State ex rel. Butler Tp. Bd. of Trustees v. Montgom-

Slip Copy  
Slip Copy, 2008 WL 5196445 (Ohio App. 2 Dist.), 2008 -Ohio- 6542  
(Cite as: 2008 WL 5196445 (Ohio App. 2 Dist.))

Page 8

ery County Bd. of County Com'rs  
Slip Copy, 2008 WL 5196445 (Ohio App. 2 Dist.),  
2008 -Ohio- 6542

END OF DOCUMENT