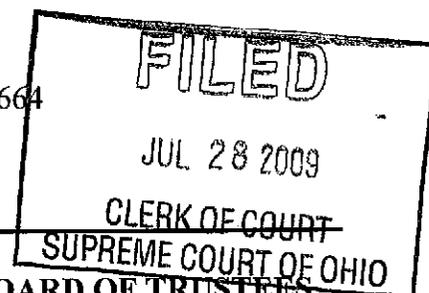


IN THE SUPREME COURT OF OHIO

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



**REPLY BRIEF OF *AMICUS CURIAE* BERLIN TOWNSHIP BOARD OF TRUSTEES
IN SUPPORT OF THE RELATOR-APPELLANT, BUTLER TOWNSHIP
BOARD OF TRUSTEES**

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I. ARGUMENT

A. Appellee stridently opposes the use of law dictionaries to define “party” yet unabashedly embraces it when used by the Appellate Court to deny standing.

Appellee may not have it both ways. Either this Court should avoid a legal dictionary to define “party,” or this Court is free to use a legal dictionary to define “party.” On the one hand, Appellee contends the Township and its Amici may not define “party” by use of a legal dictionary because “[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.”¹ On the other hand, Appellee fully embraces the Appellate Court’s use of Black’s Law Dictionary in defining “party” when such supports Appellee’s position.

In construing the term “party,” for purposes of R.C. § 709.023(G), the Court of Appeals did exactly what the Appellee claims a court should not do – rely on a law dictionary to provide a broad and general definition of “party” that could prevent a township from exercising its statutory right to file a mandamus action pursuant to R.C. § 709.023(G):

Black’s Law Dictionary, 6th Ed., defines ‘party’ in the following terms: ‘[a] party is a technical word having a precise meaning in a legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or equity, the party plaintiff or defendant, whether composed of one or more individuals and whether natural or legal persons; all other who may be affected by the suit, indirectly or consequently, are persons interested but not parties.’ (emphasis supplied.) While an annexation proceeding is not, in strict legal terms, a legal suit, it is a legal proceeding brought by and in the name of the petitioners only, and before the county commissioners. And, while a board of township trustees or a municipal

¹ See Merit Brief of Appellee, p. 13. Appellee does not explain what is meant by his use of the word “strict.” Presumably, Appellee uses the word in an attempt to persuade this Court that a “strict” statutory proceeding precludes resorting to a legal dictionary while a “not-so-strict” statutory proceeding permits it. In any case, Appellee provides no support for such a proposition.

corporation may be interested persons, they are not, by general definition, 'parties' to an annexation proceeding.²

Appellee specifically argues that it is the Appellant that seeks to look outside the framework of the expedited annexation statutes for purposes of construing the term "party" yet, ironically, the Appellee perceives no problem when the Appellate Court expressly relies upon Black's Law Dictionary to help render its decision:

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 the '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 petitions 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.³

Unfortunately, Appellee either did not realize or conveniently omitted the first sentence of Paragraph 24 of the Court of Appeals' opinion where the Court boldly and expressly relies on a portion of a legal dictionary definition of the term "party" to support its decision: Black's Law Dictionary, 6th Ed., defines 'party' in the following terms [.]" *Amicus Curiae* Berlin Township would agree with Appellee that if a more technical and particularized meaning for the term 'party' is available for construing that term in the context of the expedited annexation

² *State ex rel. Butler Township Board of Trustees v. Montgomery County Board of Commissioners* (2008), 2008 WL 5196445 (Ohio App. 2 Dist.) 2008-Ohio-6542, at ¶24 (emphasis in original and supplied).

³ See Merit Brief of Appellee, Joseph P. Moore, Agent for Annexation Petitioner, Waterwheel Farm, Inc., dated July 8, 2009, at 12.

statutes, the Court should rely upon that definition rather than a more plain and ordinary meaning, as would be required in the absence of a more particularized meaning.

Conveniently, the expedited annexation statutes provide such a definition for the term “party.” R.C. § 709.021(D) provides that townships are parties for purposes of the expedited annexation framework. In the absence of some compelling reason as to why this definition should be ignored in order to apply a more generalized and ordinary meaning of the term “party,” as the Court of Appeals and Appellee have done, the Court should recognize, in accordance with R.C. § 1.42, that the term “party” has acquired a technical and particularized meaning as defined in R.C. § 709.021(D), and townships are parties for purposes of R.C. § 709.023(G).⁴

B. Fifth District Courts continue to recognize townships have standing to assert mandamus claims in Type-2 annexations.

Once again, the Delaware County Court of Common Pleas ruled that Berlin Township has standing to challenge whether an annexation petition complies with R.C. § 709.023(G): “It must be conceded that under R.C. 709.23, the General Assembly allows and authorizes a township to file a writ of mandamus, a granted power that would be rendered meaningless unless accompanied by the necessary standing to bring such action.”⁵ Significantly, this Delaware County Court decision was journalized on July 7, 2009, after both the Court of Appeals’ decision and the Warren County Court of Common Pleas’ decision, referenced by Appellee.

⁴ Even if the Court were to find this definition may not be used for purposes of R.C. 709.023(G), the plain and ordinary definition of the term “party” includes townships. *See, Amicus Curiae Berlin Township principle brief*, pp. 4, 5.

⁵ *See* Magistrate’s Decision Denying Respondent Dominion Home’s Motion to Dismiss and Granting in Part and Denying in Part Relator’s Motion for Preliminary Junction dated July 7, 2009, in *Berlin Township Board of Trustees v. Delaware County Board of Commissioners, et al.*, Delaware County Court of Common Pleas Case No. 08 CV H 12 1692, attached as Exhibit 1.

The Magistrate in this case determined, at a minimum, Berlin Township has standing to bring a mandamus action within a Type-2 Petition annexation and a preliminary injunction should issue because it appears that two of the petitions for annexation violate certain provisions of R.C. 709.023(E).⁶ The decision timely and forcefully demonstrates the danger of Appellee's position—if Berlin Township had no standing to bring its mandamus action, then the Board of County Commissioners may approve petitions for annexation in violation of Ohio law, and Berlin Township is barred from any remedy to restrain it.

II. CONCLUSION

Accordingly, *Amicus Curiae* Berlin Township respectfully requests an order from this Court reversing the decision of the Second District Court of Appeals.

Respectfully Submitted,



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⁶ *Id.*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Amicus Curiae Berlin Township Board of Trustees is being mailed to all parties entitled to service under Rule 5 of the Ohio Rules of Civil Procedure on the 28 day of July, 2009.



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EXHIBIT 1

Co

IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

BERLIN TOWNSHIP BOARD OF TRUSTEES,

Relator,

259
214-223

Case No. 08 CV H 12 1692

VS.

: JUDGE EVERETT H KRUEGER

DELAWARE COUNTY BOARD OF COMMISSIONERS, et al.,

: MAGISTRATE ALICIA FEEHERY WOLF

Respondents.

MAGISTRATE'S DECISION
DENYING RESPONDENT DOMINION HOME'S MOTION TO DISMISS
AND
GRANTING IN PART AND DENYING IN PART
REALTOR'S MOTION FOR PRELIMINARY INJUNCTION

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COMMON PLEAS COURT
DELAWARE COUNTY OHIO
FILED

This case arises out of three expedited petitions for annexation of property in Berlin Township, Delaware County, (individually referred to as: "Annexation No. 6" (0.412 acres), "Annexation No. 7" (2.045 acres), and "Annexation No. 8" (11.372 acres)) filed by Intervenor-Respondent Dominion Homes, Inc. ("Dominion Homes"), pursuant to R.C. 709.023. Relator Berlin Township ("Berlin Township") objected to the Petitions and Respondent Delaware County Board of Commissioners ("BOC"), despite the objections, considered and approved all three petitions.

Berlin Township brought this Complaint in Mandamus and Motion for Temporary Restraining Order and Preliminary Injunction, asserting that the BOC violated various sections of the Ohio Revised Code. The Intervenor-Respondent, Dominion Homes, Inc., filed a motion to dismiss the Complaint pursuant to Civ.R. 12(B)(6), claiming that Berlin Township lacks standing to bring this action. The Court granted Berlin Township's Motion for Temporary Restraining Order. The matter came before the Magistrate for a hearing and all parties have fully argued and briefed the pending issues.



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I. STANDING

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

R.C. 709.023(G) states in pertinent part that:

[t]here is no appeal in law or equity from the board's entry of any resolution under this section, but **any party** may seek a writ of mandamus to compel the board of county commissioners to perform its duties under this section.

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

While R.C. 709.023 does not allow a township to appeal the board of commissioners' decision to incorporate, the statute does allow for the township to bring an action for a writ of mandamus if the proposed petition does not meet the statutory requirements. The Fifth District Court of Appeals held in *Washington Township Bd. of Trs. v. City of Mansfield City Counsel* (August 11, 2004), Richland Co. App. Nos. 03CA85 and 03CA97, 2004-Ohio-4299, at ¶32, that pursuant to R.C. 709.023(G), once the BOC has approved an expedited petition for annexation under this section, a township has no means to challenge the annexation except to pursue a mandamus action to compel the BOC to perform its duties.

R.C. 709.023 specifically requires that both Dominion Homes and the BOC comply with statutory requirements in filing and approving expedited petitions for annexation. Additionally, the statute provides that the BOC had a clear legal duty to review the annexation petition in compliance with the R.C. 709.023. Furthermore, R.C. 709.023 limits

Berlin Township's remedy solely to this Mandamus action, as there is no other remedy available in the ordinary course of law.

In addition, the Fifth District has held that while "townships are creatures of statute" they maintain "those powers expressly authorized or *necessarily implied* from the expressed grant of statutory power..." *Washington Twp. Bd. of Trustees, supra.*, at ¶ 23, citations omitted. (Emphasis added.) It must be conceded that under R.C. 709.023, the General Assembly allows and authorizes a township to file a writ of mandamus, a granted power that would be rendered meaningless unless accompanied by the necessary standing to bring such action.

The General Assembly further demonstrates that townships have standing under R.C. 709.023 by granting townships the authority to retain counsel to pursue a mandamus action. Allowing a township to maintain a mandamus action and retain counsel to do so, yet not confer standing upon the township is patently contradictory, and cannot be the intent of the legislature in enacting 709.023.

Dominion Homes disputes Berlin Township's standing to bring this complaint in mandamus, relying upon the Fifth District case of *Lawrence Twp., Stark Cty., Ohio Bd. of Twp. Trustees v. Canal Fulton* (Nov. 5, 2007), Stark Co. App. No. 2007 CA 00010, 2007-Ohio-6115, to bolster its argument. The *Lawrence Township* decision, however, is distinguishable from the case at bar because there the court found that the appellant township had failed to timely object to the proposed annexations, then filed for mandamus relief. *Id.* at ¶ 22. The Fifth District went on to state that Lawrence Township had an adequate remedy at law; filing an objection to the proposed annexation. *Id.* However, Lawrence Township failed to timely object to the annexation and "take advantage of its remedy," and therefore, the Fifth District found that the township could not "utilize mandamus relief to challenge" the annexation. *Id.*

Here, Berlin Township did object to the proposed annexations and the BOC approved the annexations despite Berlin Township's objections. Therefore, Berlin Township took advantage of its statutorily prescribed remedy and is left with no remedy at law once the BOC approved the annexations. The holding of the *Lawrence Township* case must be read in the context of the facts specific to it and is therefore not instructive to the case at bar.

The Respondents also cite the case of *State of Ohio, ex rel., Butler Township Bd. of Trs. v. Montgomery County Bd. of County Comm'rs*, 2nd Dist. App. No. 22664, 2008-Ohio-6542, which held that a township does not have standing to bring a mandamus action regarding an annexation brought pursuant to R.C. 709.023. This case, which directly contradicts the Fifth District case of *Washington Township, supra.*, is not binding on this Court.

Based upon the findings of the Fifth District and the provisions of R.C. 709, this Magistrate finds that Berlin Township has standing to bring this Mandamus action. Therefore, the Magistrate denies Dominion Homes' Motion to Dismiss.

II. EXPEDITED PETITIONS PURSUANT TO R.C. 709.023

The next issue before the Magistrate is whether the expedited petitions violate R.C. 709.023. Berlin Township contends that the proposed annexations violate the statute in three different ways: 1) islands of unincorporated property are created by Annexation No. 7 and Annexation No. 8; 2) the City of Delaware cannot provide proper water or sewer services to the property proposed by Annexation No. 6; and 3) the annexations create road maintenance and jurisdictional problems between the City of Delaware and Berlin Township. Each will be addressed separately.

A. The Creation of Islands of Unincorporated Township Property

The first issue before the Magistrate is whether R.C. 709.023(E)(5) prohibits the creation of an island of township property as a result of the annexation of township property into the city. There is no dispute that the adoption of Annexation No. 7 will result in the creation of an island of unincorporated township property surrounded by the City of Delaware. Likewise, the adoption of Annexation No. 8 will also result in the creation of an island. The parties, however, dispute whether these resulting islands are prohibited by statute.

Berlin Township asserts that the language of the statute prohibits the creation of an island. R.C. 709.023(E)(5) reads in pertinent part:

* * * [T]he board of county commissioners shall review [the petition] to determine if each of the following conditions have been met:

* * * * *

(5) The annexation will not create an unincorporated area of the township that is completely surrounded by the territory proposed for annexation.

Berlin Township argues that the statute precludes the BOC from adopting an annexation that will result in the creation of an island of unincorporated property, as it will in this case.

Dominion Homes and the BOC contend, however, that while R.C. 709.023 does prohibit the creation of an island, the statute only prohibits the creation of an island that results when the proposed property to be annexed completely surrounds the unincorporated area. Dominion Home and the BOC further assert that this is not the case in either Annexation No. 7 or Annexation No. 8. The property in the proposed annexations does not completely surround township property resulting in the creation of an island. Rather, these proposed annexations connect with property that has already been annexed into the City of Delaware, resulting in an area of unincorporated township property; which Dominion Homes and the BOC assert does not violate the R.C. 709.023. Dominion Homes and the BOC

further argue that the Magistrate should look solely at the property proposed to be annexed, not the surrounding property, to determine if an island is created.

Berlin Township contends, however, that this argument circumvents the intent of the statute. The Magistrate agrees. R.C. 709.023, unlike any other section of Chapter 709, specifically prohibits the creation of an island. The intent of this statute is to allow for expedited annexation, however, it seeks to specifically ensure that the annexation does not result in the creation of an island.

Although it is true that the territory *proposed* for annexation in Annexation No. 7 and Annexation No. 8 does not totally surround and create an area of unincorporated land, the Magistrate would be remiss not to look at the totality of the Respondents' actions. Dominion Homes has systematically annexed pieces of land in this area. As a matter of fact, with the exception of the area in the resulting islands, the entire area surrounding the land in Annexation No. 7 and Annexation No. 8 has been incorporated into the City of Delaware by Dominion Homes through several separate annexations. Here, the territory proposed for annexation in Annexation No. 7 and Annexation No. 8 do not create islands within its limits; however, the proposed annexations connect with previously annexed property and an island results. To allow piecemeal annexations that ultimately result in the creation of an island would render R.C. 709.023(E)(5) meaningless. As a result, the Magistrate finds that these annexations contravene the intent and requirements set forth by RC 709.023(E)(5).

Additionally, both Dominion Homes and the BOC also argue that Berlin Township's argument should fail because the Fifth District Court of Appeals has held that "neither the Ohio Revised Code nor the Ohio Supreme Court have specifically delineated that the creation of an island is an impediment to annexation." *Robinson v. Stark Co. Bd. of County Comm'rs*, Stark Co. App. No. 2007 CA 00154, 2008-Ohio-5010, at ¶17, quoting *In re Annexation of 17.958 Acres of Land in Plain Township, Stark County, Ohio* (April 17, 2000),

2025 RELEASE UNDER E.O. 14176

Stark Co. App. No. 1999 CA 00381. The Magistrate finds Dominion Home and the BOC's reliance on *Robinson* is misplaced. First, *Robinson* pertained to an annexation filed pursuant to R.C. 709.022, not R.C. 709.023 as in this case. Second, *In re Annexation of 17.958*, upon which *Robinson* relies, was issued prior to the enactment of the current R.C. 709.023(E)(5), which specifically delineates that the creation of an island is prohibited. Therefore, the Magistrate finds that that *Robinson* is inapposite to the case at bar.

For these reasons, the Magistrate finds that Annexation No. 7 and Annexation No. 8 violate R.C. 709.023(E)(5).

B. Water and Sewer Services

Next, Berlin Township argues that the petition for Annexation No. 6 should be rejected on the basis that the City of Delaware cannot provide the proper water and sewer services to the area. Pursuant to R.C. 709.023(E)(6) the BOC shall ensure that 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* * *." (Emphasis added.) There is no dispute that the City of Delaware has agreed to provide all necessary services to the annexed territories. However, Berlin Township argues that despite the agreement, the City cannot legally provide these services, and therefore, the petition for Annexation No. 6 should not be approved.

The statute requires only that the BOC determine if the City of Delaware has agreed to provide the necessary services to the territory to be annexed. There is no support for the argument that the BOC needs to find anything more than an agreement to provide services. Here there is no question as to the intent of the statute and the responsibility of the BOC. Moreover, Berlin Township does not dispute that the City of Delaware has agreed to provide these services. On this basis, the Magistrate finds that the BOC has complied with R.C. 709.023(E)(6).

2025 RELEASE UNDER E.O. 14176

C. Road Maintenance and Jurisdiction

Finally, Berlin Township asserts that the BOC should reject the petitions for Annexation No. 7 and Annexation No. 8 on the basis that these annexations create road maintenance and jurisdiction issues. Specifically, if these annexations are approved, Cheshire Road will be divided into sections intermittently between the jurisdiction of the City of Delaware and Berlin Township.

The Magistrate already determined that these petitions for annexation should be rejected on the basis that both Annexation No. 7 and Annexation No. 8, if adopted, will result in the creation of an island contravening R.C. 709.023(E)(5). Therefore, the Magistrate finds the issues of road maintenance and jurisdiction are moot.

III. STANDARD FOR GRANTING INJUNCTIVE RELIEF

When considering whether to grant a motion for preliminary injunction the Magistrate must consider four 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.

Corbett v. Ohio Building Authority (1993), 86 Ohio App.3d 44, 49, 619 N.E.2d 1145; see *Weinfeld v. Welling* (Mar. 6, 2000), 5th Dist. No. 1999CA00267, unreported. Determining whether to deny or grant an injunction is "solely within the discretion of the trial court and a reviewing court will not disturb the judgment of the trial court in the absence of a clear abuse of discretion." *Corbett*, 86 Ohio App.3d at 49 (citing *Garono v. State* (1988), 37 Ohio St.3d 171, 173, 524 N.E.2d 496).

While no clear standard of proof is provided in Civ.R. 65, Ohio courts generally require the movant to show by clear and convincing evidence that the balancing of the

Case No. 1:09-cv-00000-UNA

factors enumerated in *Corbett v. Ohio Building Authority* supports granting injunctive relief. *Cleveland Constr., Inc. v. Ohio Dept. of Admin. Servs.* (1997), 121 Ohio App.3d 372, 383.

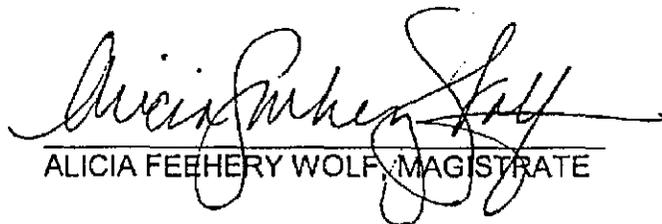
The Magistrate determines that the four factors to consider regarding whether to issue a preliminary injunction weigh in favor of issuing the order. As the purpose of a preliminary injunction is to prevent irreparable harm in order to preserve the Court's ability to render a meaningful decision on the merits, the Magistrate determines that an injunction must be issued to prevent irreparable harm to Berlin Township until the final hearing on the merits in this case. *United Ford & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.* (6th Cir. 1998), 1263 F.3d 341, 348.

IV. CONCLUSION

Based upon the foregoing, the Magistrate rules as follows. The Magistrate DENIES Dominion Home's Motion to Dismiss; and the Magistrate GRANTS Berlin Township's Motion for Preliminary Injunction as to Annexation No. 7 and Annexation No. 8 only, because these petitions violate R.C. 709.023(E)(5); and the Magistrate DENIES Berlin Township's Motion for Preliminary Injunction as to Annexation No. 6.

A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ. R. 53(D)(3)(b).

Dated: July 7, 2009


ALICIA FEEHERY WOLF, MAGISTRATE