

IN THE SUPREME COURT OF OHIO

ORIGINAL

State ex rel. City of North Canton, et al.)
)
Appellants,)
v.)
)
Board of County Commissioners of Stark)
County, et al.,)
)
Appellees.)

CASE NO. 2010-0003
On Appeal from Stark County
Court of Appeals, Fifth Appellate District
Court of Appeals
Case No. 2009CA00132

MEMORANDUM IN RESPONSE OF JURISDICTION BY APPELLEE, BOARD OF TRUSTEES, JACKSON TOWNSHIP, STARK COUNTY

Kimberly J. Brown (0064799)
Counsel of Record
Jennifer A. Flint (0059587)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215-4291
Telephone: 614-227-2300
Facsimile: 614-227-2390
Email: kbrown@bricker.com
Email: jflint@bricker.com
Counsel for Appellant, City of North Canton

Christopher J. Goldthrope (0007787)
LUNDGREN, GOLDTHORPE &
ZUMBAR
849 West Maple
Hartville, Ohio 44632
Telephone: 330-877-6111
Facsimile: 330-877-0313
Email: lgzlawhartville@sbcglobal.net
Counsel for Appellant, Daniel J. Fosnaught

Deborah A. Dawson (0021580)
Assistant Chief, Civil Division
Stark County Prosecutor's Office
110 Central Plaza South, Suite 510
Canton, Ohio 44702
Telephone: 330-451-7897
Facsimile: 330-451-7978
Counsel for Appellee, Board of County Commissioners, Stark County

Kevin R. L'Hommedieu (0066815)
Jason P. Reese (0068227)
Canton Law Department
218 Cleveland Avenue S.W.
Canton, Ohio 44701-4218
Telephone: 330-489-3251
Facsimile: 330-489-3374
Counsel for Appellee, City of Canton

Michael A. Thompson (0016874)
4571 Stephen Circle N.W., Suite 130
Canton, Ohio 44718
Telephone: 330-499-5297
Facsimile: 330-433-1313
Email: Thompsonlaw@sssnet.com
Counsel for Appellee, Board of Trustees, Jackson Township, Stark County

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Eric J. Williams (0072048)
Pelini, Campbell, Williams & Traub, LLC
8040 Cleveland Avenue N.W., Suite 400
North Canton, Ohio 44720
Telephone: 330-305-6400
Facsimile: 330-305-0042
*Counsel for Appellee, Board of Trustees of
Plain Township, Stark County*

Stephen W. Funk (0058506)
Roetzel & Andress, LPA
222 South Main Street, Suite 400
Akron, Ohio 44308
Telephone: 330-376-2700
Facsimile: 330-376-4577
*Counsel for Appellee, Metro Regional
Transit Authority*

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	iii, iv
TABLE OF AUTHORITIES.....	v
EXPLANATION OF WHY CASE IS NOT A PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION	1-3
STATEMENT OF THE CASE AND FACTS	3, 4
ARGUMENT IN OPPOSITION OF APPELLANTS' PROPOSITIONS OF LAW	4
I. Proposition of Law No. 1: The objections raised by Jackson Township and Plain Township to the Fosnaught Petition met the conditions specified in R.C. 709.023(E) requiring the County Board of Commissioners to follow the procedures set forth in R.C. 709.023(E).....	4, 5
II. Proposition of Law No. 2: Where a Board of County Commissioners determines that an expedited type-II annexation petition complies with R.C. 709.023(E), but a portion of the territory included in the annexation had previously been included in an annexation petition approved by the County Commissioners, the Board of County Commissioners could not grant the second petition given said petition contained territory which was no longer unincorporated territory	5, 6
III. Proposition of Law No. 3: The Appellants (as property owner and municipality seeking annexation) did not have standing to challenge the Board of County Commissioners granting of the competing annexation petition.	7
A. Appellants are not parties under R.C. 709.023 with standing to seek a writ of mandamus challenging the Board's action on the RM Investments Petition.....	7
B. Appellants have no standing under the Declaratory Judgment Act to challenge the RMI Petition.....	7-9
C. R.C. Chapter 709 is not unconstitutional as applied to Appellant Fosnaught.	9, 10
IV. Proposition of Law No. 4: The RMI Petition satisfied all requirements for an expedited type-II annexation petition.	10, 11

CONCLUSION 11, 12
CERTIFICATE OF SERVICE..... 13

TABLE OF AUTHORITIES

CASES

<i>State ex rel. Smith v. Frost</i> (1995), 74 Ohio St. 3d 107	6, 8
<i>Middletown v. McGee</i> (1988), 39 Ohio St.3d 284.....	7, 11
<i>North Canton v. Canton</i> , 5 th Dist. No. 2005 CA 00123, 2005-Ohio-6953	8
<i>State ex rel. Overholser Bldrs., LLC v .Bd. of Cty Commrs. of Clark Cty.</i> 174 Ohio App. 3d 631, 207,	9

STATUTES

R.C. 709.021(A)	5, 6
R.C. 709.021(D)	7
R.C. 709.022.....	9
R.C. 709.02(A)	11
R.C. 709.023	passim
R.C. 709.023(D)	1, 4, 5, 10
R.C. 709.023(E).....	1, 3, 4, 5, 10
R.C. 709.023(E)(1-7).....	4
R.C. 709.023(E)(2)	5
R.C. 709.023(E)(4)	10

EXPLANATION OF WHY THIS CASE IS NOT A PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

Contrary to the assertions of the Appellants, this case is not one of public or great general interest and does not involve a substantial constitutional question. Instead, as evidenced by the upholding of the Stark County Board of Commissioner's decision by the Trial Court and the Fifth District Court of Appeals, this case involves the County Commissioners properly exercising their duties and responsibilities under one of the three expedited-type annexations provided for in R.C. 709.023. Appellees submit there is no ambiguity in the annexation statutes and that at each level, the law was carefully reviewed and correctly applied.

Being an expedited type-II annexation under R.C. 709.23, where all required property owners have signed the annexation petition, the RM Investments Petition is not a "balloon-on-a-string" annexation prohibited by law as Appellants would like this Court to believe. Indeed, if one were to look at the Fosnaught Petition as filed with the City of North Canton, one also sees the use of the railroad right-of-way in the Fosnaught Petition along with the two parcels of land owned by Fosnaught. Under the RM Investments Petition no objections were raised by the townships involved or the City, and the annexation proceeded lawfully under R.C. 709.023 (D). However, the Fosnaught Petition was objected to by both Plain Township and Jackson Township, thus requiring the Stark County Board of Commissioners to proceed under R.C. 709.023 (E). At every turn, all procedural requirements were followed pursuant to the statutory scheme for expedited annexation cases.

Contrary to the allegations of the Appellant, the Stark County Board of County Commissioners did not struggle with the issues and did not lack for guidance and lawfully resolved the issues presented by the two annexations as evidenced by the Trial Court and the Fifth District Court of Appeals affirming the Board's decisions.

At page 2 of Appellants' Brief, it is wrongfully alleged that the RM Investments Petition sought to annex territory that is not contiguous to Canton. This is factually inaccurate and even contrary to the allegations contained at page 1 of Appellants' Brief in which Appellants state: "the RM Investments parcel shares no boundary with Canton, and Canton borders the Metro RTA parcel by only sixty feet." The RM Investments Petition contained not only land belonging to RM Investments but also a sixty-foot right-of-way owned by Metro RTA who was not an owner for purposes of this annexation.¹

Stark County Board of Commissioners rightfully decided that the Fosnaught Petition could not be granted given that they had previously granted the RMI Petition several weeks before.

Consistent with this Courts most recent ruling of *State ex rel. Butler Township Board of Trustees v. Montgomery County Board of Commissioners*, slip opinion number 2010-Ohio-169, the Trial Court and the Fifth District Court of Appeals properly held that the Appellants lacked standing in mandamus and declaratory judgment to challenge the RM Investments Petition. Notwithstanding the clear previous direction of this Court, Appellants would like this Court to find the standing to challenge the RMI Petition on the basis that "the interest of property owners to annex their property into the municipality of their choice is paramount." (See Appellants' Brief pages 4-5). What the Appellants do not tell this Court is that Fosnaught purchased two parcels of land, separated by the sixty-foot right-of-way owned by Metro RTA and many years later sought to have both properties annexed into the City of North Canton. The eastern most property (east of the Metro RTA land) is adjacent to the City of North Canton and the Commissioners at the hearing on the Fosnaught Petition specifically asked Fosnaught if he

¹ Keep in mind that the two petitions for annexation filed by Fosnaught also used the sixty-foot right-of-way without signature of Metro RTA as a part of the land seeking to be annexed.

wished to have this parcel be annexed into the City of North Canton. Fosnaught chose not to annex this parcel of land into North Canton although the same would have been granted.²

Appellants believe that the clear following of the statutory proceeding set forth for expedited annexations somehow implicates the integrity of the expedited annexation process. In fact, the decision of the Stark County Commissioners, the Trial Court and the Fifth District Court in affirming the Board's decision, upholds the integrity of the specific statutory scheme passed by the Ohio legislature within the last ten years so that those annexations where all the property owners wish to be a part of a city can expeditiously be granted without long delays and substantial and expensive legal battles. Were this Court to overturn the Trial Court and the Fifth District Court of Appeals, this Court would be thwarting the purposes of the expedited annexation proceedings and encouraging long protracted appeals as we have in this case even though the property owner, the affected townships, and the city have all agreed the annexation should go forward.

For the foregoing reasons, the decisions of the Board of County Commissioners, the Trial Court and the Fifth District Court of Appeals clearly follow the statutory mandate provided by the legislature and this appeal does not involve any issue of public or great general interest and does not raise a substantial constitutional question not previously addressed by this Court.

STATEMENT OF THE CASE AND FACTS

Appellee Jackson Township agrees with the Statement of the Case and facts as presented by Appellants at pages 5-7 of their Memorandum with several noted exceptions. The record is clear that Jackson and Plain Townships filed objections timely to the Fosnaught Petition, which objections were based on the conditions set forth in R.C. 709.023(E). Jackson, in addition to

² Fosnaught may still have this parcel of land annexed into the City of North Canton as this parcel has not been incorporated into any other annexation petition as of the date of this Brief.

setting forth the specific items found in R.C. 709.023(E)(1-7), as a part of its resolution, also attached a Stipulated Judgment Entry from the Stark County Court of Common Pleas in Case No. 2008 MI 00290 in which Fosnought's property had been seized by the State of Ohio on or about July 8, 2008 and was subject to a restraining order precluding Fosnought from disposing of said property or encumbering it pending the outcome of the seizure action.

ARGUMENT IN OPPOSITION OF APPELLANTS' PROPOSITIONS OF LAW

Proposition of Law No. 1: The objections raised by Jackson Township and Plain Township to the Fosnought Petition met the conditions specified in R.C. 709.023(E) requiring the County Board of Commissioners to follow the procedures set forth in R.C. 709.023(E).

Appellee Jackson Township agrees with the Appellants that the procedure when there are objections to an expedited Type-II Petition are governed by R.C. 709.023(D) and (E). However, the Appellants are misleading this Court in their statement that Plain and Jackson Townships filed objections to the Fosnought Petition which objections were not based on the conditions set forth in R.C. 709.023(E). In fact, both Plain and Jackson filed timely objections to the Fosnought Annexation (see Exhibit 3 and 6 to Plaintiff's First Amended Complaint) under which both Plain and Jackson objected to the proposed annexation based on the petition's failure to meet the specific items set forth in R.C. 709.023(E)(1-7). Jackson further, as discussed above, also objected based on the fact of the Stipulated Judgment Entry from the Stark County Common Pleas Court in Case No. 2008 MI 00290 in which Fosnought's property had been seized by the State of Ohio prior to the filing of the annexation petition. Both Plain and Jackson specified in their objections the conditions set forth in R.C. 709.023(E). In front of the Court of Appeals, the Appellants wanted the Court of Appeals to re-legislate R.C. 709.023 to insert the word "valid" in front of the proceeding for filing objections as set forth in R.C. 709.023(D). While the Board did not find that any of the objections set forth by the two townships and their resolutions were

reasons to preclude the Fosnaught annexation, the Board did follow the statutory mandate requiring that a hearing (to review the objections) be held no less than thirty (30) days and no more than forty-five (45) days after the filing of the Fosnaught Petition. Quite simply put, the Board followed its clear legal duty and followed R.C. 709.023. At the annexation hearing, Appellee Jackson Township did address the forfeiture action believing that under R.C. 709.023(E)(2) Fosnaught, due to the forfeiture pending, could not sign the petition as the owner of the real estate in question and as such, the Fosnaught petition should have failed for the additional reason that it did not comply with R.C. 709.023(E)(2).

The townships' objections did comply with the requirements set forth in R.C. 709.023 (D) and (E) although the Board, after the required hearing, determined that the objections did not carry the day. The statutory mandate set forth by the legislature was followed, which cannot be varied by the Board or the Court. The fact that objections were timely made citing the relevant sections of the Ohio Revised Code required the County Board of Commissioners to conduct a hearing which was not the case where all townships and the City of Canton had agreed to the expedited annexation petition filed by RM Investments.

Proposition of Law No. 2: Where a Board of County Commissioners determines that an expedited type-II annexation petition complies with R.C. 709.023(E), but a portion of the territory included in the annexation had previously been included in an annexation petition approved by the County Commissioners, the Board of County Commissioners could not grant the second petition given said petition contained territory which was no longer unincorporated territory.

Appellant's want this Court to ignore the statutory language in R.C. 709 for annexations and also to ignore common sense. One of the requirements for an annexation petition is that the territory proposed to be included must be unincorporated territory (see R.C. 709.021(A)). Since the RMI Petition had previously been granted, and a portion of the land included in the Fosnaught Petition was the same land included in the RMI Petition, the Board of County

Commissioners was under a clear legal duty to deny the Fosnaught Petition as it did not comply with R.C. 709.021(A) concerning the requirement that the annexation petition contain unincorporated territory.

In support of their position that the Fosnaught Petition should have been granted even though the RMI Petition has been previously granted by the Board of Commissioners, Appellants cite *State ex rel. Smith v. Frost* (1995), 74 Ohio St.3d 107. Appellants cite *Smith* for the proposition that the Board was required to precede with the Fosnaught Petition as if the RMI Petition did not exist. The *Smith's* case, however, is factually different for a number of reasons:

1. This case predates 2001 and the specific statutory expedited procedures for annexation which governed in this situation; and
2. In *Smith*, the Trial Court had precluded the Board of County Commissioners from acting on several annexation petitions because of an injunction sought in court by a disgruntled party. In the present case, the Board acted on both the RMI Petition and the Fosnaught Petition. Thus the *Smith* case does not apply as the Board heard under R.C. 709.023 the Fosnaught Petition and thereafter decided correctly that in the form presented, the Fosnaught Petition could not be granted (although leave was given Fosnaught to seek annexation of his eastern most parcel into North Canton at the time of the hearing).

The Appellants' position on this proposition of law must fail: the Board had no clear legal duty to process the Fosnaught Petition according to the procedure argued by the Appellants but rather, the Board had a clear legal duty to follow the statutes for the expedited annexation as was done in this case.

Proposition of Law No. 3: The Appellants (as property owner and municipality seeking annexation) did not have standing to challenge the Board of County Commissioners granting of the competing annexation petition.

A. Appellants are not parties under R.C. 709.023 with standing to seek a writ of mandamus challenging the Board's action on the RM Investments Petition.

This Court's decision in *Butler Township*, precludes the Appellants' claim that they are parties with the ability to seek a writ of mandamus challenging the Board's actions on the RMI Petition.

In *Butler*, this Court determined that the failure in R.C. 709.021(D) to provide any reference to townships as parties meant, per the legislative enactment, that a township had no standing in mandamus to compel the County Commissioners to perform its duties. In *Butler*, the township was impacted by the expedited type-II petition but nonetheless, given the statutory enactment, was not a "party." In the present case, a property owner (whose property is not being annexed in the competing annexation petition) and a city (who is not involved in the annexation of the land contained in RMI Petition), have even less basis to have standing to be a "party," and this Court's previous decision announced in *Butler* precludes the Appellants' actions herein.

B. Appellants have no standing under the Declaratory Judgment Act to challenge the RMI Petition.

Appellants cite *Middletown v. McGee* (1988) 3d St. Ohio St. 3d 284 for the proposition that any party may challenge the annexation when the party has an interest which would be adversely affected by the annexation. However, *Middletown*, a 1988 case, was decided long before the expedited annexation statutes were put into effect in 2001. Appellants argue that Fosnaught's ability to annex all of his property into North Canton has been precluded solely because of the competing RM Investments Petition. However, this is not factually supported by the ownership history of the property. Fosnaught purchased his two parcels of land after the

Metro RTA had long established its ownership of its sixty-foot right-of-way between the parcels subsequently purchased by Fosnaught (indeed Fosnaught's deeds reference the Metro RTA land). As such, his inability to annex all of his property into North Canton was not precluded because of the RM Investments Petition, but rather because his parcels of land were divided by land owned by another entity.

The Court of Appeals correctly relied on its own decision in *North Canton v. Canton*, Fifth District No. 2005-CA-00123, 2005-Ohio-6953 (North Canton I) stating that a declaratory judgment action was not available to the Appellants here. Furthermore, this Court in *State ex rel. Smith v. Frost* (1995), 74 Ohio St.3d 107 provided specific guidance in looking at the ability to seek declaratory judgment or injunctive relief. Specifically, *Smith* provides:

“As to the issue of whether Relators appeal from Judge Frost’s permanent injunction constitutes inadequate legal remedy which precludes to get extraordinary relief in mandamus, where a special statutory proceeding like that provided for annexation is available, actions for declaratory judgment injunction cannot be used to bypass the statutory procedure.

As to the issue of whether relators’ appeal from Judge Frost’s permanent injunction constitutes an adequate legal remedy which precludes extraordinary relief in mandamus, where a special statutory procedure like that provided for annexation is available, actions for declaratory judgment and injunction cannot be used to bypass the statutory procedure. *State ex rel. Albright v. Delaware Cty. Court of Common Pleas* (1991), 60 Ohio St.3d 40, 42, 572 N.E. 2d 1387, 1389; see also, *Galion v. Am. Fedn.of State, Cty., & Mun. Emp., Ohio Council 8, AFL-CIO, Local 2243* (1995), 71 Ohio St.3d 620, 623, 646 N.E.2d 813, 815. “[S]ince it is always inappropriate for courts to grant declaratory judgments and injunctions that attempt to resolve matters committed to special statutory proceedings, their decisions should always be reversed on appeal, except when they dismiss the actions. *** [T]his [is] tantamount to a holding that courts have no jurisdiction to hear [the] actions in the first place ***.” *Albright, supra*, 60 Ohio St.3d at 42, 572 N.E.2d at 1389; *Staffilino Chevrolet, Inc. v. Gen. Motors Corp.* (1993), 86 Ohio App. 3d 247, 250, 620 N.E.2d 256, 257. This lack of jurisdiction is patent and unambiguous, rendering the adequacy of appeal as an alternative remedy irrelevant. *Albright, supra*, 60 Ohio St.3d at 43, 572 N.E.2d at 1389. The only injunction provided for by the pertinent statutes as to relators’ annexation petition is that provided by R.C. 709.07 following the commissioners’ hearing and order granting the petition. Since the appeal is from a judgment which Judge Frost

patently and unambiguously lacked jurisdiction to enter, the adequacy of the remedy is immaterial. Lewis and Albright, supra.” (Emphasis added). R.C. 709.023 is such a special statutory procedure provided by the legislature.

As previously demonstrated by this Court and numerous courts of appeals throughout the state, there is no jurisdiction of the courts for declaratory judgment or injunctive relief where there is a special statutory procedure available for annexation as found under R.C. 709.

C. R.C. Chapter 709 is not unconstitutional as applied to Appellant Fosnaught.

Appellants would like this Court to believe that the RMI Petition has somehow impacted Mr. Fosnaught’s property rights. Therefore, since Fosnaught cannot attack the RMI Petition, R.C. Chapter 709 must be unconstitutional as it is adversely affecting his property rights. In actuality, Mr. Fosnaught purchased two parcels of land in Jackson Township a number of years ago. At the time that he purchased his parcels of land, the sixty-foot Metro property was already owned by Metro which was recited in the deeds describing what Mr. Fosnaught purchased. The RMI Petition does not take any of Mr. Fosnaught’s property. In fact, at the hearing on the Fosnaught annexation, Mr. Fosnaught was given the option (which he refused) for having one of his two parcels of land annexed into the City of North Canton. He chose not to and has since filed the Court action which has resulted in these appeals.

Appellants cite *State ex rel. Overholser Bldrs., LLC v. Bd. of Cty. Commrs. of Clark Cty.*, 174 Ohio App. 3d 631, 207, for the proposition in a R.C. 709.022 annexation that the inability of pursuing a mandamus action would violate section 16, Article I of the Ohio Constitution. However, *Overholser* is not an analogous case to the present situation. In *Overholser*, the property owner whose property was subject to the R.C. 709.022 annexation was being adversely affected and was allowed to maintain a mandamus action. This is not the present situation as Mr.

Fosnaught's property is not subject to the RMI annexation. Thus the reasoning cited by the Appellants must fail.

Proposition of Law No. 4: The RMI Petition satisfied all requirements for an expedited type-II annexation petition.

Appellants suggest that the RMI Petition was invalid at its inception, in part because it seeks annexation of territories not contiguous to Canton. Appellants concede at page 1 of their Memorandum filed with this Court that there is a portion of the RMI Petition land that is adjacent to the City of Canton. However, Appellants want this Court to apply the five percent (5%) requirement for continuous length set forth in R.C. 709.023(E)(4). However, subsection (E) is not applicable as all townships, property owners, and the municipality has previously consented to the RMI Petition pursuant to R.C. 709.023(D).

The Ohio Legislature in enacting the expedited annexation procedures was careful to provide the guidance to the County Commissioners in deciding issues concerning contiguity. R.C. 709.021(A) requires that the annexations relate to territory that is "contiguous" to the municipalities' territory. However, under section R.C. 709.021(A) this contiguity is not spelled out. There is a requirement under R.C. 709.023(E)(4) that the contiguous boundary between the municipality and the annexed territory be "for a continuous length of at least five percent (5%) of the perimeter of the territory proposed for annexation." This provision, however, does not apply in a R.C. 709.023(D) annexation where all property owners, all townships, and the municipality have consented. R.C. 709.023(E) only applies when there is an objection timely filed under R.C. 709.023(D). That was not the case, however, for the RMI Petition. Thus the fact that the contiguous boundary is less than one percent (1%) as claimed by the Appellants is not legally relevant. The legislature, in determining the requirements for annexation, provided that all annexations must relate to territory that is contiguous with the municipality, but where all

property owners, all townships, and the city have agree upon the annexation pursuant to R.C. 709.023(D), there is no requirement to follow the mandates of R.C. 709.023(E), including the requirement that there be a contiguous boundary between the municipality and the annexed territory for “a continuous length of at least five percent (5%) of the perimeter of territory proposed for annexation.”

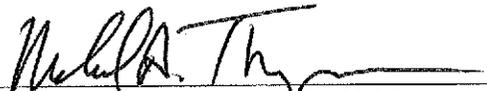
Appellants also offer the case of *City of Middletown v. McGee* (1988) 39 Ohio St.3d 284 for their belief as to the degree of contiguity required where the contiguity is not specifically defined in R.C. 709.02(A). However, *Middletown* predates the expedited type-II annexation statutes passed by the legislature in 2001. As such, *Middletown* is not applicable in the present case as the legislature in setting up the type-II expedited annexation procedures found in R.C. 709.023 did so after *Middletown* was decided and the legislature’s direction is clear: there is no requirement of a minimum degree of contiguity so long as there is contiguity in the expedited annexation procedure where all have consented. The reasoning is simple: all owners, all affected townships, and the municipality which is annexing the territory, have consented and agreed to an annexation so that the degree of contiguity is not relevant.

CONCLUSION

The Board of County Commissioners, affirmed by the Trial Court and the Court of Appeals, followed the clear law provided for expedited annexations under R.C. 709.023. In so affirming, the inferior Courts have upheld this Court’s directives and the legislative mandates. In addition, neither Fosnaught nor North Canton are “parties” so as to bring claims in either mandamus or declaratory judgment. As such, there are no matters involving public or great general interest and no substantial constitutional question. For the foregoing reasons, Appellee

Jackson Township requests that this Court deny jurisdiction in this case and allow the annexation consented to by all parties to go forward as requested over a year ago.

Respectfully Submitted,



Michael A. Thompson, (0016874)
4571 Stephen Circle N.W., Suite 130
Canton, OH 44718
Tel: 330-499-5297/ Fax: 330-433-1313
Email: Thompsonlaw@sssnet.com
*Counsel for Appellee, Board of Trustees
Jackson Township, Stark County, Ohio*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Opposition to Jurisdiction was sent via ordinary U.S. Mail, postage prepaid, this 9th day of March, 2010, to the following:

Kimberly J. Brown, Esq.
Jennifer A. Flint, Esq.
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291
*Counsel for Appellant,
City of North Canton*

Christopher J. Goldthorpe, Esq.
Lundgren, Goldthorpe & Zumbar
849 West Maple
Hartville, Ohio 44632
Counsel for Appellant, Dan J. Fosnaught

Deborah A. Dawson, Esq.
Assistant Chief, Civil Division
Stark County Prosecutor's Office
110 Central Plaza South, Suite 510
Canton, Ohio 44702
*Counsel for Appellee, Board of County
Commissioners of Stark County, Ohio*

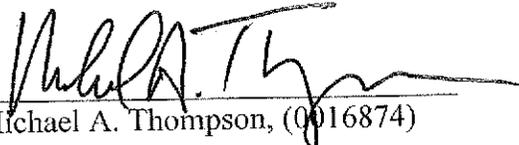
Joseph Martuccio, Canton Law Director
Jason P. Reese, Assistant Law Director
Kevin L'Hommedieu, Assistant Law Director
218 Cleveland Avenue SW
P.O. Box 24218
Canton, Ohio 44701-4218
Counsel for Appellee, City of Canton

Stephen W. Funk, Esq.
Roetzel & Andress, LPA
222 South Main Street
Akron, Ohio 44308
*Counsel for Appellee, Metro
Regional Transit Authority*

Eric J. Williams, Esq.
Pelini, Campbell, Williams & Traub LLC
8040 Cleveland Avenue NW – Suite 400
North Canton, Ohio 44720
*Counsel for Appellee, Board of Trustees of
Plain Township, Stark County, Ohio*

Courtesy copy to:

Robert Eskridge, III, Esq.
Assistant Attorney General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215


Michael A. Thompson, (0016874)