

IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
GREENE COUNTY

THE STATE OF OHIO ex rel.  
CITY OF XENIA, OHIO, et al.

*Petitioners-Relators*

v.

GREENE COUNTY BOARD OF  
COMMISSIONERS, et al.

*Respondents*

Case No. 2018CA0021

[Original Action in Mandamus]

---

**DECISION AND FINAL JUDGMENT ENTRY**

November 18, 2019

---

PER CURIAM:

**Background and Procedural History**

{¶ 1} The City of Xenia, Ohio seeks to annex certain territory located in Xenia Township, Ohio. After the Greene County Board of Commissioners denied the City's annexation petition, the City asked this court to issue a writ of mandamus compelling the Board to approve it. The Board moved to dismiss. We converted its motion to one for

summary judgment and, after briefing, overruled it. Now, the City argues that it is entitled to summary judgment. We agree, and issue the writ.

{¶ 2} The following facts are set out in our previous decision:

On September 21, 2017, the City of Xenia, Ohio (the City) filed with the Greene County Board of Commissioners (the Board) a petition for annexation of 45.637 acres, more or less, in Xenia Township (the Petition). The territory to be annexed is comprised of about 41 acres of a bike path that is owned by the City, and about 4.5 acres owned by the State of Ohio, which is located at one end of the bike path. The City filed the Petition as the owner of the territory, and also participated in the proceedings as the municipal corporation to which annexation was proposed.

The Petition seeks what is commonly referred to as an “expedited type 2” annexation, which is a process that “allow[s] a unanimous group of defined owners to seek annexation in a streamlined fashion.” *State ex rel. Cornell v. Greene Cty. Bd. of Commrs.*, 2d Dist. Greene No. 13-CA-23, 2014-Ohio-5584, ¶ 27; R.C. 709.023. The Xenia Township Board of Trustees (the Township) objected to annexation. On November 2, 2017, the Greene County Board of Commissioners concluded that the Petition did not satisfy all the statutory requirements for annexation and voted to deny the Petition. This mandamus case was filed thereafter on May 23, 2018 by the City and its agent, Donnette Fisher.

Decision and Entry (April 12, 2019) (hereinafter “April 12 Decision”), at ¶ 2-3.

**{¶ 3}** The Board had rejected the Petition after finding that it did not meet four of the seven statutory requirements for an expedited type 2 annexation petition set out in R.C. 709.023(E):

(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.

\* \* \*

(4) The territory proposed for annexation shares a contiguous boundary with the municipal corporation to which annexation is proposed for a continuous length of at least five per cent of the perimeter of the territory proposed for annexation.

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

\* \* \*

(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. \* \* \*

R.C. 709.023(E).

**{¶ 4}** Here, the City moves for summary judgment on the basis that all seven of the requirements are met and that the Board therefore had a duty to approve the annexation petition. The Board disputes whether these four requirements are met and argues that genuine issues of material fact remain as to each. The Board also challenges certain legal

determinations made in our April 12 Decision. Before examining the merits of the City's summary judgment motion, we consider the Board's motion for reconsideration, which was made in its response to the City's motion for summary judgment.

### **Reconsideration of our April 12 Decision**

{¶ 5} In our April 12 Decision, we resolved several legal issues, including the main disputed issue of whether the territory to be annexed was sufficiently contiguous to the City of Xenia under the statute. As noted above, Subdivision (E)(4) specifically requires that the "territory proposed for annexation shares a contiguous boundary \* \* \* of at least five per cent" of the perimeter with the municipal corporation. R.C. 709.023(E)(4). The Board asserts, as it did in previous briefing, that R.C. 709.023(E)(1) incorporates 709.021(A), which imposes an additional contiguity requirement. Specifically, the Board reasons that R.C. 709.21(A)'s use of the word "contiguous" adds an additional contiguity requirement, as developed in caselaw, that is separate and distinct from the specific 5 percent contiguity requirement described in R.C. 709.023(E)(4).

{¶ 6} We agree that R.C. 709.023(E)(1) requires a reviewing board to find that the "petition meets all the requirements set forth in, and was filed in the manner provided in, section 709.021 of the Revised Code." However, we have rejected the Board's argument that a different and separate contiguity requirement exists. We instead held that:

if the territory described in an expedited type 2 annexation petition satisfies the 5 percent contiguity requirement set forth in R.C. 709.023(E)(4), that is, if it "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," then the territory is sufficiently "contiguous" to a

municipal corporation as described in R.C. 709.021(A).

April 12 Decision, ¶ 33.

{¶ 7} The Board asks us to reconsider,<sup>1</sup> arguing that this interpretation creates an illogical result and “eviscerates any meaningful review by the Board,” and that the better reading of the statutes is to find that there are two separate contiguity requirements. While we understand the Board’s concerns and have carefully considered them, we decline to reconsider our April 12 Decision in this respect. The Board’s remedy if it disagrees with our determination is an appeal to the Supreme Court of Ohio, or to seek modification or clarification of the language of the statutes from the General Assembly. The motion for reconsideration is overruled.

### **Summary Judgment Standard**

{¶ 8} Original actions filed in this court “ordinarily proceed as civil actions under the Ohio Rules of Civil Procedure.” Loc.App.R. 8(A). Pursuant to those rules, summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Civ.R. 56(C). It must appear “from the evidence that reasonable minds can come to but one conclusion, and viewing the

---

<sup>1</sup> App.R. 26(A) does not apply to original actions. *State ex rel. Manley v. Walsh*, 142 Ohio St.3d 384, 2014-Ohio-4563, 31 N.E.3d 608, ¶ 40. The Rules of Civil Procedure, which generally apply to original actions filed in this court (Loc.App.R. 8(A)) do not specifically provide for a motion for reconsideration. However, this court, sitting as a trial court, has authority to reconsider interlocutory orders at any time prior to the entry of a final order. *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 379, 423 N.E.2d 1105 (1981), fn. 1, citing Civ.R. 54(B).

evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party.” *State ex rel. Levin v. Schremp*, 73 Ohio St.3d 733, 734, 654 N.E.2d 1258 (1995). Here, we view the evidence in a light most favorable to the Board.

**{¶ 9}** The party moving for summary judgment “bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact \* \* \*.” *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). “[I]f the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.” *Id.*

### **Analysis**

**{¶ 10}** As outlined in our April 12 Decision, an action in mandamus is an appropriate way to seek enforcement of the expedited type 2 annexation statute. *Lawrence Twp. Bd. of Trustees v. Canal Fulton*, 185 Ohio App.3d 267, 2009-Ohio-6822, 923 N.E.2d 1180, ¶ 16 (5th Dist.) (“A writ of mandamus is an appropriate remedy should a board of county commissioners fail to perform its statutory duty in regard to a Type 2 annexation petition”); R.C. 709.023(G). “Because R.C. 709.023(G) states that there is no appeal in law or equity from any resolution of the commissioners regarding an expedited annexation but that ‘any party may seek a writ of mandamus to compel the board of county commissioners to perform its duties under this section,’ the third requirement for the issuance of [a mandamus] writ – that the petitioner lacks an adequate remedy in the ordinary course of law – has been

satisfied.” *State ex rel. National Lime & Stone Co. v. Marion Cty. Bd. of Commrs.*, 152 Ohio St.3d 393, 2017-Ohio-8348, 97 N.E.3d 404, ¶ 26.

{¶ 11} The City “must establish a clear legal right to the requested relief by demonstrating that it has satisfied all of the statutory conditions for annexation.” *Id.* “If each of the conditions of R.C. 709.023(E) has been met, the commissioners have a clear legal duty to approve the annexation.” *Id.*, citing R.C. 709.023(F). The City argues here that all the requirements are met; the Board argues that genuine issues of material fact remain as to four requirements.

{¶ 12} Before addressing the individual requirements, we address generally the Board’s arguments concerning disputes that preclude summary judgment. The Board argues that “it is clear from the Joint Statement of Facts filed October 5, 2018, that the parties dispute whether the Relator’s annexation petition meets four of the statutory factors enumerated in R.C. 709.023 \* \* \*.” The Board then suggests that because the City has not submitted additional evidentiary materials, the disputed facts listed in the Joint Statement of Facts preclude summary judgment.

{¶ 13} Our review of the Joint Statement of Facts reveals one disputed fact, and several disputed issues of law. Specifically, the “parties disagree[d] whether Respondents held a public meeting or a public hearing” on November 2, 2017. Joint Statement of Facts, at ¶ 9. The parties otherwise agreed that the Petition filed as the City’s Exhibit A was filed seeking to annex 45.637 acres, more or less (¶ 1); that the City filed a resolution “adopting a statement of services” (¶ 4); that Xenia Township objected (¶ 6); and that the Board denied the Petition (¶ 11). The Joint Statement of Facts also states that “[t]he factors in dispute in the instant action are whether:

(a) The respondents improperly held a public hearing on the Relators' annexation petition.

(b) Whether the pre-filing review of the Petition by the Greene County Engineer, the Greene County Prosecutor, and the Greene County Regional Planning and Coordinating Commission was proper.

(c) Whether the Respondents' denial of Relators' annexation petition was proper, based on the Respondents' determination in Resolution 17-11-2-20 that the petition did not meet the following requirements of R.C. 709.023(E): [listing the four statutory requirements at issue]."

Joint Statement of Facts, ¶ 12. These latter disputes involve legal, rather than factual, matters. The existence of legal disputes between the parties does not prevent summary judgment. To the extent the parties disagree whether the Board "improperly" held a public hearing on the Petition, or instead held a public hearing, this disagreement involves both legal and factual questions. However, as we will discuss below, the factual question is not material to the outcome of this case. We therefore reject the argument that the Joint Statement of Facts itself demonstrates the existence of factual disputes that prevent summary judgment.

**{¶ 14}** We turn next to the individual statutory requirements in dispute.

*R.C. 709.023(E)(1) – Other statutory requirements satisfied*

**{¶ 15}** R.C. 709.023(E)(1) requires the Board to find that the "petition meets all the requirements set forth in, and was filed in the manner provided in, section 709.021 of the Revised Code." R.C. 709.021, entitled "Owners of real estate in unincorporated territory of township requesting annexation; application for annexation," provides:



**(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.

(Emphases added.) R.C. 709.021.

**{¶ 16}** Here, the evidence before us shows that annexation was sought by a Petition, filed with the Board of the County Commissioners of Greene County, which is the county in which the territory is located. See Joint Statement of Facts, ¶ 1; Exhibit A. It was signed by all the owners, as defined in the statute.<sup>2</sup> The Petition contains the notice required by R.C. 709.023(A) on the first page, prior to the signatures.<sup>3</sup> The Board does not dispute any of these facts.

---

<sup>2</sup> The Petition is signed by Brent Merriman, City Manager, on behalf of the City of Xenia, Ohio, and Donnette Fisher, Agent. As we noted in the April 12 Decision, “[t]he parties appear to agree that the State of Ohio, which owns the remaining portion of the territory to be annexed, was not required to join in the Petition by virtue of R.C. 709.02(E), which states:

For purposes of sections 709.02 to 709.21, 709.38, and 709.39 of the Revised Code, the state or any political subdivision shall not be considered an owner and shall not be included in determining the number of owners needed to sign a petition unless an authorized agent of the state or the political subdivision signs the petition. The authorized agent for the state shall be the director of administrative services.

The record before us nonetheless contains a ‘Consent for Annexation’ by ‘The State of Ohio, on behalf of Central State University (“CSU”), by and through the Department of Administrative Services,’ signed by Robert Blair, its Director. See Exhibit BB.” April 12 Decision, ¶ 20.

<sup>3</sup> “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.’ ” R.C. 709.023(A).

**{¶ 17}** The City asserts that the remaining issue, whether the petition seeks “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,” is also met. (Emphasis added.) R.C. 709.021(A). As discussed above, the degree of contiguity of the territory to the City of Xenia remains the main disputed issue in this case. On the basis of our April 12 Decision, the City asserts that because the territory in the Petition meets the specific contiguity requirement set forth in R.C. 709.023(E)(4), it is sufficiently contiguous under R.C. 709.021(A). See April 12 Decision, ¶ 42.

**{¶ 18}** In response, the Board does not point to any specific facts showing that there is a genuine issue of material fact for trial. The Board instead urges us to reconsider our April 12 Decision, which we have declined to do. Under that decision, if sufficient contiguity is established under R.C. 709.023(E)(4), contiguity is established under R.C. 709.021(A). April 12 Decision, ¶ 42. We therefore turn to subdivision (E)(4).

*R.C. 709.023(E)(4) – 5 percent contiguity*

**{¶ 19}** R.C. 709.23(E)(4) requires a finding that “[t]he 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.” This is a numerical calculation. The City asserts that the contiguous boundary is 5.31 percent of the perimeter of the territory in this case, citing to the legal description and the map/plat attached to the Petition. Specifically, the City asserts that the contiguous boundary between the City of Xenia and the territory to be

annexed is 1,929.14 feet, while the total perimeter of the 45.637 acre territory to be annexed is 36,302.11 feet.

**{¶ 20}** In response, the Board argues that “the total area proposed for annexation is 159.066 acres, not the 45.637 acres stated in the Petition.” The Board points to, among other things, what appears to be a legal description labeled “Annexation of 159.066 acres to the City of Xenia” and a map/plat labelled “Annexation to the City of Xenia, Ohio,” containing the same acreage. The Board argues that the City intends to annex additional territory, and therefore the total acreage that the City intends to annex is the relevant “territory proposed for annexation.”

**{¶ 21}** We disagree. The “territory proposed for annexation” in this context can only mean the territory proposed for annexation *in the petition for annexation*. A statutory construction that allowed approval (or rejection) of an annexation petition based on what an entity wanted to do in the future would rely on speculation and be unworkable in the context of an expedited type 2 annexation petition. See April 12 Decision, ¶ 34 (describing the “streamlined, expedited process in which the Board essentially checks the boxes (or not) on seven technical requirements, and only if there is an objection asking it to do so”). That the City may file another annexation petition in the future is not relevant to whether the Petition that was actually filed and was actually before the Board meets the statutory requirements. Thus, we first conclude that the territory proposed for annexation here is the 45.637 acres described in the Petition.

{¶ 22} The perimeter of the 45.637 acre territory, found by adding the perimeter distances listed in the legal description and the map/plat, is 36,302.12 feet.<sup>4</sup> Five percent of that perimeter is 1,815.11 feet.<sup>5</sup> Thus, the contiguous boundary here must be at least 1,815.11 feet to satisfy R.C. 709.023(E)(4).

{¶ 23} The contiguous boundary between the municipal corporation of the City of Xenia and the territory proposed for annexation in the Petition is 1,929.14 feet, according to the map/plat attached to the Petition. Exhibit A. 1,929.14 feet is more than 1,815.11 feet. Therefore, the evidence before this court demonstrates that 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.” R.C. 709.023(E)(4). We conclude that no genuine issue of material fact remains on this requirement and hold that R.C. 709.023(E)(4) is satisfied.

---

<sup>4</sup> Unfortunately, this number is not specifically set forth in the Petition or its attachments, although it is calculable from the information therein. The City calculates the perimeter at 36,302.11 feet. This .01 difference does not impact the calculation of the 5 percent contiguous boundary. The Board asserts that the perimeter is 38,317.34 feet, but does not point to any particular evidence to substantiate this number, beyond stating that “it relied on the calculations of the Greene County Engineer. The Engineer’s office has software that measures boundary lines.” This difference also does not change the 5 percent calculation, as described in the next footnote.

<sup>5</sup> Five percent of the City’s perimeter number (36,302.11 feet) is also 1,815.11 feet. Five percent of the Board’s perimeter number (38,317.34 feet) is 1,915.87 feet. These numbers are rounded to the second decimal place as are the numbers in the legal description and map/plat (except the acreage number). The contiguous boundary shown on the map/plat of 1,929.14 is greater than either of these numbers, meaning that even if we relied on the City’s or the Board’s calculations, the contiguous boundary would be at least 5 percent.

R.C. 709.023(E)(5) – Surrounded unincorporated area

{¶ 24} Pursuant to R.C. 709.023(E)(5), the City must show that the “annexation will not create an unincorporated area of the township that is completely surrounded by the territory proposed for annexation.” We have already determined that “the territory [to be annexed], mostly comprised of a bike path, does not surround anything.” April 12 Decision, at ¶ 49 (citing the map/plat attached to the Petition).

{¶ 25} The Board again urges us here to construe this requirement differently. It argues that it should be construed to mean that the annexation cannot create isolated “islands” or areas of the township. According to the Board, “two isolated areas of township will be completely surrounded by the city on the remaining sides. This final side makes them entirely surrounded \* \* \*.” While this statement appears to be true, and while the two identified areas may be completely surrounded after annexation, they will be surrounded by the municipal corporation, not by the “territory proposed for annexation.” R.C. 709.023(E)(7). Had the drafters of the statute meant to prevent this situation, they could have done so. The plain language of the statute instead requires the Board (and this court) to determine whether annexation will result in “an unincorporated area of the township that is completely surrounded by the territory proposed for annexation.” R.C. 709.023(E)(7).

{¶ 26} Here, the City has shown that the territory proposed for annexation does not completely surround any unincorporated area of the township. The Board has not demonstrated that any genuine issues of material fact remain with respect to this requirement. We hold that R.C. 709.023(E)(5) is satisfied.

R.C. 709.023(E)(7) – Road maintenance problems

{¶ 27} The City must finally show that it agreed to address certain road maintenance problems:

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.

R.C. 709.023(E)(7). This “statutory requirement is phrased in the disjunctive: either the City must agree to “assume the maintenance of that street or highway or to otherwise correct the problem.” (Emphasis added.) *Id.*; April 12 Decision, ¶ 55.

{¶ 28} The Board has asserted, and the City does not dispute, that four streets will be divided or segmented by the territory to be annexed. The City also does not dispute that road maintenance problems will be created on three of them. In support of its motion for summary judgment, the City points to the second paragraph of the Petition, which states that:

\* \* \* the City of Xenia, as a condition of annexation, agrees that if any street or highway is divided or segmented by the boundary line between the township and the City as to create a road maintenance problem it will assume the maintenance of that street or highway or \* \* \* otherwise correct the problem.

The Petition is signed by Brent Merriman, City Manager, and Donnette Fisher, Agent, on behalf of the City of Xenia, Ohio. The City also points to a Resolution passed by the City of Xenia on September 29, 2017, which states in part:

Upon the effective date of annexation of the Territory, the City of Xenia shall provide police, fire, emergency medical services, as well as all other public services provided to all other lands within the corporate limits of the City of Xenia \* \* \* including \* \* \* road maintenance \* \* \*.

The resolution was signed by Michael D. Engle, President of the Xenia City Council.

**{¶ 29}** The City's statement in the Petition satisfies its initial burden on summary judgment. In response, the Board acknowledges the City's agreement in the Petition, but argues that it found the agreement insufficient after discussions at a public hearing/meeting. The Board argues:

While Relator's petition for annexation does read that it will assume the maintenance of that street or highway, Respondents asked Relators for clarification of that issue at the public meeting. Relator responded that if the bike path crossed any roads, that the City would only accept responsibility at the intersection where the bike path meets the road. Thus, Respondent has before it information that it was not in fact the City's intent to assume the maintenance of the roads that were divided and/or segmented as a result of the annexation. \* \* \* It is the Board that makes the determination as to whether the City's representations are credible. Respondent was not satisfied with the inconsistent statements provided by the city, that they would assume maintenance of the road or otherwise correct the problem. Therefore, the Respondents properly concluded that the City has failed to establish the requirements of R.C. 709.023(E)(7), as the City refused to accept maintenance of the entire street or highway.



Board's MSJ Response (May 8, 2019), p. 9-10 (citations to the record omitted).

**{¶ 30}** The Board's argument creates requirements or standards that are not present in the statutory regime. For example, there is no statutory requirement that the Board find the City's oral representations in this context "credible" – indeed, there is no requirement of, or provision for, oral representations at all, or that the City's official statements be compared with such oral representations for consistency. As we have said, "Subdivision (E)(7) simply requires the Board to determine if the City has or has not 'agreed as a condition of the annexation to assume the maintenance of that street or highway or to otherwise correct the problem.' Allowing the Board to acknowledge the City's express agreement but then disapprove or effectively veto it is contrary to the purpose and language of the expedited statute, and outside the Board's limited role in analyzing an expedited type 2 annexation petition." April 12 Decision, ¶ 54. We likewise find any focus on the propriety of the Board's conclusions to be irrelevant; our focus here is whether the City satisfied the statutory requirements.

**{¶ 31}** The Board's argument also brings forward two related disagreements between the parties, which the Board suggests are remaining genuine issues of material fact. The first disagreement relates to the scope of the alternative requirement that a municipal corporation agree to "assume the maintenance of that street or highway." R.C. 709.023(E)(7). The Board's position, implicit in its argument here and set out more fully in previous briefing, is that the municipal corporation must agree to assume maintenance of any divided or segmented streets from the beginning of the street to the end of the street, wherever located. See, e.g., Board's MSJ Reply (Nov. 5, 2018), p. 8 ("the city has to assume the maintenance of the entire roadway"). The City does not directly challenge this position

in its motion for summary judgment, but previously suggested that only the divided or segmented parts of the streets (i.e., the parts within the municipal corporation) need be maintained by the City. The City argued that it would lack the jurisdiction or ability to maintain streets that potentially range far outside its municipal limits. See City's MSJ Response (Oct. 25, 2018), p. 19.

**{¶ 32}** The record of this action contains a transcript of a November 2, 2017 public hearing/meeting at which the matter was discussed. Whether the Board was allowed to conduct this hearing/meeting – and thus, whether the Board could rely on evidence or argument presented at the hearing/meeting – is the second issue in contention here. The Board relied on comments made at the November 2 hearing/meeting in denying the Petition, and continues to rely on them before this court.

**{¶ 33}** The Transcript reflects the following discussions at the November 2 hearing/meeting:

COMMISSIONER TOM KOOGLER: \* \* \* Donnette, you made a comment that, that you will -- the City will take care of, assume any maintenance of street and/or highways ?

MS. DONNETTE FISHER: Correct.

COMMISSIONER TOM KOOGLER: Is that the total street that you're crossing from one end of the street to the other or just the portion of where the bike path, bike path is crossing?

MS. DONNETTE FISHER: I know the area that you're talking about. If the Commissioners made it a condition of the annexation that we take care of from one side to the other, then we would do that.

COMMISSIONER TOM KOOGLER: When you say one side, I'm talking about, based on the way I read that, you would be required to take care of the total road from the beginning of that road to the ending of that road, regardless of where it started or where it ended.

MS. DONNETTE FISHER: If there was a road maintenance problem, we have already said that we would agree to --

COMMISSIONER TOM KOOGLER: So if that road is 20 miles long, you'll take the responsibility for maintenance on that road?

MS. DONNETTE FISHER: I don't think it is. I think the only area where there could potentially be a road maintenance problem is right there where the bike path meets the road. There's a section right there.

COMMISSIONER TOM KOOGLER: Well, I think you cross, is it New Jasper you cross? And there's a couple roads you cross there, isn't there?

MS. DONNETTE FISHER: There is some --

COMMISSIONER BOB GLASER: Bickett?

COMMISSIONER TOM KOOGLER: Bickett? Bickett? You cross Bickett, and Bickett -- yeah. Wilberforce Switch. I mean, you're talking probably, my guess is, you could be 15 miles of roads here.

MS. DONNETTE FISHER: The, the only place I know that we're dividing a road --

COMMISSIONER TOM KOOGLER: Regardless of where you're dividing it, are you going to cover the whole road from beginning to end?

\* \* \*

MS. DONNETTE FISHER: If, if the property that we're annexing completely crosses the road from one side --

COMMISSIONER TOM KOOGLER: Right.

MS. DONNETTE FISHER: -- of the right of way to the other --

COMMISSIONER TOM KOOGLER: Right.

MS. DONNETTE FISHER: -- then whatever we cross, we are responsible for maintaining.

COMMISSIONER TOM KOOGLER: You're not answering my question. What you're telling me is --

MS. DONNETTE FISHER: I'm afraid I'm not --

COMMISSIONER TOM KOOGLER: what you're telling me is, are you only going to cover that portion of that -- if you cross 20 feet of road, you're only going to cover 20 feet. If the road is ten miles long, you're not going to cover the ten miles?

MS. DONNETTE FISHER: That is correct.

COMMISSIONER TOM KOOGLER: Okay.

MS. DONNETTE FISHER: Because, we wouldn't have jurisdiction over that because it doesn't lie within the City.

COMMISSIONER TOM KOOGLER: I guess I interpret the, the O.R.C. a little bit differently then, so. It says that you'll take the maintenance on that road. In fact, your comment was, you said you'll assume the maintenance of that street or highway. You didn't say that portion that you crossed. You said that street or highway.

MS. DONNETTE FISHER: If it creates a road maintenance problem, we're only required to take maintenance --

COMMISSIONER TOM KOOGLER: Create's a relative term. Create is a relative term. Okay. The second -- do we have another [question]? Anybody? I have another one here.

Transcript, 12-17.

COMMISSIONER TOM KOOGLER: So what you're telling me for clarification, or you're telling us is that the only part of the street that you're going to maintain is where the bike path crosses over that road? That segment at that bike path is 10 foot wide, and the road is 20 foot wide, that 10 by 20 area is the only thing that you're going to be responsible for?

MS. DONNETTE FISHER: We would have a duty to maintain that, yes.

COMMISSIONER TOM KOOGLER: You will not be responsible for anything else?

MS. DONNETTE FISHER: Huh-uh.

COMMISSIONER TOM KOOGLER: Okay. You clarified it. Thank you.

Transcript, 21-22.

MS. DONNETTE FISHER: Let me clarify what I said earlier about the streets. The City will comply with whatever legal requirements as far as road maintenance are there. We've said that in the petition, and we maintain that.

Transcript, 75-76.

**{¶ 34}** Upon consideration, we do not find that these comments, even if properly elicited by the Board in a proper forum, demonstrate the existence of a genuine issue of

material fact about whether the City satisfied R.C. 709.023(E)(7). As noted above, the road maintenance problem requirement is phrased in the disjunctive: the City must have agreed to either “assume the maintenance of that street or highway” or “otherwise correct the [road maintenance] problem.” Thus, if the City agreed to otherwise correct the road maintenance problem (the second alternative), the first alternative is irrelevant. Disputes about the scope of the first alternative, or about whether the first alternative is met, or about what evidence the Board can consider when determining if the first alternative is met, are also irrelevant and do not present genuine issues of *material* fact.

**{¶ 35}** In the Petition itself, the City agreed in writing to do what R.C. 709.023(E)(7) required, repeating the statutory language nearly verbatim. The Petition therefore satisfies the City’s initial summary judgment burden to show that R.C. 709.023(E)(7) is met. The City also agreed to provide road maintenance services to lands within the annexed territory in its September 29, 2017 Resolution.<sup>6</sup>

**{¶ 36}** While the comments at the November 2 public hearing/meeting cited by the Board detail a disagreement about the scope of the first alternative of R.C. 709.023(E)(7),

---

<sup>6</sup> Other boards of county commissioners have accepted city ordinances agreeing to assume maintenance or otherwise correct a road maintenance problem. See, e.g., *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Cty. Commrs.*, 2d Dist. Montgomery No. 22664, 2008-Ohio-6542, ¶ 6, *aff’d sub nom. State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 124 Ohio St.3d 390, 2010-Ohio-169, 922 N.E.2d 945 (resolving the case on an unrelated standing issue, but noting that a petition was approved where “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’ ”); *Tuscarawas Twp. Bd. of Trustees v. Stark Cty. Bd. of Commrs.*, 5th Dist. Stark No. 2011CA00043, 2011-Ohio-5581, ¶ 99 (accepting a city ordinance “stating it would maintain the roadways segmented by the annexation” as satisfactory under the same requirement in the full annexation statute, R.C. 709.033(A)(6)).

they do not show any dispute about, or any genuine issues of material fact, as to the second alternative. The Board does not argue as much. We therefore conclude that the second alternative of R.C. 709.023(E)(7) is met.

{¶ 37} In so concluding, we need not resolve whether the Board held a public hearing or public meeting on November 2, 2017,<sup>7</sup> and whether such evidence is appropriately presented (or rather, solicited) in expedited type 2 annexation proceedings.

Unchallenged Statutory Factors

{¶ 38} The Board did not challenge the City's evidence on the other three requirements in R.C. 709.023(E), which are that:

(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.

---

<sup>7</sup> We observe that there is no explicit provision for a public hearing or public meeting in R.C. 709.023. The statute requires the Board, "not less than thirty or more than forty-five days after the date that the petition is filed," to review the Petition "to determine if each of the following conditions has been met." R.C. 709.023(E). "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(F).

Alternatively, if a petition is granted and a resolution granting annexation is entered on a board's journal, "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.*" (Emphasis added.) R.C. 709.023(F)-(G). We note that other types of annexation proceedings specifically include a hearing. See, e.g., R.C. 709.032 (captioned "Hearings; testimony"). The exclusionary language in this statute suggests that no hearings are anticipated in expedited type 2 annexation proceedings. The Board refers to the November 2 proceeding as a public meeting under R.C. 121.22.

\* \* \*

**(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.

The Board found that these subdivisions were met during the initial proceedings. See Board Resolution 17-11-2-20, Exhibit B. We agree. The Petition was signed by all the owners, as defined in the statute.<sup>8</sup> The territory to be annexed is 45.637 acres, which is less than 500 acres.<sup>9</sup> And the City has agreed to provide certain municipal services as described in its Resolution 17-T.<sup>10</sup> The requirements in these subdivisions are also met.

### **Conclusion**

**{¶ 39}** To be entitled to an extraordinary writ of mandamus, the City must ultimately show (1) that it has a clear legal right to the relief sought, (2) that the Board has a clear legal duty to perform the requested act, and (3) that the City has no plain and adequate remedy at law. *Cornell*, 2d Dist. Greene No. 13-CA-23, 2014-Ohio-5584, at ¶ 23. The Board has a clear legal duty to approve the Petition where the City has shown that it meets all the statutory requirements of R.C. 709.023(E). *National Lime*, 152 Ohio St.3d 393, 2017-Ohio-8348, 97 N.E.3d 404, ¶ 26.

**{¶ 40}** Here, the City has shown that all the statutory requirements are met, and that there are no remaining genuine issues of material fact. The City is therefore entitled to

---

<sup>8</sup> See fn. 2, above.

<sup>9</sup> See paragraphs 19-21; Petition at Exhibit A; Joint Statement of Facts, ¶ 1.

<sup>10</sup> Exhibit F.



judgment as a matter of law and to a writ of mandamus. We SUSTAIN the City's motion for summary judgment. We ISSUE a writ of mandamus to the Respondents, the Greene County Board of Commissioners, Alan G. Anderson, Robert J. Glaser, Jr. and Tom Koogler, to grant the annexation as described in the Petition. The Board's motion for reconsideration is OVERRULED.

SO ORDERED.

---

JEFFREY M. WELBAUM, Presiding Judge

---

MARY E. DONOVAN, Judge

---

JEFFREY E. FROELICH, Judge

To The Clerk: Within three (3) days of entering this judgment on the journal, you are directed to serve on all parties not in default for failure to appear notice of the judgment and the date of its entry upon the journal, pursuant to Civ.R. 58(B).

---

JEFFREY M. WELBAUM, Presiding Judge

Copies to:

Donnette Fisher

101 N. Detroit Street  
Xenia, Ohio 45385  
Petitioner /  
Attorney for Petitioner, City of Xenia, Ohio

Elizabeth Ellis

55 Greene Street

Xenia, Ohio 45385

Attorney for Respondents, Greene County Board of Commissioners, Alan Anderson, Robert Glaser, Jr., and Tom Koogler

CA3/KY