

ORIGINAL

IN THE SUPREME COURT OF OHIO
No. 2009-0186

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

Relator-Appellant,

v.

MONTGOMERY COUNTY BOARD
OF COUNTY COMMISSIONERS, et al.

Respondents- Appellees.

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: On Appeal from the
: Montgomery County Court
: of Appeals, Second Appellate District
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BRIEF OF AMICUS CURIAE THE OHIO MUNICIPAL LEAGUE
IN SUPPORT OF THE CITY OF UNION

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIESv

INTRODUCTION.....1

STATEMENT OF AMICUS INTEREST1

STATEMENT OF THE CASE AND FACTS.....1

ARGUMENT.....1

 The Statutes1

Proposition of Law No. 1: A mandamus action cannot be used to challenge the decision of a board of county commissioners to grant a petition for an expedited type II annexation......4

Proposition of Law No. 2: “Substantial compliance” with the procedural requirements set forth in R.C. §709.023(E) is all that is required for an expedited type II annexation......5

CONCLUSION6

TABLE OF AUTHORITIES

PAGE

Cases

In re Petition to Annex 320 Acres to the Village of South Lebanon v. Board of Commissioners of Warren County, Ohio (1992), 64 Ohio St.3d 585; N.E.2d 463, 1992-Ohio-134..... 1

State of Ohio, ex rel., Butler Township Bd. of Trustees v. Montgomery County Board of County Commissioners, Montgomery County Court of Appeals Case No. 22664, 2008-Ohio-6542..... 1

Statutes

R.C. §709.015 5

R.C. §709.02 to 709.21 5

R.C. §709.021 3

R.C. §709.022 2

R.C. §709.023 passim

R.C. §709.024 2

INTRODUCTION

The Ohio Municipal League (the “League”), as amicus curiae on behalf of the City of Union, Ohio (“City”), urges this Court to affirm the decision of the Second District Court of Appeals. The Montgomery County Board of Commissioners (“Board”), in granting the property owner’s request for annexation, substantially complied with all applicable statutory requirements for the annexation. Consequently, a mandamus action is inappropriate in this case.

STATEMENT OF AMICUS INTEREST

The League is a non-profit Ohio corporation composed of a membership of more than 750 Ohio cities and villages. The League and its members have an interest in ensuring the integrity of annexation procedures in Ohio.

STATEMENT OF THE CASE AND FACTS

The League hereby adopts, in its entirety, and incorporates by reference, the statement of the case and the statement of facts contained within the opinion of the Second District Court of Appeals in the case of *State of Ohio, ex rel., Butler Township Bd. of Trustees v. Montgomery County Board of County Commissioners*, Montgomery County Court of Appeals Case No. 22664, 2008-Ohio-6542.

ARGUMENT

The Statutes

As this Court has noted, “annexation is strictly a statutory process.” *In re Petition to Annex 320 Acres to the Village of South Lebanon v. Board of Commissioners of Warren County*,

Ohio (1992), 64 Ohio St.3d 585, 591, 597 N.E.2d 463, 1992-Ohio-134. In 2005, the Ohio General Assembly revised Ohio's annexation law and provided for three (3) types of expedited annexation that may be used when all the property owners within the proposed territory of annexation agree to the annexation. Each type of expedited annexation is unique and contains specific requirements and processes.

Expedited type I annexations are authorized by R.C. §709.022 and require the signature of all property owners in the territory proposed to be annexed. Expedited type I annexations are frequently referred to as "agreement" or "consent of the parties" annexations as each party in an expedited type I annexation, including the township, must agree to the annexation.

Expedited type III annexations are authorized by R.C. §709.024 and require the signature of all property owners in the territory proposed to be annexed. Expedited type III annexations are for the purpose of undertaking a significant economic development project and are frequently referred to as "economic development annexations".

Expedited type II annexations, the type of annexation pursued in this case, are authorized by R.C. §709.023 and are often referred to as "property owner annexations". In an expedited type II annexation, the petition must contain the signatures of all property owners in the territory proposed to be annexed and the annexation may occur with or without the consent of the municipality or the township.

The statute establishing expedited type II annexations or "property owner annexations" directs that they shall occur upon the finding of certain conditions. R.C. §709.023(F) provides, in part: "the board of county commissioners, if it finds that each of the conditions specified in division (E) of this section has been met, *shall* enter upon its journal a resolution granting the annexation." (Emphasis added). The conditions specified in division (E) do not include

township approval.¹ A township is authorized to file a resolution objecting to the proposed annexation prior to action by the board of county commissioners,² and while this resolution may be considered by the board of county commissioners in determining whether or not an expedited type II annexation petition complies with the division (E) conditions, the mere filing of an objection is not an authorized reason to deny the proposed annexation. This is consistent with the concept of a “property owner annexation,” as this process is requested to be done by and for the benefit of the property owner.

The Ohio General Assembly provided for a writ of mandamus to compel the board of county commissioners to perform its duties. R.C. §709.023(G) provides, in part: “[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.”

¹ The following conditions are listed in division (E) of R.C. §709.023:

- (1) the petition meets all the requirements set forth in, and was filed in the manner provided in, R.C. §709.021;
- (2) the persons who signed the petition are owners of the real estate located in the territory proposed for annexation and constitute all of the owners of real estate in that territory;
- (3) the territory proposed for annexation does not exceed five hundred acres;
- (4) the territory proposed for annexation shares a contiguous boundary with the municipal corporation to which annexation is proposed for a continuous length of at least five per cent of the perimeter of the territory proposed for annexation;
- (5) the annexation will not create an unincorporated area of the township that is completely surrounded by the territory proposed for annexation;
- (6) the municipal corporation to which annexation is proposed has agreed to provide to the territory proposed for annexation the services specified in the relevant ordinance or resolution adopted under division (C) of R.C. §709.023; and
- (7) if a street or highway will be divided or segmented by the boundary line between the township and the municipal corporation as to create a road maintenance problem, the municipal corporation to which an 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.

² See R.C. §709.023(D). A municipal or township objection to the proposed annexation is required to be based solely upon the petition’s failure to meet the conditions specified in division (E).

Proposition of Law No. 1: A mandamus action cannot be used to challenge the decision of a board of county commissioners to grant a petition for an expedited type II annexation.

It is the view of the League that this case has arisen as a substitute for an appeal; an appeal which was eliminated by statute. The mandamus action for the expedited type II annexation was not intended to substitute for such an appeal, but as a remedy for any party to compel the county commissioners to grant the annexation upon substantial compliance with the statutory requirements for annexation.

Butler Township is seeking to challenge the granting of the annexation, and wants to argue whether or not the city “agreed” to maintain a portion of the road that would remain in the township, as directed by R.C. 709.023(E)(7). This case should be resolved in favor of the Board’s decision to grant the annexation upon the request of the property owner. At the time of the Board’s decision, the City of Union had passed a resolution stating it would maintain the portion of the road that was to remain in the township. This fact establishes substantial compliance with the statutory requirements, and provides the basis for deciding the case.

Butler Township’s objection to the expedited type II annexation is based on the claim that the annexation does not comply with the seventh condition of annexation set forth in R.C. §709.023(E). This, effectively, is an attempt to appeal the board’s decision. Mandamus is not available to review the action of the Board, which granted the petition of the property owner. Mandamus is only appropriate if the Board fails to act on the petition, either to approve or deny it based upon the statutory criteria.

Proposition of Law No. 2: “Substantial compliance” with the procedural requirements set forth in R.C. §709.023(E) is all that is required for an expedited type II annexation.

R.C. §709.023(E)(7) requires a board of county commissioners to review an annexation petition to determine “[i]f 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.”

Butler Township claims that the unannexed portion of Jackson Road would cause road maintenance problems, as Butler Township and the City of Union did not enter into an agreement regarding the maintenance of the unannexed portion of the roadway. The City of Union, however, prior to the action of the Montgomery County Board of Commissioners, adopted an ordinance agreeing to assume maintenance of the unannexed portions of Jackson Road. By adopting this maintenance ordinance, the seventh condition of R.C. §709.023(E) was satisfied.

As this is an expedited annexation, “substantial compliance” is all that is required for the procedural requirements of R.C. §709.023(E). R.C. §709.015 provides: “[t]he procedural requirements set forth in sections §709.02 to 709.21 of the Revised Code are directory in nature. Substantial compliance with procedural requirements of these sections is sufficient ***.” The City of Union’s action adopting a maintenance ordinance satisfied the substance of the statute. The Board’s failure to make a finding regarding same was merely procedural, but such failure does not negate the fact that the Board’s decision substantially complied with the statute.

CONCLUSION

Based upon the foregoing, the League respectfully requests this Court to affirm the decision of the Second District Court of Appeals deciding that Butler Township, Ohio, is not entitled to a writ of mandamus.

Respectfully submitted,


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CERTIFICATE OF SERVICE

A copy of the within *Brief of Amicus Curiae the Ohio Municipal League In Support of the City of Union* has been mailed regular U.S. mail on the 7th day of July, 2009 to:

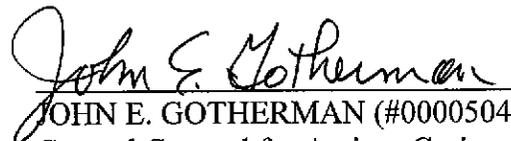
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