

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.	:	

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**MERIT BRIEF OF APPELLEE, JOSEPH P. MOORE,  
AGENT FOR ANNEXATION PETITIONER, WATERWHEEL FARM, INC.**

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## STATEMENT OF FACTS

Appellee, Agent substantially agrees with Appellant, Butler Township's Statement of the Facts. However, there are additional relevant facts in this action.

Waterwheel Farm, Inc. ("Waterwheel") owns 78.489 acres in unincorporated Butler Township adjacent to the city of Union.<sup>1</sup> Waterwheel has twice petitioned the Montgomery County Board of County Commissioners ("Commissioners") to annex the property now before this Court to the city of Union. Waterwheel and this identical property were before this Court in *State ex rel. Butler Twp. Bd. of Trustees, et al. v. Montgomery Cty Bd. of Cty. Cmmrs.*, 112 Ohio St.3d 262, 2006-Ohio-6411 (hereafter "*Waterwheel 1*"). The issue in that case was the interpretation of the R.C. 709.02(E) definition of "owners" in determining the number of owners needed to sign an annexation petition.

As part of the first petition, Waterwheel sought to annex a slightly larger 79.840 acre annexation territory that included Waterwheel's property along with 1.351 acres of adjacent Jackson Road "right of way." Jackson Road is an easement passing over the fee of the adjoining owners that Waterwheel included in the annexation territory at the city's request to facilitate the city's construction and maintenance of Jackson Road.<sup>2</sup> Waterwheel signed the annexation petition for its property, but the owners of included right of way did not sign. An issue arose on

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<sup>1</sup> Record, Complaint ¶8, Agent Answer ¶5, Transcript of County Commissioners' proceedings: Annexation Petition, Affidavit of Paul D. Thies, president of Waterwheel Farm, Inc., Deeds for Waterwheel Farm, Inc. (Vol. 93-0470, Page E09, Vol. 93-0799, Page E01, Vol. 85-0312, Page E04, Vol. 01-0820, Page D11).

<sup>2</sup> The standing of Butler Township was a challenged in the court of appeals in Waterwheel's first annexation attempt. Although the court of appeals questioned the standing of the township in an expedited type 2 annexation in *dicta*, it did not make any decision on the issue since it fee owners had standing. See *State ex rel. Butler Twp. Bd. of Trustees, et al. v. Montgomery Cty Bd. of Cty. Cmmrs.*, 162 Ohio App.3d 394, 401, 2005-Ohio-3872, ¶32, *affirmed* 112 Ohio St.3d 262, 2006-Ohio-6411.

whether the owners of the fee of property over which a roadway easement passes are “owners” required to sign an annexation petition pursuant to R.C. 709.02 when an adjacent owner includes the roadway in the territory sought to be annexed to a municipality. This Court determined that fee owners of right-of-way were owners required to sign an annexation petition. The first annexation then failed because it did not contain 100% of the property owners’ signatures.

Thereafter, Waterwheel filed the petition for annexation now before this Court, that includes *only* the 78.489 acre property owned by Waterwheel Farm, Inc. utilizing the R.C. 709.023 expedited type-2 annexation process. (Complaint ¶8, Answer of Agent ¶5). Within twenty (20) days of the filing of the petition, as required by R.C. 709.023(C), the city of Union adopted and filed with the Commissioners Ordinance No. 1438 indicating the services and buffering it would provide to the territory if annexed. That Ordinance provided in Section III (Answer of Agent, Exhibit A):

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.

Butler Township adopted and filed with the commissioners an objection to the annexation claiming that, if approved, the annexation territory would cause a road maintenance problem in violation of R.C. 709.023(E)(7). (Record, Transcript of Commissioners Proceedings, Butler Township Resolution No. 07-2156). In the expedited type-2 annexation process, if the petition meets all of the conditions set forth in R.C. 709.023(E)(1) – (7) the commissioners are required to grant the annexation. There is no hearing on an expedited type-2 annexation petition. If an objection is filed, the commissioners must “review” the petition to determine if all of the

statutory conditions have been met. R.C. 709.023(E). The commissioners reviewed the petition, expressly acknowledged the city ordinance, township objection, agent's opposition to the objection, and all of the filings, then approved the annexation by Resolution No. 07-2156. (Complaint, Exhibit 1). While not required by the statute, the commissioners made findings on the R.C. 709.023(E)(1)-(E)(6) criteria. The commissioners did not make a specific finding on R.C. 709.023(E)(7) nor did they identify any R.C. 709.023(E) conditions that were not met by this annexation, including R.C. 709.023(E)(7). (Complaint, Exhibit 1). The board of commissioners approved the annexation after it determined, upon review, that all of the R.C. 709.023(E) conditions were met. (Complaint ¶ 15, Answer of Montgomery County Board of County Commissioners ¶3) The record of the proceedings and commissioners' resolution granting the annexation has been delivered to the city of Union for acceptance by city council. (Record, Complaint, ¶13, Answer of Montgomery Board of County Commissioners, ¶6). R.C. 709.04. The annexation is no longer before the county commissioners.

The Appellant, Butler Township filed a complaint for declaratory judgment, mandamus and preliminary and permanent injunction in the trial court essentially to enjoin the city of Union from accepting the annexation and have the decision of the county commissioners approving the annexation reversed. (Complaint). The township asserted that the board had a clear legal duty to rescind its resolution approving of the annexation on the narrow technical ground that the commissioners had *made no express finding* in their resolution that the R.C. 709.023(E)(7) criteria for annexation had been met. (Complaint ¶1). (The township does not claim the annexation did not, in fact, meet the R.C. 709.023(E)(7) condition on its merits, only that the board of county commissioners failed to so find making its resolution improper). A board of county commissioners has no clear legal duty to make express findings upon the conditions of

annexation when an annexation is *granted* or to rescind its decision once made. See R.C. 709.023(E) and (F).

In the trial court proceedings all of the Respondents (the Annexation Petitioner's Agent, city of Union, and Montgomery County Commissioners) opposed the township's request for a preliminary and permanent injunction.<sup>3</sup> The city of Union filed a motion to dismiss primarily on the grounds that Butler Township has no standing to challenge an expedited type-2 annexation approved by the county commissioners by mandamus and the annexation statutes do not provide any other remedy. (Respondent City of Union's Motion to Dismiss). The agent for the annexation petitioner filed an answer, request for dismissal, and given Appellant's claims, a cross-claim in mandamus against the Montgomery County Commissioners. (Respondent Agent's Answer and Cross-claim). The agent asserted that if the commissioners had clear legal duty to make an affirmative finding upon the R.C. 709.023(E)(7) condition for annexation, the court should grant a writ to compel the commissioners to make a finding that the R.C. 709.023(E)(7) factor had been met. (Respondent Agent's Answer and Cross-claim, ¶¶48-50, 55-63). Alternatively, the Agent requested that the trial court compel the commissioners to adopt a legally sufficient resolution amending Resolution No. 07-2156, nunc pro tunc, to approve the annexation, to the extent that Commissioner's Resolution No. 07-2156 was deemed legally insufficient to grant the annexation. (Respondent Agent's Answer and Cross-claim, ¶¶45-63).

The Commissioners admitted that the 78.489 acre single owner annexation met all of the requirements of R.C. 709.023(E)(1) – 709.023(E)(7), including that there was no road

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<sup>3</sup> (See Record, Respondents' Joseph P. Moore And City Council, City Of Union's Memorandum In Opposition To Motion Of Relator Butler Township Board Of Trustees For Preliminary Injunction filed February 8, 2008 and Memorandum of Respondent, Montgomery County Board of County Commissioners, in Opposition to Motion of Relator for Preliminary Injunction filed February 14, 2009).

maintenance problem as a result of the annexation. (Agent's Cross-claim ¶56-58, Commissioners Answer to Cross-claim ¶1). The Commissioners admitted that they made no finding on the R.C. 709.023(E)(7) condition as part of their resolution and denied that they were required to make an affirmative finding upon the that criteria. (Agent's Cross-claim ¶58-59, Commissioners Answer to Cross-claim ¶1, 2). The Commissioners claimed and the trial court found that "a finding on R.C. 709.023(E)(7) was not necessary because the [Board of County Commissioners] determined that a road maintenance problem was not created" and "because the [Commissioners] determined that the City of Union had agreed, in Union Ordinance No. 1438, to assume road maintenance responsibility or otherwise correct any road maintenance problem that may have been created by the annexation." (Agent's Cross-claim, ¶59; Answer to Cross-claim ¶2, 6, 7, Trial Court Decision, pp. 17-18, attached as Appendix). The merits of the cross-claim became moot when the trial court dismissed Butler Township's Complaint finding the township did not have standing to file mandamus against the Montgomery County Commissioners. (Trial Court Decision, pp. 15-17). The trial court also found, even if the township did have standing, declaratory judgment and injunction actions are outside the statutory annexation process and not available to challenge an annexation and the county commissioners did not have a clear legal duty to make a finding on R.C. 709.023(E)(7). (Trial Court Decision, pp. 17 - 18).

The Second District Court of Appeals affirmed the trial court in a well-reasoned opinion and ordered that the city of Union and/or the Union City Council be stayed from accepting the annexation until this Court completes its review of this case. (Court of Appeals Decision and Entry, Dec. 12, 2008, 2008-Ohio-6542 (hereafter referred to as "*Court of Appeals Decision*" followed by the paragraph number in 2008-Ohio-6542 without further citation).

## ARGUMENT

### Agent's Proposition of Law No. 1:

**A township, any portion of which is included within territory proposed for annexation, does not have standing under R.C. 709.023(G) to seek a writ of mandamus to compel the board of county commissioners to perform an act that is not its clear statutory duty to perform.**

The Montgomery County Commissioners granted Waterwheel's special expedited type-2 annexation and forwarded it to the city of Union for acceptance. There is no appeal in law or equity from the commissioners decision in an expedited type-2 annexation. R.C. 709.023(G). Butler Township claims a statutory right as a "party" to the annexation to bring an action in mandamus pursuant to R.C. 709.023(G) to compel the Montgomery County Commissioners to perform a duty the Township claims it has to rescind its resolution granting Waterwheel's annexation. R.C. 709.023(G). The General Assembly did make townships parties to expedited type-2 annexation proceedings and the Township does not have a statutory right or standing to bring mandamus.

Even if the Township can sue the county commissioners for mandamus in expedited annexations, in this case the commissioners performed their duties and the resolution approving the annexation is no longer before the them. There is no statutory duty or authority under R.C. 709.023(G) for the commissioners to rescind or reconsider an annexation after it has been approved and forwarded to the municipality. The Township claims the commissioners' resolution approving the annexation was defective and must be rescinded asserting a board of county commissioners has a clear legal duty to make express findings upon each of the R.C. 709.023(E)(1) – (7) statutory conditions in an expedited annexation before the annexation is granted. R.C. 709.023(F) imposes no duty upon the county commissioners to make finding upon

any of the statutory conditions when and annexation is granted or where, as here, one of the conditions does not apply. Moreover, the Commissioners have admitted that the annexation met all of the statutory criteria and they had a duty to approve it.

Annexation is “strictly a statutory process.” *In re Petition to Annex of 320 Acres to Village of South Lebanon* (1992), 64 Ohio St.3d 585, 591. *Court of Appeals Decision*, ¶15. “With the passage of Am.Sub.S.B. No. 5 (“Senate Bill 5”) in 2001, 149 Ohio Laws, Part I, 621, the General Assembly accomplished a comprehensive reform of Ohio's laws regarding annexation, principally through amendments to R.C. Chapter 709. One of the major innovations of Senate Bill 5 was the establishment of three new specific procedures that allow for expedited annexations when all the property owners within a parcel to be annexed sign an annexation petition.” *Waterwheel I*, 2006-Ohio-6411, ¶2. When examining an expedited type-2 annexation and the new statutory scheme of annexation in Ohio, the policies of the state and intentions of the legislature must be considered as the court of appeals did below. See R.C. 1.49.

This Court has long recognized the policy of the state of Ohio to favor the annexation of unincorporated territory to municipal corporations, and to give an owner of property freedom to choose the governmental subdivision in which he desires this property to be located. *Middletown v. McGee* (1988), 39 Ohio St.3d 284, 285. “One of the intentions of the legislature in enacting the statutes governing annexation was 'to give an owner of property freedom of choice as to the governmental subdivision in which he desires his property to be located.' ” *Id.* at 286. See also, *In re Annexation of 118.7 Acres in Miami Twp.* (1990), 52 Ohio St.3d 124, 127. This is particularly true when 100% of the owners of property in the annexation territory desire annexation. *Smith v. Granville* (1998), 81 Ohio St.3d 608, 615. With the adoption of Senate Bill 5, the General Assembly advanced these policies by “expediting” certain annexations when

they are supported by 100% of the property owners and meet various objective conditions established by the legislature. The General Assembly defined and protected various governmental interests in the expedited annexation proceedings and commensurately limited or eliminated any challenges to the property owners right to annex their land in these special expedited annexation proceedings.

Three new 100% owner-supported expedited annexation procedures were established by the General Assembly in Senate Bill 5 and succinctly described by this Court in *Waterwheel 1*, 2006-Ohio-6411, ¶5 as follows:

The three additional, expedited procedures all apply only when “all of the owners of real estate” within a particular territory request annexation by signing the petition. R.C. 709.021(A) and (B). The first, established by R.C. 709.022, commonly called an expedited type-1 annexation, applies when “all parties,” including the township and the municipality, agree to the annexation of property. The second, established by R.C. 709.023, is commonly called an expedited type-2 annexation and applies when the property to be annexed to the municipality will remain within the township despite the annexation. The third type of special annexation, established by R.C. 709.024, is commonly called an expedited type-3 annexation and applies when the property to be annexed has been certified as “a significant economic development project.”

Each expedited procedure establishes certain conditions that must be met for annexation and also prescribes any remedies available. The court of appeals described the remedies in each expedited proceeding (*Court of Appeals Decision*, ¶19 and ¶27):

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.

\* \* \*

[I]n 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.”

The general provisions that apply to all expedited annexation proceedings are set out in R.C. 709.021.

“To be valid” an expedited type-2 annexation petition must include the following notice:

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.

(Emphasis added). R.C. 709.021(B) and R.C. 709.023(A). Three fundamental principles are recognized in this notice: (1) the decisions made by the commissioners in an expedited type-2 process are “ministerial”; (2) a petitioning owner is a party who can seek a writ of mandamus to compel the board of county commissioners to perform its duties; and (3) the county commissioners have a duty to the annexation petitioners.

In this case Waterwheel expressly waived its right of appeal and acknowledged its right to file mandamus against the board of county commissioners to compel them to perform their duties required by law when it signed its annexation petition. In addition, by signing the petition, Waterwheel waived any rights it may have to sue on any issue relating to the city of Union requiring a buffer to uses on its property that are clearly incompatible with land uses on the adjacent property that remains in the unincorporated township as provided R.C. 709.023(C) and

waived any rights it had to seek a variance that would relieve or exempt them from that buffer requirement. R.C. 709.023(A).

The county commissioners are required to grant a property owners' expedited type-2 annexation petition if it meets the seven conditions for annexation set out in R.C. 709.023(E). If any of the conditions are not met, the board of county commissioners must identify which conditions the board finds have not been met and deny the annexation petition. R.C. 709.023(F). R.C. 709.023(G) provides:

(G) If a petition is granted under division (D) [without objection] or (F) [after review following objection] 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.

This section recognizes two more principles applicable in an expedited type-2 annexation. First, after a the commissioners have acted to grant and expedited type-2 annexation, even over the objection of a township, the clerk of the commissioners is required to transmit the record of the annexation proceedings to the municipality. Second, as noticed, acknowledged, and waived by the owner in its annexation petition, there is no appellate review of the merits of the decision of the county commissioners. The sole remedy available to a 'party' in an expedited type-2 annexation is a writ of mandamus to compel the commissioners to take action. R.C. 709.023(A).

The definition of "parties" in all expedited annexation proceedings is contained in R.C. 709.021.<sup>4</sup> R.C. 709.021(D) provides:

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<sup>4</sup> In the majority petition process provides in R.C. 709.032(A) "As used in this section, "necessary party" means the municipal corporation to which annexation is proposed, each township any portion of which is included within the territory proposed for annexation, and the

(D) As used in sections 709.022 and 709.024 of the Revised Code, "party" or "parties" means the municipal corporation to which annexation is proposed, each township any portion of which is included within the territory proposed for annexation, and the agent for the petitioners.

That definition is clearly not made applicable in an R.C. 709.023 annexation proceeding. See *Hamilton Twp. Bd. of Trustees v. Warren Cty. Bd. of Commrs.* (June 25, 2009), Warren C.P. No. 09CV73431, attached. There is no other definition of a "party" in any of the expedited annexation statutes. See R.C. 709.022, .023 and .024. The court of appeals properly examined the plain language of R.C. 709.023 and R.C. 709.021(D) and the overall statutory scheme of expedited annexations and determined that the General Assembly intended to exclude townships as parties to expedited type-2 annexation proceedings.<sup>5</sup> (*Court of Appeals Decision*, ¶28). It did not find a definition outside the strict statutory scheme of expedited annexations as Appellant and its supporting *Amicus Curiae* assert. In construing R.C. 709.023(G), the court of appeals examined Senate Bill 5's new annexation procedures and compared and contrasted the criteria and remedies in each of the expedited annexation processes. The court of appeals stated (*Court of Appeals Decision*, ¶28, *emphasis added*).

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.***

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agent for the petitioners." Those same persons are necessary parties to any appeal of the decision of the county commissioners in a majority-supported annexation. See R.C. 709.07(A).

<sup>5</sup> The significance of the General Assembly's omission of a definition of "party" that includes the township in an expedited type-2 annexation is that it is only the property owners whose petition is before the board who are parties. No other person, including the township, is a "party" to the owners' proceedings.

The language in the expedited type-3 annexation proceeding (R.C. 709.024) does not support the township's claim that the General Assembly would have used the term "owner" rather than "party" in R.C. 709.023(G) if it had meant to limit mandamus to petitioning owners for two reasons. First, R.C. 709.021 makes townships a party to expedited type-3 annexations, so any limitation of remedy in R.C. 709.024(G) to an owner could not refer to a "party." Second, the owners in an expedited type-2 annexation are required to waive their right of appeal and acknowledge their right of mandamus. There is no such waiver or acknowledgement in an expedited type-3 annexation. In an expedited type-3 annexation if the township files an objection, the county commissioners must hold an evidentiary hearing to determine if the factors for annexation have been met. R.C. 709.024(E). Following that hearing, the only remedy provided by the General Assembly is to an owner who may only appeal the commissioner's denial the owners' petition. R.C. 709.024(G). The legislature did not give townships the right to challenge any decision of the county commissioners in an expedited type-3 annexation.

The township's claim that the Court should go beyond the express terms of the annexation statutes and look to the 'plain and ordinary meaning' of "party" must also fail. As the court of appeals recognized, "party" has a particular meaning in legal and administrative proceedings. R.C. 1.42. It means someone "by or against whom a legal suit is brought." Someone who has a sufficient legal right or interest to initiate an action, such as a property owner petitioning for annexation. The Court of Appeals stated at ¶24:

While an annexation proceeding is not, in strict legal terms, a legal suit, it is a legal proceeding brought by and in the name of the petitioners only, and before the board of county commissioners. And, while a board of township trustees or a municipal corporation may be interested persons, they are not, by general definition, "parties" to an annexation proceeding.

The township's attempt to construe to term "party" more broadly to mean anyone who might claim to be interested must be rejected. Townships have the rights as are expressly granted by the legislature and can only be parties authorized to bring mandamus upon express grant by the legislature. See *Lawrence Twp., Stark Cty., Ohio, Bd. of Twp. Trustees v. Canal Fulton*, Stark App. No. 2007 CA00010, 2007-Ohio-6115, ¶21. A broad and general definition of 'party' from a law dictionary is not sufficient to make a township a party in a strict statutory proceeding.

Similarly, the township's receipt of notice of the annexation proceedings and authority to object before the county commissioners does not make it a "party" authorized to bring mandamus or to whom the commissioners owe a duty. Adjacent property owners are also given notice of the filing of an expedited type-2 annexation, but they cannot participate in nor are they parties to the expedited annexation proceedings. R.C. 709.023(B). Townships are creatures of statute with no inherent power. *Trustees of New London Twp. v. Miner* (1875), 26 Ohio St. 452, 456 (neither the township nor its trustees are invested with the general powers of a corporation; hence the trustees can exercise only those powers conferred by statute). Whatever authority a township possesses in annexation is strictly limited to that which is specifically conferred by statute. *State ex rel. Overholser Builders, LLC v. Bd. of Cty. Commrs. of Clark Cty.*, Clark No. 2007 CA 36, 2007-Ohio-7230, ¶5, 38 citing *Yorkavitz v. Bd. of Trustees of Columbia Twp.* (1957), 166 Ohio St. 349, 351 and *Bd. of Twp. Trustees v. Funtime, Inc.* (1990), 55 Ohio St.3d 106. R.C. 503.01 generally conferring upon a township the right to sue and be sued does not confer standing, it must be expressly granted. See *In re Annexation of 311.8434 Acres of Land* (1992), 64 Ohio St.3d 581, 583. The township's participation in the annexation proceedings is strictly limited to its right to file a resolution objecting to the annexation. Even when an objection is filed, there is no evidentiary hearing and the township is not made a party. The

commissioners simply review the petition and filings to determine if it meets the statutory criteria for annexation. R.C. 709.023(D) and (E).

Appellant and its supporting *Amicus Curiae* claim the General Assembly must have intended to grant them some right to challenge expedited type-2 annexation petitions beyond the county commissioners proceedings, otherwise the commissioners could wrongly approve annexations without any judicial oversight. This argument presumes townships are “aggrieved” or harmed by an expedited type-2 annexation. They are not.

When the General Assembly created the three expedited annexation proceedings, it also protected or disregarded the governmental interests the township and its supporting *Amicus Curiae* claim are harm. In exchange for these protections, the General Assembly expedited certain 100% owner supported proceedings limited township’s right to challenge them. Townships are made parties to both expedited type-1 and expedited type-3 annexations, but they have no remedy available to them in either proceeding. In an expedited type-1 annexation, the township must consent, and in an expedited type-3 annexation, the General Assembly determined that the state’s interest in promoting significant economic development projects outweighed any interest of a township or municipality in challenging the annexation – even if it was ‘wrongly approved’ as argued by the township.

In an expedited type-2 annexation, General Assembly determined that the rights of property owners in certain 100% supported annexations outweigh Appellant’s claimed interest in preserving the unincorporated territory of the township and regulating and serving the territory. The General Assembly limited the affect of the annexation on townships. The municipality cannot petition to exclude the territory from the township under R.C. 503.07 at any time without

the township's consent.<sup>6</sup> The annexation territory remains in the township and "subject to the township's real property taxes," even after the annexation to a municipality becomes effective. R.C. 709.023(H). Upon annexation township zoning remains in place until the city takes action to rezone the property. R.C. 519.18. The municipality is required to agree to create buffer zoning to clearly incompatible uses in the township and the owners must waive any right they have to sue on any issue relating to the municipal corporation requiring a buffer or request a variance or exemption from the buffer requirement. R.C. 709.023(C) and (A). The city is required to serve all segmented streets or highways in the unincorporated township if a road maintenance problem is created by the annexation. R.C. 709.023(E)(7). Taxes within the ten-mil limitation (inside millage) are reapportioned further preserving the township's tax base. R.C. 5705.315. Although township road and bridge funds are eliminated, annexed roads become municipal streets by operation of law, and the township is no longer required to service them. R.C. 5575.10.

All of the "harm" and "detriment" claimed by the Appellant and their *Amicus Curiae* are not legal rights or interests of a township. They are simply statutory authorities both granted and limited by the General Assembly that a Township has no authority to dispute, not negotiated rights as *Amicus Curiae* Ohio Township Association claims. The statutory process and consequences of annexation are established by the General Assembly within its sole discretion.

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<sup>6</sup> Under the former annexation law, there was only one annexation process and any annexed territory could be excluded from the township upon petition by a municipal corporation for a change of township boundaries in order to make those boundaries conform in whole or in part to the limits of the municipality. R.C. 503.07. A change of township boundaries to conform to a city was an ministerial act and required to be granted upon municipal petition. *State ex rel. Dublin v. Delaware Cty. Bd. of Cmmrs.* (1991) 62 Ohio St.3d 55. Under the new law, territory may not be excluded when an R.C. 709.023 expedited type-2 annexation process is followed. R.C. 709.023(H).

Indeed, the township is afforded more protection in an expedited type-2 process than it is under the general law, former annexation law, or in the new majority annexation petition process where annexed property can be removed from the township and its tax base and no buffering of land uses or municipal road service in problematic areas are not required.<sup>7</sup>

The township's claim the expedited annexation cases that have made their way through the courts illustrate the importance of the township's standing to challenge these special 100% owner supported proceedings is unpersuasive. In *Waterwheel 1*, individuals who claimed they were owners of annexation territory who, as owners, were parties to the proceedings. In *Lawrence Twp. Bd. of Twp. Trustees v. Canal Fulton*, Stark App. No. 2008 CA 00021, 2009-Ohio-759, the township asserted the rights of a railroad that does not object to the annexation and though named in the mandamus, has not been served. As a legal matter, the court anticipated that the railroad was not an owner required to sign an annexation petition but remanded the case because there were not undisputed facts to support the trial court's granting of summary judgment. The court did not identify what, if any, harm the township claimed it would

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<sup>7</sup> The General Assembly has determined: (1) townships have no authority over, nor can they receive revenues for former township roads that are located in a municipal corporation (R.C. 5575.10); (2) taxes within the ten-mil limitation (inside millage) are re-apportioned following annexation when the territory is not removed from the township (R.C. 5705.315); (3) property in an expedited type 2 annexation cannot be excluded from the township (absent an agreement) following annexation and "thus, remains subject to the township's real property taxes" (R.C. 709.023(H)); (4) townships have no authority to zone property located in incorporated territory (R.C. 519.02); and (5) township zoning remains in place following annexation only until the municipal corporation zones the property (R.C. 519.18); among other consequences. Ohio courts have held that the general statutory authority of a township to enter contracts and spend money associated with annexation in R.C. 505.62 is not a grant of standing in any legal proceedings on annexation. See *In re Annexation of 311.8434 Acres of Land* (1992), 64 Ohio St.3d 581, 585, and *Washington Tp. Bd. of Trustees v. City of Mansfield City Council*, *Richland App. 03 CA 85, 03 CA 97, 2004-Ohio-4299*. A township has no legal right or interest in or standing to complain about its statutory authority or the statutory consequences of every annexation.

suffer if the property were annexed. It simply presumed the township was a party entitled to bring mandamus.

The limitation of challenges to certain types of annexation is not create an unreasonable or “absurd result” in annexation as the Township claims. Rather it fosters the state policy to allow owners to choose the political subdivision in which they desire their property to be located, provides for an truly special “expedited” annexation process, and promotes and facilitates economic development throughout the state. Even under the former law, when there was a single method requiring only a “majority” of property owners to petition for annexation, townships rights to challenge <sup>8</sup>approved annexations was limited by the General Assembly. See *In re Annexation of 311.8434 Acres of Land, supra*. As in this case, annexation is often sought because a municipality can provide services such as water and sewer that are not available in the township and that will allow the development of the property and potentially the creation of jobs.

Even if this Court finds Butler Township is a “party” to an Waterwheel’s expedited type-2 annexation proceeding, a fundamental flaw in Appellant township’s argument that it has a right of mandamus is its erroneous claim that (1) the board of county commissioners failed to perform its statutory duty (it did not), and (2) mandamus is an appropriate remedy to restrain one

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<sup>8</sup> Under the former law, if the annexation was approved, the exclusive remedy that was available to anyone who objected at the hearing on the annexation was to file an original action in the common pleas court petitioning for a permanent injunction against the annexation. See former R.C. 709.07. The burden of proof in this special statutory injunction was clear and convincing evidence of error. If an annexation was denied, an administrative appeal was available under R.C. Chapter 2506 having a mere “preponderance of the evidence” burden. Under the former law, this Court reasoned that “ ‘the policy of the state of Ohio to encourage annexation by municipalities of adjacent territory’ \* \* \* “would be thwarted to a great extent if township trustees were provided the broad appeal rights contained in R.C. Chapter 2506.” *In re Annexation of 311.8434 Acres of Land* at 585. Senate Bill 5 extended this policy by limiting both “parties” to and the remedies available in 100% owner supported expedited annexations.

action taken by the county commissioners (approving an annexation) and compel them to take a different action (denying the annexation).

Mandamus is a writ “commanding the performance of an act which the law specially enjoins as a duty from an office.” R.C. 2731.01. In order to be entitled to a writ of mandamus in an expedited type-2 annexation, the township seeking mandamus must to establish: (1) that *the township* has a clear legal right to the relief prayed for; (2) that the county commissioners has a clear legal duty to perform the acts complained of; and (3) that the township has no plain and adequate remedy at law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 29, citing *State ex rel. Heller v. Miller* (1980), 61 Ohio St.2d 6, para. 1 of syllabus. These requirements are conjunctive; the failure of one requirement will preclude relief in mandamus. *State ex rel. Smith v. Cuyahoga County Court of Common Pleas*, 106 Ohio St.3d 151,15, 2005-Ohio-4103, ¶13 citing *State ex rel. Cincinnati Bell Tel. Co. v. Publ. Util. Com.*, 105 Ohio St.3d 177, 2005-Ohio-1150, ¶13.

After the township’s objection was filed, it was the duty of the county commissioners to review the petition and adopt a resolution approving or denying an annexation petition. R.C. 709.023(E) and (F). In this case, the record from the commissioners proceedings and trial court clearly establish that the annexation petition met all of the requirements of R.C. 709.023(E). The county commissioners have performed their duty and there is no action in mandamus and no act to compel.<sup>9</sup> The township had a plain and adequate remedy at law in its

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<sup>9</sup> In its Complaint, Butler Township urged the court create then compel a duty upon the county commissioners to “rescind” its resolution granting the annexation. The General Assembly did not impose upon a board of county commissioners any duty rescind a resolution granting an annexation or create any stay against the processing of an annexation that is challenged by mandamus.

right to file an objection to the owner's petition in the county commissioners proceedings. See *Lawrence Twp. Bd. of Twp. Trustees v. Canal Fulton, supra* at 2007-Ohio-6115, ¶22.

What the township seeks is not mandamus, but rather appellate review of the merits of the 'act performed' by the county commissioners in approving Waterwheel's annexation petition, and an injunction against the approved annexation. There is no appeal of the commissioners decision in an expedited type-2 annexation. R.C. 709.023(H). Mandamus cannot be used as a substitute for appeal to review the merits of the decision made by the county commissioners and reverse the commissioners' decision. A writ to compel a public official to act is directly contrary to an injunction to prohibit the single action taken by the official in a two step process from being consummated by a third party in the second step – here, the acceptance of the annexation by the municipality. R.C. 709.04. The court of appeals held that Butler Township had no authority to bring an action for declaratory judgment or preliminary and permanent injunction. The township did not appeal that determination. (*Court of Appeals Decision*, ¶29, ¶38-41 and Appellant's Merit Brief, footnote 1, p. 4).

An examination of the former annexation law and statutory scheme of Senate Bill 5 is further evidence that the General Assembly did not intend for mandamus to be used to challenge expedited annexations the county commissioners have approved. When the General Assembly adopted Senate Bill 5, it eliminated the special statutory injunction against the city's processing of an approved annexation that was available under the former law, which enjoined municipal annexation proceedings pending a review of the merits of the case. See *former* R.C. 709.07 attached. The General Assembly replaced the injunction against the municipal clerk to annexation proceedings available under the former law with a stay against the processing of an annexation under the new law. R.C. 709.07. However, the new stay of annexation proceedings

is *only* available when an appeal is filed in the R.C. 709.03 majority supported petition process pursuant to R.C. 709.07. There is no statutory injunction or stay available in the execution or processing of any of the expedited annexation proceedings.<sup>10</sup> R.C. 709.07(A) and 709.03(D).

As the Fifth District court of appeals noted in *Lawrence Twp. Bd. of Twp. Trustees v. Canal Fulton*, *supra* at 2009-Ohio-759, ¶36, “it is easier to conceptualize Appellant’s [mandamus] challenge as one seeking prohibition as opposed to mandamus given the board of commissioners’ resolution approving annexation.” That court erroneously presumed that the township was defined as a “party” in an expedited type-2 annexation and it must have a right of mandamus. The court found ‘it is conceivable to frame Appellant’s mandamus complaint as one to compel the board of commissioners to reject the annexation petition’ so ‘mandamus *may* lie.’<sup>11</sup> *Id.* at ¶36. However, once the county commissioners have approved an annexation, it has

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<sup>10</sup> In the majority petition process, after the board of commissioners enters upon its journal a resolution granting or denying the petition, the clerk of the board is prohibited from transmitting the record of an approved annexation to the municipality for acceptance or taking any further action for a period of thirty days after the date of journalization of the commissioners resolution. R.C. 709.03(B). “The filing of a notice of appeal with the clerk of the board of county commissioners ***shall operate as a stay of execution upon that clerk and all parties to the appeal***, which stay shall not be lifted until the court having jurisdiction over the proceedings enters a final order affirming or reversing the decision of the board of county commissioners and the time limits for an appeal of that final order have passed without a notice of appeal being filed.” R.C. 709.07(A). *See also* R.C. 709.03(D) requiring the commissioners clerk to process the record in accordance with R.C. 709.07 when an appeal is filed. “The agent for the petitioners, any township in which the territory proposed for annexation is located, and any municipal corporation to which the territory is proposed to be annexed are necessary parties in an appeal.” R.C. 709.07(A).

<sup>11</sup> The township cites *Washington Tp. Bd. of Trustees v. City of Mansfield City Council*, *Richland App. 03 CA 85, 03 CA 97, 2004-Ohio-4299* in support of its claim that the township has standing to bring mandamus in an expedited type-2 annexation. The issue of standing in mandamus was not before the court in *Mansfield*. That case involved a declaratory judgment action brought by a township challenging a municipality’s reconsideration of legislation and ultimate acceptance of an expedited type-2 annexation. The court stated the “township was creature of statute that only had those powers expressly granted by statute,” and had no right to challenge city council’s

performed its duty, the annexation is transferred to the municipality for processing, and the commissioners no longer have any authority over the annexation. R.C. 709.023(G). If the General Assembly had intended to make mandamus a remedy available to challenge an annexation that is granted, it would not have eliminated the statutory injunction against annexation or it would have made the stay of the annexation proceedings applicable in the expedited processes to prevent the municipality from accepting the annexation after they receive the record of the proceedings from the municipal clerk. It did not.

Finally, the duties the General Assembly imposed upon county commissioners in action on an expedited type-2 annexation do not support the township's claim that mandamus is available by any party to challenge the commissioners' decision granting an annexation. When an annexation is granted, the commissioners are simply required to adopt a resolution granting the annexation. R.C. 709.023(F). (See also, Appellee's argument in proposition of Law No. II below). It is only when an annexation is denied, that the commissioners must adopt a resolution that states which statutory conditions in R.C. 709.023(E)(1) to (E)(7) the board finds have not been met. The court of appeals properly found that of this dichotomy

is consistent with the "longstanding common law that individual property owners are entitled to the free alienation of their property if specific conditions are met." *Id.* [*Lawrence Twp. Bd. of Trustees v. Canal Fulton*, Stark App. No.2007CA00308, 2008-Ohio-2690] 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.

(*Court of Appeals Decision* at ¶36).

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acceptance of annexation petition. It was only in dicta that the court noted the township may have a right of mandamus.

As this Court recognized in *Waterwheel 1* at 2006-Ohio-6411, ¶8:

An examination of Senate Bill 5 indicates that some of the overall goals of the bill-including those of the new expedited procedures-were to promote consistency in decision-making by putting in place firm standards to govern the consideration of annexation petitions, *to improve the efficiency of annexations by creating the expedited processes*, and to promote cooperation among local governments.

The interpretation of the annexation statutes urged by Appellant Butler Township and the supporting *Amicus Curiae* in this case are contrary to the rights of a property owner to choose the jurisdiction in which their property is located, the state policy encouraging annexation, the goal of improving the efficiency of annexations that are supported by 100% of the property owners through expedited processes.

For the reasons stated herein, and the additional reasons set forth in the Merit Brief of the Montgomery County Commissioners which are expressly adopted by reference herein, Appellant Agent for Waterwheel Farm, Inc. urges this Court to affirm the well-reasoned opinion of the Second District Court of Appeals below, in its entirety.

**Agent's 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.**

Assuming, *arguendo*, Butler Township has the right (standing) to bring an action in mandamus, the township has no actionable claim. The township asserts that R.C. 709.023(E) and (F) impose upon a board of county commissioners a clear legal duty to make express findings on each of the R.C. 709.023(E)(1) - (E)(7) conditions for annexation in their resolution before granting an owners' expedited type-2 annexation petition. The township then claims the

commissioners' resolution granting the annexation in this case was defective on its face due to a 'lack of an express finding' that the R.C. 709.023(E)(7) condition was met.

The township's argument relies upon an erroneous premise. There is no statutory requirement or duty for a board of county commissioners to make an express finding upon each of the R.C. 709.023(E)(1) - (7) criteria when an annexation is granted. R.C. 709.023(F) only requires a board of county commissioners to identify and make specific findings upon select criteria of the R.C. 709.023(E)(1) - (7) when it relies upon the condition to *deny* an annexation. R.C. 709.023(E) and (F) provides (emphasis added):

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

\* \* \*

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

R.C. 709.023(E) and (F) is clear on its face and needs no interpretation. The court below properly held "consistent with a clear reading of the statute"

\* \* \* 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. \* \* \*

*Court of Appeals Decision* at ¶36. The statute does not say the commissioners shall make findings when an annexation is granted. Rather, it mandates the adoption of a resolution granting the annexation. Appellant township's assertion that the only reasonable conclusion that

can be drawn from the commissioners' omission of any express finding on R.C. 709.023(E)(7) is that the board did not find that the seventh condition is met is contrary to the express statutory language that when a board of county commissioners adopts and resolution granting an annexation is has found the conditions for annexation have been met, and the facts in this case.

In this case, the Montgomery County Commissioners acknowledged in their resolution that Butler Township filed a resolution objecting to the annexation and then granted the annexation. (Commissioners' Resolution 07-2156). The commissioners also found in their resolution that the city of Union had agreed to "provide the services specified in the relevant Service Ordinance/Resolution No. 1438 passed on November 13, 2007 by the Union City Council" (including maintenance of those portions of Jackson Road for which any maintenance problem was caused by the annexation) and the relevant criteria of R.C. 709.023(E) had been met. There is no requirement that the board of county commissioners address the R.C. 709.023(E)(7) criteria unless it finds that the annexation creates a road maintenance problem. The commissioners admitted in the trial court that the petition satisfied the statute and asserted they were not required to make any finding upon R.C. 709.023(E)(7) because they had determined that a road maintenance problem was not created and the city of Union had agreed, in Union Ordinance No. 1438, to assure road maintenance responsibility or otherwise correct any road maintenance problem that may have been created by the annexation. (Agent's Cross-claim, ¶59; Answer to Cross-claim ¶2, 6, 7, Trial Court Decision, pp. 17-18).

R.C. 709.023(E) must also be read consistently with the other statutes that were part of the Senate Bill 5 comprehensive annexation reform. R.C. 1.49(A) - (C). When the legislature intended for county commissioners to make specific findings as to the criteria for an annexation, it have expressly required it. In an expedited type-3 annexation, R.C. 709.024(F) provides: "The

[commissioners'] resolution shall include specific findings of fact as to whether or not each of the conditions listed in this division has been met.” In a majority supported annexation petition, R.C. 709.033(B) requires that the commissioners “resolution shall include specific findings of fact as to whether each of the conditions listed in divisions (A)(1) to (6) of this section has been met.” If the General Assembly had intended for the commissioners to make specific findings upon each of the seven conditions when an annexation is granted, it would have specifically required it as it did in the expedited type-3 and majority petition processes.

The court of appeals properly considered the statutory scheme of Senate Bill 5, and expedited type-2 annexation proceedings in making its decision. The decision of the court of appeals is consistent with the intention of the General Assembly in recognizing the rights of individual property owners in 100% owner-supported special expedited type-2 annexation proceedings and limiting governmental challenges in those proceedings. Petitioning owners must waive their right of appeal in an expedited type-2 annexation and acknowledge that their sole remedy is mandamus. As recognized by the court of appeals, “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.” *Court of Appeals Decision*, ¶36. No such finding is necessary if the petition is granted.

Appellant township complains that the court of appeals relied solely upon an opinion of the Fifth District Court of Appeals that does not support the decision of the court below. See *Lawrence Twp. v. City of Canal Fulton, supra* at 2008-Ohio-2690. In addition to the clear language of the statute, the opinion cited by the court below and the case law under the former annexation statute support the decision of the court of appeals. In the *Lawrence Twp.* case, the court noted that the commissioners stated they reviewed the appellants' objection, then granted

the annexation without making any specific findings. *Id.* at ¶30. The commissioners also acknowledged the objection, then granted the annexation following its review. The standing of the township to bring a mandamus action to challenge the commissioners' resolution granting an expedited type-2 annexation was not raised in that case.

The court's decision in the *Lawrence Twp.* case was also consistent with the uniform holdings of Ohio courts when interpreting similar language under the former annexation statute. Former R.C. 709.033, establishing the commissioners criteria for determining owner-initiated annexation petitions under the old law, provided, in part, that "[A]fter the hearing on petition to annex, the board of county commissioners *shall enter an order* upon its journal allowing the annexation *if it finds that*" the five statutory criteria set forth in former R.C. 709.033(A) – (E) had been met. Courts interpreting this language consistently held the former statute required the commissioners to enter an order, not written findings on each of the statutory criteria for annexation.<sup>12</sup> See *In Re Petition to Annex 95 Acres to Nelsonville* (1997), 84 Ohio Misc.2d 20. See also *Carrolls Corp. v. Willoughby Planning Comm.*, Lake App. 2005-L-112, 2006-Ohio-3209 (the requirement that the board make certain findings before granting a conditional use permit does not, without more, impose the duty to make "written affirmative findings" and it is presumed from the agency's approval that the necessary criteria were found to be satisfied *citing* and relying upon the cases interpreting former R.C. 709.033).

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<sup>12</sup> See also *In re Annexation of 14.5618 Acres of Land in Brunswick Hills Twp. v. Tini* (May 20, 1992), Medina App. No. 2058, 1992 WL 112595, *Bd. of Trustees of Canton Twp. v. Mallonn* (May 25, 1985), Stark App. No. CA-6535, 1985 WL 9169, *Symmes Twp. Bd. of Trustees v. Dee* (May 22, 1991), Hamilton App. No. C-900275, 1991 WL 84198 (the requirement that the board make certain findings before granting a petition does not, without more, impose the duty to make "written affirmative findings.").

The commissioners had no legal duty to make the finding the township complains of, and the township cannot prevail on the merits. For the reasons stated herein, and the additional reasons set forth in the Merit Brief of the Montgomery County Commissioners which are expressly adopted by reference herein, Appellant Agent for Waterwheel Farm, Inc. 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. Appellee Agent also urges this Court to affirm that a board of county commissioners reviewing the annexation does not have any duty to address one of the required elements, specifically, R.C. 709.023(E)(7), unless it finds that the splitting of highways caused by the proposed annexation would cause a maintenance problem.

Should this Court find that the commissioners were required to make a specific finding on the R.C. 709.023(E)(7) criteria, this Court should not grant the township a writ of mandamus to compel the commissioners to change the result of their review as Appellant advocates. Rather, the Court should order that a writ of mandamus be issued on behalf of the annexation petitioner and compel the commissioners to perform their clear legal duty to adopt a legally sufficient resolution to approve the annexation by amending Resolution No. 07-2156 approving the annexation, nunc pro tunc, to include a finding that all of the criteria of R.C. 709.023(E), including (E)(7), were met by the 78.489 acre annexation and certifying the amended resolution to the city of Union as part of the papers of the annexation proceedings.

**CONCLUSION**

Appellant Waterwheel Farm, Inc. urges this Court to affirm the decision of the Court of Appeals in its entirety, dissolve the order of the Court of Appeals staying any further proceedings on the annexation, and allow Waterwheel to annex its property to the city of Union, as it has sought to do since 2004.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served upon the following parties by regular U.S. mail, postage pre-paid, on the 8<sup>th</sup> day of July, 2009:

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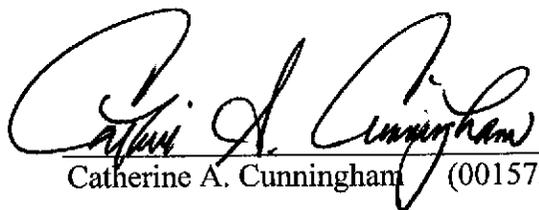
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# **APPENDIX**

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 Comms.*, 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 Commrs.*, 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. Commrs.*, 162 Ohio App.3d 394, 833 N.E.2d 788, 2005-Ohio-3872, ¶ 9, affirmed by *State ex rel. Butler Twp.*, 112 Ohio St.3d 262, 858 N.E.2d 1193, 2006-Ohio-6411.

{¶ 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-

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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.

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

MONTGOMERY COUNTY BOARD  
OF COUNTY COMMISSIONERS, ET  
AL.,

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

Respondents.

: 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. Cmpl't. 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. Bicking* (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

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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

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

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

RESOLUTION ACCEPTING AND APPROVING THE ANNEXATION OF 78.489 ACRES, MORE OR LESS, SITUATED IN SECTION 12, TOWNSHIP 5, RANGE 5 EAST, BUTLER TOWNSHIP, MONTGOMERY COUNTY, OHIO, TO THE CITY OF UNION, MONTGOMERY COUNTY, OHIO UTILIZING THE SPECIAL PROCEDURE "EXPEDITED TYPE 2 ANNEXATION", IN ACCORDANCE WITH O.R.C. SECTION 709.023 ET SEQ.

WHEREAS, the Clerk, Board of County Commissioners of Montgomery County, State of Ohio, received a petition for the annexation of 78.489 acres, more or less, situated in Section 12, Township 5, Range 5 East, Butler Township, Montgomery County, Ohio, to the City of Union, Montgomery County, Ohio, on October 31, 2007 which was entered upon the Board's Journal on November 6, 2007; and,

WHEREAS, the legislative authority of the City of Union, Ohio filed with the board and ordinance/resolution consenting to the proposed annexation; and

WHEREAS, within five (5) days of the filing of the petition with the Montgomery County Board of County Commissioners, the Agent notified the City of Union and Butler Township Trustees; and

WHEREAS, the Commissioners make the following findings as required in Section 709.023E of the O.R.C.

1. The petition does meet all the requirements set forth in, and was filed in the manner provided in Sections 709.021 and 709.023 of the Revised Code.
2. The persons who signed the petition are owners of the real estate located in the territory proposed for annexation and constitute all of the owners of real estate in that territory.
3. The territory proposed does not exceed five hundred acres.
4. The territory proposed for annexation does share a contiguous boundary with the municipal corporation to which annexation is proposed for a continuous length of at least five percent of the perimeter of the 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 Service Ordinance/Resolution No. 1438 passed on November 13, 2007 by the Union City Council.

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D  
L

WHEREAS, the Clerk, Board of County Commissioners of Montgomery County, Ohio, received Resolution No. 07-075 from the Butler Township Board of Trustees objecting to the petition to annex 78.489 acres, more or less in Butler Township, Montgomery County, to the City of Union, Montgomery County, Ohio on November 26, 2007; and

WHEREAS, the Clerk, Board of County Commissioners of Montgomery County, Ohio, received an Annexation Petitioner's Memorandum in Opposition to Butler Township's Objection to the annexation from Catherine A. Cunningham of PLANK & BRAHM, attorney for the Annexation Petitioner's Agent on December 7, 2007; and

BE IT RESOLVED, that the Petition be approved, and the territory sought to be annexed by the petition filed herein shall be annexed to the City of Union, Ohio, that the orders and proceedings of this board relating to the petition, and map and description attached hereto, and all papers on file relating to this matter be delivered forthwith to the Clerk of Council, City of Union, Ohio.

BE IT FURTHER RESOLVED, that the Clerk certify a copy of this resolution to the Planning Commission, County Engineer, County Auditor, Sanitary Engineering Department, Board of Elections, Butler Township Trustees, Agent Joseph P. Moore, Moore & Associates, 410 Corporate Center Drive, Vandalia, Ohio 45377.

BE IT FURTHER RESOLVED, that the Clerk of Commission certify this Resolution and make an imaged copy of this Resolution available on the Montgomery county website at <http://www.mcoho.org/>.

Mr. Foley moved for the adoption of the foregoing resolution. It was seconded by Ms. Dodge, and upon call of the roll the following vote resulted:

Mr. Foley, aye; Ms. Dodge, aye; Mrs. Lieberman, aye: Carried.

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I hereby certify that the foregoing is a true and correct copy of a resolution duly adopted by the Board of County Commissioners of Montgomery County, Ohio, the 11<sup>th</sup> day of December, 2007.

THE BOARD OF COUNTY COMMISSIONERS HEREBY FINDS AND DETERMINES THAT ALL FORMAL ACTIONS RELATIVE TO THE ADOPTION OF THIS RESOLUTION WERE TAKEN IN AN OPEN MEETING OF THIS BOARD OF COUNTY COMMISSIONERS, AND THAT ALL DELIBERATIONS OF THIS BOARD OF COUNTY COMMISSIONERS, AND OF ITS COMMITTEES, IF ANY WHICH RESULTED IN FORMAL ACTION, WERE TAKEN IN MEETINGS OPEN TO THE PUBLIC, IN FULL COMPLIANCE WITH APPLICABLE LEGAL REQUIREMENTS, INCLUDING SECTION 121.22 OF THE REVISED CODE.

  
Carol A. Prewitt, Clerk  
Board of County commissioners  
Montgomery County, Ohio

C

Only the Westlaw citation is currently available.

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

Court of Appeals of Ohio, Fifth District, Stark  
County.  
BOARD OF TRUSTEES OF CANTON TOWN-  
SHIP, Plaintiff-Appellant  
v.  
RICHARD MALLONN, et al., Defendants-Appellees  
Case No. CA-6535.

CA-6535

May 25, 1985.

Civil appeal from Court of Common Pleas, Case  
No. 84-1045.

For Plaintiff-Appellant DARLENE S. ODAR, 600  
Renkert Building, 306 Market Ave. N., Canton, OH  
44702.

For Defendant-Appellee James Bowe WILLIAM  
HAMANN, 7th Floor, City Hall, Canton, OH  
44702.

For Defendant-Appellee City of Canton MICHAEL  
THOMPSON, 526 Citizens Savings Bldg, Canton,  
OH 44702.

OPINION

Before Hon. John R. Milligan, P.J., Hon. John R.  
Hoffman, J., Hon. Ira G. Turpin, J. MILLIGAN, P.J.

ANNEXATION, R.C. 709.07 - TOWNSHIP  
CHALLENGE -

ADEQUACY OF COUNTY COMMISSIONER

ORDER

\*1 Upon application of all of the owners of 163  
acres, located in Canton Township, adjacent to the  
City of Canton, the Stark County Board of Com-  
missioners, following a hearing at which protracted  
testimony was given (including township trustees'  
objections), adopted a resolution approving the an-  
nexation.

By favor of R.C. 709.07 the Board of Trustees of  
Canton Township sought an injunction against  
Auditor of the City of Canton and the agent for the  
landowners-petitioners enjoining them from "taking  
further action whatsoever with reference to the an-  
nexation and from laying the transcript of said an-  
nexation proceedings and the accompanying plat or  
map, before the council of the City of Canton, and  
such other relief to which plaintiff may be entitled."

Bench trial was held in the Court of Common Pleas  
of Stark County, following which the court issued  
separate findings of fact and conclusions of law and  
dismissed the complaint for injunction. The trustees  
appeal, assigning two errors:

I. THE TRIAL COURT ERRORED [sic] IN FIND-  
ING THAT APPELLANTS FAILED TO PROVE  
THAT ITS LEGAL RIGHTS OR INTERESTS  
WERE IMPAIRED BY THE ANNEXATION.

II. THE TRIAL COURT ERRORED [sic] IN  
FINDING THAT THE RESOLUTION PASSED  
BY THE STARK COUNTY BOARD OF COM-  
MISSIONERS MET ALL THE REQUIREMENTS  
OF O.R.C. 709.033.

We attach and incorporate the trial court's separate  
findings of fact and conclusions of law.

I

The first assignment of error challenges conclusion

of law number one, i.e. the plaintiffs failed to prove by clear and convincing evidence that they had a legally recognizable right or interest that would be impaired by the annexation.

It is conceded that the Board of Township Trustees, within whose jurisdiction land is approved for annexation to a municipality, may seek injunctive relief pursuant to R.C. 709.07 and 709.032. Appeal of Bass Lake Community, Inc. (1983), 5 Ohio St. 3d 141, 449 N.E. 2d 771, syllabus 3. ("Standing," the right to sue, is no longer an issue.)

The question is whether the petitioner Board of Trustees have met the burden imposed by R.C. 709.07(D).

The petition for injunction shall be dismissed unless the court finds the petitioner has shown by clear and convincing evidence that the annexation would adversely affect the legal rights or interests of the petitioner, and that: 1. There was error in the proceedings before the county commissioners pursuant to § 709.032 or 709.033 of the Revised Code, or that the board's decision was unreasonable or unlawful; or

R.C. 709.07(D)

(Appellant inaccurately quotes R.C. 709.07(D) at page five of its brief by failing to include the conjunctive "and".)

The decision of the common pleas court that the trustees failed to prove by clear and convincing evidence that the annexation would adversely affect its legal rights or interests and was not unreasonable or unlawful is neither an abuse of discretion, contrary to law, or against the manifest weight of the evidence. Compare Lariccia v. Board of Commissioners (1974), 38 Ohio St. 2d 99 (emphasizing the decision is to be made in the general good of the territory sought to be annexed); In re Kucharski (1977), 56 Ohio App. 2d 121 (the desires of the owners seeking annexation are to be given greater weight than those of residents outside the territory);

In re the Annexation of 109.528 Acres of Land in Perry Twp. (1983), Stark App. No. CA-6206, unreported (where the fact pattern was substantially similar to the case sub judice); McClintock v. Cain (1956) C.P. 74OLA554 (tax duplicate reduction no valid objection); Post v. Cain (1956), C.P., 154 N.E. 2d 185.

\*2 The first assignment of error is overruled.

## II

The second assignment of error challenges the common pleas court determination that the county commissioners made the prerequisite findings enumerated in Subsections A thru D of R.C. 709.033.

After the hearing on a petition to annex, the board of county commissioners shall enter an order upon its journal allowing the annexation if it finds that: (4 criteria enumerated).

R.C. 709.033.

The county commissioners' resolution of November 22, 1984, does not affirmatively spell out the four finding criteria called for in R.C. 709.033. It simply recites:

WHEREAS, James M. Bowe, filed an annexation petition with this Board on June 7, 1983, proposing to annex 163.21 acres of Canton Township to the City of Canton, popular name of such territory being the Canton Industrial Park; and

WHEREAS, as required by law, a public hearing on such annexation was held by this Board on August 24, 1983; and

WHEREAS, this Board has examined the arguments both for and against such annexation.

NOW, THEREFORE, BE IT RESOLVED:

That this Board hereby determines the general good of the territory sought to be annexed will be served if granted, and hereby approves said annexation.

Upon roll call the vote resulted as follows:

MR. WATKINS - YES MR. SPONSELLER - NO  
MR. PATRICK - YES

In the trial upon the complaint for injunction, the trial court heard evidence from the county commissioners establishing that they did consider and rule favorably upon all the criteria enumerated in 709.033. The trial court acted within its discretion and consistent with the evidence and its findings of in that regard - i.e. the record now affirmatively demonstrates that the four findings were made.

The assignment of error extrapolates from the specific language of the statute the implication that the four criteria must be affirmatively found in writing upon the resolution of the county commissioners in much the same fashion as a court would make separate findings of fact prior to its conclusions of law in a case tried to the court without a jury.

This is not what the statute says and we resist the invitation to read such a requirement into R.C. 709.033.

The common pleas court cases cited by the appellant are clearly distinguishable. In Dayton v. McPherson (1969), 29 Ohio Misc. 190, the record affirmatively demonstrated that the county commissioners had failed to even consider the criteria of the statute. Akron v. Frey, Summit Co. C.P. Case No. CV-80-10-2843, unreported, involved the trial court determining that the county commissioners' transcript "wholly fails to establish that the area to be annexed is not unreasonably large and fails to show that the annexation would serve the general good."

In the case sub judice, not only is the record before the county commissioners replete with evidence, including the testimony of trustees relative to each of the criteria, but the testimony presented to the common pleas court affirmatively demonstrates that the county commissioners did consider and make the appropriate threshold requirements as a condition of exercising their statutory discretion.

\*3 The second assignment of error is overruled.

The judgment of the Court of Common Pleas of Stark County is affirmed.

Hoffman, J. and Turpin, J. concur.

JUDGE QUINN

SEPARATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on before the Court for hearing on October 31, 1984, on the Complaint for Injunction as filed by Plaintiffs against Defendants, and the Court having heard the evidence as offered by the parties, reviewed the exhibits as admitted, and the briefs as filed by the parties, and the Plaintiffs having filed a request on December 3, 1984, for separate findings of fact and conclusions of law, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On June 7, 1983, a petition for annexation to the City of Canton was filed with the Board of Commissioners of Stark County, praying for the annexation of 163.21 acres, more or less, of land in Canton Township, Stark County, Ohio, and in which James M. Bowe was named agent for the petitioners. A public hearing was held by the Board of Stark County Commissioners on the petition on August 24, 1983. The annexation petition was approved by the Board of Commissioners on November 22, 1983.

2. The annexation petition was filed upon petition of the land owners and was signed by all of the land owners. The land owners appointed James Bowe as agent. The land owners and the individuals who signed were: Mr. Lloyd W. Smail; Metropolitan Ceramics, Inc., by J. Steven Renkert; Metropolitan Industries, Inc., by J. Steven Renkert; H.P. Products, Inc., by Paul R. Bishop; Sunfield, Ltd.,

by Caroman Corporation, its General Partner, by Carl Sorenson; Canton Industrial Park, by Caroman Corporation, its General Partner, by Carl Sorenson. The persons whose names were subscribed to the petition were owners of the real estate or individuals authorized to sign for the owners of the real estate located in the territory in the petition.

3. The number of valid signatures on the petition constituted a majority of owners of real estate in the territory to be annexed.

4. The petition included a statement of the number of owners of real estate in the territory to be annexed.

5. The map/plat accompanying the annexation petition is accurate, and the petition contains a full description of the territory to be annexed.

6. The notice of annexation was published in The Repository on June 30, July 7, 14, and 21, 1983.

7. Plaintiffs filed a motion requesting that the Board of Commissioners issue subpoenas and allow Plaintiffs to cross-examine witnesses, make objections, and offer rebuttal testimony at the hearing. This motion was served on the Commissioners two (2) days before the hearing and was not served on the Defendants.

8. There was no limitation at the annexation hearing as to the length of giving testimony, rebuttal testimony, summation, and commenting on the testimony.

9. Plaintiffs were permitted to ask any questions at the annexation hearing.

10. Plaintiffs were permitted to make objections to testimony at the annexation hearing.

\*4 11. The territory included in the annexation is not unreasonably large.

12. The annexation petition contained all matters required by Section 709.02, Ohio Revised Code.

13. The general good of the territory to be annexed will be served by the annexation.

14. The City of Canton is capable of providing services to the territory to be annexed.

15. The Board of County Commissioners found that the petition contained all required matters, that the notice of annexation had been properly published, that the persons whose names were subscribed to the petition were owners of the real estate located in the territory in the petition, that as of the time the petition was filed with the Board of Commissioners, the number of valid signatures on the petition constituted a majority of the owners of real estate in the territory proposed to be annexed, that the territory included in the annexation was not unreasonably large, that the map or plat was accurate and that the good of the territory to be annexed will be served by the annexation before the Board passed the Resolution permitting the annexation.

#### CONCLUSIONS OF LAW

1. Plaintiffs failed to prove by clear and convincing evidence that in this case they had a legally recognizable right or interest that would be impaired by the annexation.

2. The due process requirements of an annexation hearing before the Board of County Commissioners are a reasonable notice and a fair opportunity to be heard and does not require the Board of Commissioners to subpoena witnesses or allow cross-examination at the annexation hearing.

3. The refusal of the Board of County Commissioners to subpoena witnesses, and the failure to allow the Township to cross-examine witnesses at the annexation hearing was not error because there was no limitation at the annexation hearing as to the length of giving testimony, rebuttal testimony, summation, and commenting on the testimony.

4. Denial of Plaintiffs' motion requesting specific procedures at the annexation hearing caused no pre-

judice.

5. The annexation petition was properly brought under Section 709.02 et seq., Ohio Revised Code, as an annexation upon the application of land owners.

6. The notice of annexation was published as required by Section 709.031, Ohio Revised Code.

7. The map/plat accompanying the annexation petition is accurate, and the petition contains a full description of the territory to be annexed.

8. The annexation petition contained all matters required by Section 709.02, Ohio Revised Code.

9. The resolution of the Board of County Commissioners passed by the Board of Commissioners on November 22, 1983, met the requirements of Section 709.033, Ohio Revised Code.

10. The failure of the Board of County Commissioners to list items deemed necessary by Plaintiffs in the Commissioners' order granting the annexation caused no prejudice because the Commissioners specifically found that the petition contained all matters required in Section 709.02, Ohio Revised Code, the notice of annexation was published as required by Section 709.031, Ohio Revised Code, the persons whose names were subscribed to the petition were owners of the real estate located in the territory in the petition, as of the time the petition was filed with the Board of Commissioners, the number of valid signatures on the petition constituted a majority of the owners of real estate in the territory proposed to be annexed, the territory in the annexation petition was not unreasonably large, the map or plat was accurate, and the good of the territory to be annexed will be served.

\*5 11. The area to be annexed, 163.21 acres, more or less, is not unreasonably large.

12. The good of the territory to be annexed will be served by the annexation.

13. The Plaintiffs were permitted to appear at the Board of Commissioners' hearing and were permitted to contest the annexation petition.

14. That the stay order prohibiting Defendant, Richard Mallonn, Auditor of the City of Canton, from presenting application for annexation to the legislative authority of the City of Canton and the legislative authority of the City of Canton from taking action on the annexation petition, be dismissed and that the complaint as filed by the Plaintiffs herein be dismissed, at Plaintiffs' cost.

IT IS SO ORDERED, ADJUDGED, and DECREED.

#### JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Stark County Ohio, is affirmed.

Ohio App., 1985.

Board of Trustees of Canton Tp. v. Mallonn  
Not Reported in N.E.2d, 1985 WL 9169 (Ohio App. 5 Dist.)

END OF DOCUMENT

09 JUN 25 AM 10:08  
JAMES L. SPAETH  
CLERK OF COURTS

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

THE HAMILTON TOWNSHIP : Case No. 09CV73431  
BOARD OF TRUSTEES :

Plaintiffs, :

-vs- :

DECISION

WARREN COUNTY BOARD OF :  
COMMISSIONERS :

Defendants. :

In this action the Relator Board of Township Trustees seeks a writ of mandamus to require the Respondent Board of County Commissioners to reconsider the Respondent's resolution of January 15, 2009, wherein the annexation of 458.2347 acres to the Village of Maineville was approved. The Relator contends that the Respondent, in adopting the resolution, did not consider, or did not properly apply, the mandatory factors embodied in R.C. 709.023(E)(3) and (4). Consequently, the Relator seeks a writ of mandamus directing the Respondent to reconsider its approval of the annexation.

The Relator also seeks injunctive relief to prevent the completion of the annexation process.

Various Intervening Respondents have filed a motion to dismiss the complaint arguing that the Relator lacks standing to oppose, in any manner, the approval of the annexation by the Board of Commissioners.

A board of township trustees, being purely a creature of statute, has no inherent power. It has only such power and authority as may be granted to it by statute. Therefore, the Relator may contest this annexation only if a statute specifically given it the power to do so.

This is a so-called expedited type type II annexation proceeding pursuant to R.C. 709.23. There is no statute that authorizes a board of township trustees to object to this type of annexation once it is approved by the board of county commissioners. In order to have standing to object, a board of township trustees would have to be a "party" to the proceedings as that term is defined in R.C. 709.021(D). However, that definition is clearly not made applicable to R.C. 709.23 annexation. Consequently, since the Relator here is not a "party", it has no standing to object or intervene in any fashion in this annexation.

Even if the Relator had standing, we find that it is not entitled to the relief sought.

In adopting its resolution approving the annexation, the Respondent listed its factual findings with regard to each of the seven factors enumerated in R.C. 709.0223. The Relator contends that the Respondent reached

conclusions in regards to factors 3 and 4 of the statute that are not supported by the evidence or law. The Respondent's resolution of approval clearly shows that the Respondent gave consideration to each of the seven factors and reached findings and conclusions on each one. This is sufficient compliance with its duty under the statute.

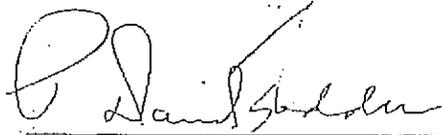
If the Respondent reached findings or conclusions that are not supported by the record, this would normally be a subject for appeal or some form of judicial review. However, for whatever reason, a board of township trustees is not empowered to appeal such alleged errors. R.C. 709.23(G) states "there 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." This sentence makes it abundantly clear that it is intended that a decision of the board of commissioners is final and not subject to any form of review or appeal. The reference to seeking a writ of mandamus "to compel the board of county commissioners to perform its duties under the statute" only means that the board of commissioners can be compelled to follow the procedural requirements of the statute. It does not mean that the decision of the board of commissioners can be reviewed on the merits.

The writ of mandamus will be denied. We further find that the Relator, having failed on its claim for a writ of mandamus, is not entitled to

injunctive relief.

We also find that the Intervening Respondent's motion to dismiss is well taken due to the Relator's lack of standing as explained above.

Counsel for Respondent shall prepare the appropriate judgment entry.

A handwritten signature in cursive script, appearing to read "P. Daniel Fedders", written over a horizontal line.

JUDGE P. DANIEL FEDDERS

cc: Bruce A. McGary, Esq.  
Warren J. Ritchie, Esq.  
Richard A. Paolo, Esq.  
Stephen R. Hunt, Esq.  
Kevin C. McDonough, Esq.

Annexation of 14.5618 Acres of Land in Brunswick Hills Tp. v. Tintl

Ohio App. 9 Dist., 1992.

Only the Westlaw citation is currently available.

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

Court of Appeals of Ohio, Ninth District, Medina County.

In re ANNEXATION OF 14.5618 ACRES OF LAND IN BRUNSWICK HILLS TWP. to the City of Brunswick Brunswick Hills Twp. Trustees, et al.,  
Plaintiffs-Appellants,

v.

Robert T. TINL, Agent for Petitioners, Defendant-Appellee.

No. 2058.

May 20, 1992.

Appeal From Judgment Entered in the Common Pleas Court County of Medina, Case No. 54778.

Alfred E. Schrader, Akron, for plaintiff.

Robert T. Tintl, Brunswick, for defendant.

William J. Thorne, Asst. Prosecutor, Medina.

*DECISION AND JOURNAL ENTRY*

\*1 This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

COOK, Judge.

Appellant Brunswick Hills Township Board of Trustees ("Township"), appeals the trial court's judgment affirming the Medina County Board of Commissioners' ("Board") approval of a petition for annexation to the City of Brunswick. We affirm.

A petition for annexation of 16.7044 acres of land in Brunswick Hills Township to the City of Brunswick was filed with the Board in August 1990.

This petition was later amended decreasing the acreage to 14.5618. On February 19, 1991, the Commissioners passed Resolution 91-122, which approved the petition for annexation of the property. The Township appealed the Board's approval to the court of common pleas pursuant to R.C. Chapter 2506. The trial court upheld the Board's decision. The Township appeals asserting two assignments of error.

Assignment of Error I

"The county commissioners failed to comply with Ohio Revised Code Section 709.033(E) which requires the commissioners to make a finding on the unreasonable largeness issue."

The Township requests that Resolution 91-122 be set aside because the Board failed to specifically find that the 14.5618 acres was not unreasonably large.

R.C. 709.033 states:

"After the hearing on a petition to annex, the board of county commissioners shall enter an order upon its journal allowing the annexation if it finds that:

" \* \* \*"

"(E) The territory included in the annexation petition is not unreasonably large; the map or plat is accurate; and the general good of the territory sought to be annexed will be served if the annexation petition is granted."

Although R.C. 709.033 does require the prescribed findings be made before an annexation petition will be granted, *In re: Annexation of 1,544 Acres* (1984), 14 Ohio App.3d 231, 235, that section does not require written affirmative findings on the R.C. 709.033 criteria. *Symmes Township Bd. of Trustees v. Dee* (May 22, 1991), Hamilton App. No. C-900275, unreported. In the absence of proof to the

contrary, we will presume from the Board's approval of the annexation that the Board found in favor of annexation on the R.C. 709.033 criteria. *Id.* The first assignment of error is overruled.

#### Assignment of Error II

"Substantial evidence on the whole record does not exist to support a finding that the area to be annexed was not unreasonably large and this court should so find as a matter of law."

The Township claims that there is insufficient evidence to support a finding that 14.5618 acres is not unreasonably large. In *In re: Annexation of 155.3052 Acres* (Jan. 2, 1992), Medina App. 2030, unreported at 4, a case also involving the annexation of property from Brunswick Hills Township to the City of Brunswick, we held that: "As a matter of law, 155 acres is not unreasonably large." Based on that holding, we find that, as a matter of law, 14.5618 acres is not unreasonably large. The second assignment of error is overruled.

\*2 The judgment of the lower court is affirmed.

CACIOPPO, P.J., and REECE, J., concur.

Ohio App. 9 Dist., 1992.

Annexation of 14.5618 Acres of Land in Brunswick Hills Tp. v. Tini

Not Reported in N.E.2d, 1992 WL 112595 (Ohio App. 9 Dist.)

END OF DOCUMENT

Symmes Tp. Bd. of Trustees v. Dee

Ohio App., 1991.

Only the Westlaw citation is currently available.

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

Court of Appeals of Ohio, First District, Hamilton  
County.

SYMMES TOWNSHIP BOARD OF TRUSTEES,  
Petitioner-Appellant,

v.

Barbara DEE, Clerk, City Council, City of Love-  
land, and Joseph L. Trauth, Jr., Respondents-Appel-  
lees.

No. C-900275.

May 22, 1991.

Civil Appeal From, Hamilton County Court of  
Common Pleas, Appeal No. C-900275.

Moots, Cope, Stanton & Kizer, Elizabeth M. Stan-  
ton, and Wanda L. Carter, Columbus, and Taylor &  
Associates Co., L.P.A., and Jeffrey L. Taylor, West  
Carrollton, for petitioner-appellant.

Santen & Hughes and Edward E. Santen, Cincin-  
nati, for respondents-appellees.

*DECISION.*

PER CURIAM.

\*1 This cause came on to be heard upon the appeal,  
the transcript of the docket, journal entries and ori-  
ginal papers from the Hamilton County Court of  
Common Pleas, the briefs and the arguments of  
counsel.

Petitioner-appellant Symmes Township Board of  
Trustees ("Trustees") has taken the instant appeal  
from the common pleas court's dismissal of its peti-  
tion to enjoin the annexation of approximately  
sixty-eight acres of land located in Symmes Town-

ship to the City of Loveland. The Trustees advance  
on appeal three "assignments of error" which, in es-  
sence, constitute a solitary challenge to the balance  
struck by the common pleas court in weighing the  
evidence before it. This challenge is untenable.

The proceedings for annexation were initiated by  
the filing, pursuant to R.C. 709.02, of a petition for  
annexation with the Hamilton County Board of  
County Commissioners ("Board"), signed by ap-  
proximately seventy percent of the owners of the  
territory to be annexed. Following a public hearing,  
the Board issued a resolution allowing the annexa-  
tion.

The Trustees subsequently filed with the common  
pleas court a petition seeking a permanent injunc-  
tion to restrain the Loveland city clerk from  
presenting the annexation petition to the legislative  
authority of Loveland. The common pleas court,  
upon its determination that the Board's decision to  
allow annexation was neither unlawful nor unreas-  
onable and that there was no error in the findings or  
proceedings before the Board, dismissed the Trust-  
ees' petition, and this appeal ensued.

Pursuant to R.C. 709.07, the approval by a board of  
county commissioners of the annexation by a muni-  
cipality of adjacent territory may be challenged by  
filing with the common pleas court a "petition \* \* \*  
praying for an injunction restraining the auditor or  
clerk from presenting the annexation petition and  
other papers to the legislative authority." R.C.  
709.07(A). R.C. 709.07(D) provides:

The petition for injunction shall be dismissed un-  
less the court finds the petitioner has shown by  
clear and convincing evidence that the annexation  
would adversely affect the legal rights or interests  
of the petitioner, and that:

- (1) There was error in the proceedings before the  
board of county commissioners \* \* \*, or that the  
board's decision was unreasonable or unlawful; or

(2) There was error in the findings of the board of county commissioners or in the election or certification by the board of elections of the results of the election held pursuant to division (D) of section 707.04 of the Revised Code.

Thus, to avoid dismissal, a petitioner must show by clear and convincing evidence that the annexation would adversely affect his legal rights or interests and (1) that there was prejudicial error in the proceedings or findings of the board, (2) that the board's decision was unreasonable or unlawful, or (3) that prejudicial error tainted a special election held pursuant to R.C. 707.04(D).<sup>FNI</sup> *Middletown v. McGee* (1988), 39 Ohio St.3d 284, 530 N.E.2d 902.

\*2 R.C. 709.033, which governs the disposition of a petition for annexation, provides in relevant part:

After the hearing on a petition to annex, the board of county commissioners shall enter an order upon its journal allowing the annexation if it finds that:

(A) The petition contains all matter required in section 709.02 of the Revised Code.

(B) Notice has been published as required by section 709.031 of the Revised Code.

(C) The persons whose names are subscribed to the petition are owners of real estate located in the territory in the petition, and as of the time the petition was filed with the board of county commissioners the number of valid signatures on the petition constituted a majority of the owners of real estate in the territory proposed to be annexed.

(D) The municipal corporation to which the territory is proposed to be annexed has complied with division (B) of section 709.031 of the Revised Code.

(E) The territory included in the annexation petition is not unreasonably large; the map or plat is accurate; and the general good of the territory sought to be annexed will be served if the annexation petition

is granted.

The Trustees on appeal challenge the common pleas court's determination that the Board's decision was not unreasonable or unlawful when the Board failed to make express findings with respect to property ownership, Loveland's compliance with the resolution requirement, and the general good of the territory, see R.C. 709.033(C), (D) and (E), and when the evidence did not support a finding that annexation would serve the general good of the territory sought to be annexed.

R.C. 709.033 does not require written affirmative findings on the R.C. 709.033 criteria, and we decline the invitation to so require. See *Bd. of Trustees of Canton Twp. v. Mallonn* (March 25, 1985), Stark App. No. CA-6535, unreported. In the absence of proof to the contrary, we must presume from the Board's approval of the proposed annexation that the Board found for the petitioners for annexation on the R.C. 709.033 criteria.

The determination of a board of county commissioners that annexation will serve the general good of the territory to be annexed is a factual determination committed to the discretion of the board of county commissioners and will not be disturbed by a reviewing court unless the determination is found to be "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence on the whole record." *McGee, supra* (citing R.C. 2506.04). The Trustees present no constitutional challenge, and we find, from our review of the record before the common pleas court, that the Board's determination that annexation will serve the general good of the territory was not illegal, arbitrary, capricious or unreasonable and that it was supported by the preponderance of substantial, reliable and probative evidence.

The Trustees also contend that the common pleas court erred in dismissing their petition for an injunction without determining whether annexation would adversely affect their legal rights or in-

terests. We hold that the court's failure to so determine was without consequence when the record discloses no error in the proceedings and findings of the Board and when the Board's decision to allow annexation was neither unreasonable nor unlawful. See R.C. 709.07(D).

\*3 Having thus concluded that the Trustees' petition for an injunction was properly dismissed, we overrule the Trustees' assignments of error and affirm the judgment of the court below.

FN1. R.C. 707.01*et seq.* govern the incorporation of a village or municipality. The R.C. 707.04(D) provision for a special election is inapplicable to the proceedings at issue in the instant appeal.

Ohio App.,1991.  
Symmes Tp. Bd. of Trustees v. Dec  
Not Reported in N.E.2d, 1991 WL 84198 (Ohio App. 1 Dist.)

END OF DOCUMENT

R.C. § 709.021

**C** Baldwin's Ohio Revised Code Annotated Currentness  
 Title VII. Municipal Corporations  
Chapter 709. Annexation; Detachment (Refs & Annos)  
Annexation on Application of Citizens

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

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

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

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

(D) As used in sections 709.022 and 709.024 of the Revised Code, "party" or "parties" means the municipal corporation to which annexation is proposed, each township any portion of which is included within the territory proposed for annexation, and the agent for the petitioners.

CREDIT(S)

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

#### HISTORICAL AND STATUTORY NOTES

**Ed. Note:** 2001 S 5 Effective Date--2001 S 5 was filed with the Secretary of State's office on July 27, 2001. On October 25, 2001 a referendum petition was filed, and on March 27, 2002, the Secretary of State declared the referendum petitions invalid. In Thornton v. Salak, 2006-Ohio-6407, 112 Ohio St.3d 254, the Ohio Supreme Court held that 2001 S 5 went into effect upon proof that a referendum petition contains an insufficient number of valid signatures to have the matter submitted to the electorate of the state of Ohio as contemplated by Section 1g, Article II, Ohio Constitution and R.C. 3519.16.

R.C. § 709.021, OH ST § 709.021

Current through 2009 File 2 of the 128th GA (2009-2010), apv. by 6/23/09 and filed with the Secretary of State by 6/23/09.

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R.C. § 709.022

**C** Baldwin's Ohio Revised Code Annotated Currentness  
Title VII. Municipal Corporations  
Chapter 709. Annexation; Detachment (Refs & Annos)  
Annexation on Application of Citizens

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

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

(B) Owners who sign a petition requesting that the special procedure in this section be followed expressly waive their right to appeal any action taken by the board of county commissioners under this section. There is no appeal from the board's decision under this section in law or in equity.

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

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

CREDIT(S)

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

UNCODIFIED LAW

2001 S 5, § 3: See Uncodified Law under 709.02.

HISTORICAL AND STATUTORY NOTES

**Ed. Note:** 2001 S 5 Effective Date--2001 S 5 was filed with the Secretary of State's office on July 27, 2001. On October 25, 2001 a referendum petition was filed, and on March 27, 2002, the Secretary of State declared the referendum petitions invalid. In *Thornton v. Salak*, 2006-Ohio-6407, 112 Ohio St.3d 254, the Ohio Supreme Court held that 2001 S 5 went into effect upon proof that a referendum petition contains an insufficient number of valid signatures to have the matter submitted to the electorate of the state of Ohio as contemplated by Section 1g, Article II.

R.C. § 709.022

Ohio Constitution and R.C. 3519.16.

R.C. § 709.022, OH ST § 709.022

Current through 2009 File 2 of the 128th GA (2009-2010), apv. by 6/23/09  
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R.C. § 709.023

**C**Baldwin's Ohio Revised Code Annotated Currentness  
Title VII. Municipal Corporations  
Chapter 709. Annexation; Detachment (Refs & Annos)  
Annexation on Application of Citizens

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

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

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

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

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

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

## R.C. § 709.023

upon annexation. The municipal corporation is entitled in its sole discretion to provide to the territory proposed for annexation, upon annexation, services in addition to the services described in that ordinance or resolution.

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

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

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

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

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

- (1) The petition meets all the requirements set forth in, and was filed in the manner provided in, section 709.021 of the Revised Code.
- (2) The persons who signed the petition are owners of the real estate located in the territory proposed for annexation and constitute all of the owners of real estate in that territory.
- (3) The territory proposed for annexation does not exceed five hundred acres.
- (4) The territory proposed for annexation shares a contiguous boundary with the municipal corporation to which annexation is proposed for a continuous length of at least five per cent of the perimeter of the territory proposed for annexation.
- (5) The annexation will not create an unincorporated area of the township that is completely surrounded by the terri-

R.C. § 709.023

tory proposed for annexation.

(6) The municipal corporation to which annexation is proposed has agreed to provide to the territory proposed for annexation the services specified in the relevant ordinance or resolution adopted under division (C) of this section.

(7) If a street or highway will be divided or segmented by the boundary line between the township and the municipal corporation as to create a road maintenance problem, the municipal corporation to which annexation is proposed has agreed as a condition of the annexation to assume the maintenance of that street or highway or to otherwise correct the problem. As used in this section, "street" or "highway" has the same meaning as in section 4511.01 of the Revised Code.

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

(G) If a petition is granted under division (D) or (F) of this section, the clerk of the board of county commissioners shall proceed as provided in division (C)(1) of section 709.033 of the Revised Code, except that no recording or hearing exhibits would be involved. There is no appeal in law or equity from the board's entry of any resolution under this section, but any party may seek a writ of mandamus to compel the board of county commissioners to perform its duties under this section.

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

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

CREDIT(S)

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

UNCODIFIED LAW

2001 S 5, § 3: See Uncodified Law under 709.02.

HISTORICAL AND STATUTORY NOTES

**Ed. Note:** 2001 S 5 Effective Date--2001 S 5 was filed with the Secretary of State's office on July 27, 2001. On October 25, 2001 a referendum petition was filed, and on March 27, 2002, the Secretary of State declared the referen-

R.C. § 709.023

dum petitions invalid. In Thornton v. Salak, 2006-Ohio-6407, 112 Ohio St.3d 254, the Ohio Supreme Court held that 2001 S 5 went into effect upon proof that a referendum petition contains an insufficient number of valid signatures to have the matter submitted to the electorate of the state of Ohio as contemplated by Section 1g, Article II, Ohio Constitution and R.C. 3519.16.

R.C. § 709.023, OH ST § 709.023

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R.C. § 709.024

**C** Baldwin's Ohio Revised Code Annotated Currentness

Title VII. Municipal Corporations

Chapter 709. Annexation; Detachment (Refs & Annos)

Annexation on Application of Citizens

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

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

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

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

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

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

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

person who delivered the notice. Proof of service of the notice on each appropriate government officer shall be filed with the board of county commissioners with which the petition was filed.

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

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

(D) If all parties to the annexation proceedings consent to the proposed annexation, a hearing shall not be held, and the board, at its next regular session, shall enter upon its journal a resolution granting the annexation. There is no appeal in law or in equity from the board's entry of a resolution under this division. The clerk of the board shall proceed as provided in division (C)(1) of section 709.033 of the Revised Code.

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

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

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

(1) The petition meets all the requirements set forth in, and was filed in the manner provided in, section 709.021 of the Revised Code.

(2) The persons who signed the petition are owners of real estate located in the territory proposed to be annexed in the petition and constitute all of the owners of real estate in that territory.

(3) No street or highway will be divided or segmented by the boundary line between a township and the municipal corporation as to create a road maintenance problem, or if the street or highway will be so divided or segmented, the municipal corporation has agreed, as a condition of the annexation, that it will assume the maintenance of that street

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or highway. For the purposes of this division, "street" or "highway" has the same meaning as in section 4511.01 of the Revised Code.

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

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

(G) An owner who signed the petition may appeal a decision of the board of county commissioners denying the proposed annexation under section 709.07 of the Revised Code. No other person has standing to appeal the board's decision in law or in equity. If the board grants the annexation, there shall be no appeal in law or in equity.

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

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

CREDIT(S)

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

UNCODIFIED LAW

2001 S 5, § 3: See Uncodified Law under 709.02.

HISTORICAL AND STATUTORY NOTES

**Ed. Note:** 2001 S 5 Effective Date--2001 S 5 was filed with the Secretary of State's office on July 27, 2001. On October 25, 2001 a referendum petition was filed, and on March 27, 2002, the Secretary of State declared the referendum petitions invalid. In Thornton v. Salak, 2006-Ohio-6407, 112 Ohio St.3d 254, the Ohio Supreme Court held that 2001 S 5 went into effect upon proof that a referendum petition contains an insufficient number of valid signatures to have the matter submitted to the electorate of the state of Ohio as contemplated by Section 1g, Article II, Ohio Constitution and R.C. 3519.16.

R.C. § 709.024, OH ST § 709.024

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R.C. § 709.03

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Title VII. Municipal Corporations  
    Chapter 709. Annexation; Detachment (Refs & Annos)  
        Annexation on Application of Citizens

→ 709.03 Filing petition with county commissioners; proceedings

(A) Once a petition described in section 709.02 of the Revised Code is filed, the clerk of the board of county commissioners shall cause the petition to be entered upon the journal of the board at its next regular session. This entry shall be the first official act of the board on the petition. Within five days after the filing of the petition, the board shall set the date, time, and place for the hearing on the petition and shall notify the agent for the petitioners. The date for the hearing shall be not less than sixty or more than ninety days after the petition is filed with the clerk of the board.

(B) Upon being notified of the date of the hearing, the agent for the petitioners shall do all of the following:

(1) Within five days cause written notice of the filing of the petition with the board of county commissioners, the date and time of the filing, and the date, time, and place of the hearing, to be delivered to the clerk of the legislative authority of the municipal corporation to which annexation is proposed, to the clerk of each township any portion of which is included within the territory proposed for annexation, and to the clerk of the board of county commissioners of each county in which the territory proposed for annexation is located other than the county in which the petition is filed. The notice shall state the date and time when the petition was filed and the county in which it was filed and shall have attached or shall be accompanied by a copy of the petition and any attachments or documents accompanying the petition as filed. The notice shall be given by certified mail, return receipt requested, or by causing the notice to be personally served on the appropriate governmental officer, with proof of service being by affidavit of the person who delivered the notice. Within ten days after the date of completion of service, the agent for the petitioners shall file proof of service of the notice with the board of county commissioners with which the petition was filed.

(2) Within ten days send by regular mail a copy of the notice of the board of county commissioners of the hearing to all owners of property within the territory proposed to be annexed, and to all owners of property adjacent to the territory proposed to be annexed or adjacent to a road that is adjacent to that territory and located directly across that road from that territory, whose names were provided by the agent for the petitioners under division (D) of section 709.02 of the Revised Code, along with a map of the territory proposed to be annexed and a statement indicating where the full petition for annexation can be reviewed. The notice also shall include a statement that any owner who signed the petition may remove the owner's signature by filing with the clerk of the board of county commissioners a written notice of withdrawal of the owner's signature within twenty-one days after the date the agent mails the notice; the agent shall include with each mailed notice a certification of the date of its mailing for this purpose. Within ten days after the mailing of the notices, the agent shall file with the board of county commissioners with which the petition was filed, a notarized affidavit that a notice was sent by regular mail to these property owners.

(3) Cause a notice containing the substance of the petition, and the date, time, and place of the hearing, to be published at least once and at least seven days prior to the date fixed for the hearing, in a newspaper of general circulation in each county in which territory proposed for annexation is situated. Within ten days after the date of completion of the publication or at the hearing, whichever comes first, the agent for the petitioners shall file proof of publication of the notice with the board of county commissioners with which the petition was filed.

(C) Any owner who signed the annexation petition may remove that signature by filing with the clerk of the board of

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county commissioners a written notice of withdrawal of the owner's signature within twenty-one days after the date the agent for the petitioners mailed the notice of the hearing to the owner as provided in division (B)(2) of this section. Thereafter, signatures may be withdrawn or removed only in the manner authorized by section 709.032 of the Revised Code.

(D) Upon receiving the notice described in division (B)(1) of this section, the legislative authority of the municipal corporation shall adopt, by ordinance or resolution, a statement indicating what services the municipal corporation will provide, and an approximate date by which it will provide them, to the territory proposed for annexation, upon annexation. The statement shall be filed with the board of county commissioners at least twenty days before the date of the hearing. The municipal corporation is entitled in its sole discretion to provide to the territory proposed for annexation, upon annexation, services in addition to the services described in the ordinance or resolution it adopts under this division.

CREDIT(S)

(2005 S 107, eff. 12-20-05; 2001 S 5, eff. 3-27-02 (*Thornton v. Salak*); 1988 S 38, § 3, eff. 7-20-89; 1988 S 38, § 1; 132 v S 220; 1953 H 1; GC 3549)

UNCODIFIED LAW

2001 S 5, § 3: See Uncodified Law under 709.02.

HISTORICAL AND STATUTORY NOTES

**Ed. Note:** The legal review and technical services staff of the Legislative Service Commission has issued an opinion regarding the treatment of multiple amendments stating, "[S]ome S 107 amendments fail. Language previously repealed cannot be amended, and does not stand alone." The opinion is neither legally authoritative nor binding, but is provided as a general indication that the amendments of the several acts [2005 S 107, eff. 12-20-05 and 2001 S 5, eff. 3-27-02 (See Historical and Statutory Notes)] may be harmonized pursuant to the rule of construction contained in R.C. 1.52(B) requiring all amendments be given effect if they can reasonably be put into simultaneous operation. See *Baldwin's Ohio Legislative Service Annotated*, 2005, page 8/L-2195, and 2001, page 6/L-1588, or the OH-LEGIS or OH-LEGIS-OLD database on Westlaw, for original versions of these Acts.

**Ed. Note:** 2001 S 5 Effective Date--2001 S 5 was filed with the Secretary of State's office on July 27, 2001. On October 25, 2001 a referendum petition was filed, and on March 27, 2002, the Secretary of State declared the referendum petitions invalid. In *Thornton v. Salak*, 2006-Ohio-6407, 112 Ohio St.3d 254, the Ohio Supreme Court held that 2001 S 5 went into effect upon proof that a referendum petition contains an insufficient number of valid signatures to have the matter submitted to the electorate of the state of Ohio as contemplated by Section 1g, Article II, Ohio Constitution and R.C. 3519.16.

**Pre-1953 H 1 Amendments:** RS 1590

R.C. § 709.03, OH ST § 709.03

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R.C. § 709.032

**C** Baldwin's Ohio Revised Code Annotated Currentness  
Title VII. Municipal Corporations  
    Chapter 709. Annexation; Detachment (Refs & Annos)  
        Annexation on Application of Citizens

→ 709.032 Hearings; testimony (later effective date)

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

(A) As used in this section, "necessary party" means the municipal corporation to which annexation is proposed, each township any portion of which is included within the territory proposed for annexation, and the agent for the petitioners.

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

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

(C) Any person may appear in person or by attorney and, after being sworn, may support or contest the granting of the petition. Affidavits presented in support of or against the petition shall be considered by the board, but only if the affidavits are filed with the board and served as provided in the Rules of Civil Procedure upon the necessary parties to the annexation proceedings at least fifteen days before the date of the hearing; provided that the board shall accept an affidavit after the fifteen-day period if the purpose of the affidavit is only to establish the affiant's authority to sign the petition on behalf of the entity for which the affiant signed. Necessary parties or their representatives are entitled to present evidence, examine and cross-examine witnesses, and comment on all evidence, including any affidavits presented to the board under this division.

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

CREDIT(S)

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

UNCODIFIED LAW

2001 S 5, § 3: See Uncodified Law under 709.02.

HISTORICAL AND STATUTORY NOTES

**Ed. Note:** 2001 S 5 Effective Date--2001 S 5 was filed with the Secretary of State's office on July 27, 2001. On October 25, 2001 a referendum petition was filed, and on March 27, 2002, the Secretary of State declared the referendum petitions invalid. In *Thornton v. Salak*, 2006-Ohio-6407, 112 Ohio St.3d 254, the Ohio Supreme Court held that 2001 S 5 went into effect upon proof that a referendum petition contains an insufficient number of valid signatures to have the matter submitted to the electorate of the state of Ohio as contemplated by Section 1g, Article II, Ohio Constitution and R.C. 3519.16.

R.C. § 709.032, OH ST § 709.032

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R.C. § 709.033

**C** Baldwin's Ohio Revised Code Annotated Curentness

Title VII. Municipal Corporations

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

Annexation on Application of Citizens

→ 709.033 Resolution granting annexation

(A) After the hearing on a petition for annexation, the board of county commissioners shall enter upon its journal a resolution granting the annexation if it finds, based upon a preponderance of the substantial, reliable, and probative evidence on the whole record, that each of the following conditions has been met:

(1) The petition meets all the requirements set forth in, and was filed in the manner provided in, section 709.02 of the Revised Code.

(2) The persons who signed the petition are owners of real estate located in the territory proposed to be annexed in the petition, and, as of the time the petition was filed with the board of county commissioners, the number of valid signatures on the petition constituted a majority of the owners of real estate in that territory.

(3) The municipal corporation to which the territory is proposed to be annexed has complied with division (D) of section 709.03 of the Revised Code.

(4) The territory proposed to be annexed is not unreasonably large.

(5) On balance, the general good of the territory proposed to be annexed will be served, and the benefits to the territory proposed to be annexed and the surrounding area will outweigh the detriments to the territory proposed to be annexed and the surrounding area, if the annexation petition is granted. As used in division (A)(5) of this section, "surrounding area" means the territory within the unincorporated area of any township located one-half mile or less from any of the territory proposed to be annexed.

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

(B) The board of county commissioners shall enter upon its journal a resolution granting or denying the petition for annexation within thirty days after the hearing provided for in section 709.032 of the Revised Code. The resolution shall include specific findings of fact as to whether each of the conditions listed in divisions (A)(1) to (6) of this section has been met. Upon journalization of the resolution, the clerk of the board shall send a certified copy of it to the agent for the petitioners, the clerk of the legislative authority of the municipal corporation to which annexation is proposed, the fiscal officer of each township in which the territory proposed for annexation is located, and the clerk of the board of county commissioners of each county in which the territory proposed for annexation is located other than the county in which the petition is filed. The clerk of the board shall take no further action until the expiration of thirty days after the date of journalization.

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(C) After the expiration of that thirty-day period, if no appeal has been timely filed under section 709.07 of the Revised Code, the clerk of the board of county commissioners shall take one of the following actions:

(1) If the board granted the petition for annexation, the clerk shall deliver a certified copy of the entire record of the annexation proceedings, including all resolutions of the board, signed by a majority of the members of the board, the petition, map, and all other papers on file, the recording of the proceedings, if a copy is available, and exhibits presented at the hearing relating to the annexation proceedings, to the auditor or clerk of the municipal corporation to which annexation is proposed.

(2) If the board denied the petition for annexation, the clerk shall send a certified copy of its resolution denying the annexation to the agent for the petitioners and to the clerk of the municipal corporation to which the annexation was proposed.

(D) If an appeal is filed in a timely manner under section 709.07 of the Revised Code from the determination of the board of county commissioners granting or denying the petition for annexation, the clerk of the board shall take further action only in accordance with that section.

CREDIT(S)

(2005 S 107, eff. 12-20-05; 2001 S 5, eff. 3-27-02 (*Thornton v. Salak*); 1988 S 38, § 3, eff. 7-20-89; 1988 S 38, § 1; 1984 H 175; 1969 H 491; 132 v S 220)

UNCODIFIED LAW

2001 S 5, § 3: See Uncodified Law under 709.02.

HISTORICAL AND STATUTORY NOTES

**Ed. Note:** 2001 S 5 Effective Date--2001 S 5 was filed with the Secretary of State's office on July 27, 2001. On October 25, 2001 a referendum petition was filed, and on March 27, 2002, the Secretary of State declared the referendum petitions invalid. In *Thornton v. Salak*, 2006-Ohio-6407, 112 Ohio St.3d 254, the Ohio Supreme Court held that 2001 S 5 went into effect upon proof that a referendum petition contains an insufficient number of valid signatures to have the matter submitted to the electorate of the state of Ohio as contemplated by Section 1g, Article II, Ohio Constitution and R.C. 3519.16.

R.C. § 709.033, OH ST § 709.033

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BALDWIN'S OHIO REVISED CODE ANNOTATED  
TITLE VII. MUNICIPAL CORPORATIONS  
CHAPTER 709. ANNEXATION; DETACHMENT  
ANNEXATION ON APPLICATION OF CITIZENS

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Current through 2002 File 92 of the 124th GA (2001-2002), apv. 2/13/02

709.033 ORDER FOR ANNEXATION (FIRST VERSION)

<Note: See also following version, and Publisher's Note.>

After the hearing on a petition to annex, the board of county commissioners shall enter an order upon its journal allowing the annexation if it finds that:

(A) The petition contains all matter required in section 709.02 of the Revised Code.

(B) Notice has been published as required by section 709.031 of the Revised Code.

(C) The persons whose names are subscribed to the petition are owners of real estate located in the territory in the petition, and as of the time the petition was filed with the board of county commissioners the number of valid signatures on the petition constituted a majority of the owners of real estate in the territory proposed to be annexed.

(D) The municipal corporation to which the territory is proposed to be annexed has complied with division (B) of section 709.031 of the Revised Code.

(E) The territory included in the annexation petition is not unreasonably large; the map or plat is accurate; and the general good of the territory sought to be annexed will be served if the annexation petition is granted.

The board of county commissioners shall grant or deny the petition for annexation within ninety days after the hearing set pursuant to section 709.031 of the Revised Code.

If the board of county commissioners grants the petition for annexation it shall enter on its journal all the orders of the board relating to the annexation and deliver a certified transcript of all orders of the board, signed by a majority of the members of the board, the petition, map, and all other papers on file relating to the annexation proceedings to the auditor or clerk of the municipal corporation to which annexation is proposed.

If the board of county commissioners denies the petition for annexation, it shall send a certified copy of its order denying the annexation to the agent for the petitioners and to the clerk of the municipal corporation to which the annexation was proposed. If, on any appeal of any such annexation denial, a court holds that the board's denial was contrary to law, and if the court orders the clerk of the board of county commissioners to enter on the journal of the board an order approving the annexation, then the clerk shall enter the order.

CREDIT(S)

(1988 S 38, § 3, eff. 7-20-89; 1988 S 38, § 1; 1984 H 175; 1969 H 491; 132 v S 220)

<Note: See also following version, and Publisher's Note.>

<General Materials (GM) - References, Annotations, or Tables>

R.C. § 709.033

OH ST § 709.033

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R.C. § 709.04

**C**

Baldwin's Ohio Revised Code Annotated Currentness

Title VII. Municipal Corporations

<sup>Ⓜ</sup> Chapter 709. Annexation; Detachment (Refs & Annos)        <sup>Ⓜ</sup> Annexation on Application of Citizens

## → 709.04 Acceptance or rejection of annexation by legislative authority

At the next regular session of the legislative authority of the municipal corporation to which annexation is proposed, after the expiration of sixty days from the date of the delivery required by division (C) of section 709.022 or division (C)(1) of section 709.033 of the Revised Code, the auditor or clerk of that municipal corporation shall lay the resolution of the board granting the petition and the accompanying map or plat and petition before the legislative authority. The legislative authority, by resolution or ordinance, then shall accept or reject the petition for annexation. If the legislative authority fails to pass an ordinance or resolution accepting the petition for annexation within a period of one hundred twenty days after those documents are laid before it by the auditor or clerk, the petition for annexation shall be considered rejected by the legislative authority.

## CREDIT(S)

(2001 S 5, eff. 3-27-02 (*Thornton v. Salak*); 132 v S 220, eff. 12-1-67; 1953 H 1; GC 3550)

## UNCODIFIED LAW

2001 S 5, § 3: See Uncodified Law under 709.02.

## HISTORICAL AND STATUTORY NOTES

**Ed. Note:** 2001 S 5 Effective Date--2001 S 5 was filed with the Secretary of State's office on July 27, 2001. On October 25, 2001 a referendum petition was filed, and on March 27, 2002, the Secretary of State declared the referendum petitions invalid. In *Thornton v. Salak*, 2006-Ohio-6407, 112 Ohio St.3d 254, the Ohio Supreme Court held that 2001 S 5 went into effect upon proof that a referendum petition contains an insufficient number of valid signatures to have the matter submitted to the electorate of the state of Ohio as contemplated by Section 1g, Article II, Ohio Constitution and R.C. 3519.16.

**Pre-1953 H 1 Amendments:** RS 1591

R.C. § 709.04, OH ST § 709.04

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Title VII. Municipal Corporations  
    Chapter 709. Annexation; Detachment (Refs & Annos)  
        Annexation on Application of Citizens

→ 709.07 Appeals

(A) The agent for the petitioners, any owner of real estate in the territory proposed for annexation, any township in which territory proposed for annexation is located, and the municipal corporation to which the territory is proposed to be annexed may file an appeal under Chapter 2506. of the Revised Code from a resolution of the board of county commissioners granting or denying the petition. The agent for the petitioners, any township in which the territory proposed for annexation is located, and any municipal corporation to which the territory is proposed to be annexed are necessary parties in an appeal. The filing of a notice of appeal with the clerk of the board of county commissioners shall operate as a stay of execution upon that clerk and all parties to the appeal, which stay shall not be lifted until the court having jurisdiction over the proceedings enters a final order affirming or reversing the decision of the board of county commissioners and the time limits for an appeal of that final order have passed without a notice of appeal being filed.

(B) Any party filing an appeal from the court of common pleas or court of appeals decision in an annexation matter shall serve on the clerk of the board of county commissioners a time-stamped copy of the notice of appeal. Upon issuance of a final order of any court regarding an annexation appeal, the clerk of the court shall forward a certified copy of the court's order to the clerk of the board of county commissioners that rendered the annexation decision that was appealed.

(C) If, after all appeals have been exhausted, the final determination of the court is that the petition for annexation should be granted, the board of county commissioners shall enter on its journal a resolution granting the annexation, if such a resolution has not already been journalized, and the clerk of the board shall deliver a certified copy of that journal entry and of the entire record of the annexation proceedings, including all resolutions of the board, signed by a majority of the members of the board, the petition, map, and all other papers on file, the transcript of the proceedings, and exhibits presented at the hearing relating to the annexation proceedings, to the auditor or clerk of the municipal corporation to which annexation is proposed. The municipal auditor or clerk shall lay these certified papers, along with the copy of the court's order, before the legislative authority at its next regular meeting. The legislative authority then shall proceed to accept or reject the petition for annexation as provided under section 709.04 of the Revised Code.

(D) If, after all appeals have been exhausted, the final determination of the court is that the petition for annexation should be denied, the board of county commissioners shall enter on its journal a resolution denying the annexation, if such a resolution has not already been journalized.

CREDIT(S)

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

UNCODIFIED LAW

R.C. § 709.07

2001 S 5, § 3: See Uncodified Law under 709.02.

#### HISTORICAL AND STATUTORY NOTES

**Ed. Note:** 2001 S 5 Effective Date--2001 S 5 was filed with the Secretary of State's office on July 27, 2001. On October 25, 2001 a referendum petition was filed, and on March 27, 2002, the Secretary of State declared the referendum petitions invalid. In *Thornton v. Salak*, 2006-Ohio-6407, 112 Ohio St.3d 254, the Ohio Supreme Court held that 2001 S 5 went into effect upon proof that a referendum petition contains an insufficient number of valid signatures to have the matter submitted to the electorate of the state of Ohio as contemplated by Section 1g, Article II, Ohio Constitution and R.C. 3519.16.

**Ed. Note:** Former 709.07 repealed by 2001 S 5, eff. 10-26-01; 1991 H 228, eff. 3-2-92; 1979 S 151; 1978 H 218; 132 v S 220.

**Ed. Note:** Prior 709.07 repealed by 132 v S 220, eff. 12-1-67; 1953 H 1; GC 3553.

**Pre-1953 H 1 Amendments:** RS 1594

R.C. § 709.07, OH ST § 709.07

Current through 2009 File 2 of the 128th GA (2009-2010), apv. by 6/23/09 and filed with the Secretary of State by 6/23/09.

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END OF DOCUMENT

BALDWIN'S OHIO REVISED CODE ANNOTATED  
TITLE VII. MUNICIPAL CORPORATIONS  
CHAPTER 709. ANNEXATION; DETACHMENT  
ANNEXATION ON APPLICATION OF CITIZENS

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709.07 PETITION FOR INJUNCTION; HEARING; ORDER

(A) Within sixty days from the filing of the papers relating to the annexation with the auditor or clerk as provided by section 709.033 of the Revised Code, any person interested, and any other person who appeared in person or by an attorney in the hearing provided for in section 709.031 of the Revised Code, may make application by petition to the court of common pleas praying for an injunction restraining the auditor or clerk from presenting the annexation petition and other papers to the legislative authority. The petition of a person interested shall set forth facts showing:

(1) How the proposed annexation adversely affects the legal rights or interests of the petitioner;

(2) The nature of the error in the proceedings before the board of county commissioners pursuant to section 709.032 or 709.033 of the Revised Code, or how the findings or order of the board is unreasonable or unlawful.

The petition of any other person shall set forth facts applicable to division (A)(2) of this section.

(B) The petition shall be filed and docketed in the office of the clerk of the court of common pleas, naming the auditor or clerk of the municipal corporation to which annexation is proposed and the agent of the petitioners for annexation as defendants, and summons shall be served in the manner provided in Chapter 2703. of the Revised Code. The auditor or clerk shall not present the annexation application to the legislative authority, and it shall not take any action thereon, until after the final hearing and disposition of such petition if an order staying further proceedings on the annexation is entered by the court of common pleas or a judge thereof and served upon the auditor or clerk.

(C) The court of common pleas shall hear the petition not less than twenty days from the filing thereof, and at the hearing the court may hear evidence upon the matters averred in the petition.

(D) The petition for injunction shall be dismissed unless the court finds the petitioner has shown by clear and convincing evidence that the annexation would adversely affect the legal rights or interests of the petitioner, and that:

(1) There was error in the proceedings before the board of county commissioners pursuant to section 709.032 or 709.033 of the Revised Code, or that the board's decision was unreasonable or unlawful; or

(2) There was error in the findings of the board of county commissioners.

(E) If the court finds all the matters required in divisions (D)(1) and (2) of this section it shall make an order enjoining the auditor or clerk of the annexing municipal corporation from presenting the annexation application and related papers to the legislative authority. Such order shall not be a bar to subsequent applications to the board of county commissioners for the purpose of annexing the territory involved in the annexation application. The court shall render such judgment as to the payment of the costs incurred in the proceedings of injunction as is just and equitable.

CREDIT(S)

(1991 H 228, eff. 3-2-92; 1979 S 151; 1978 H 218; 132 v S 220)

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