[Cite as *Wadsworth Twp. Bd. of Trustees v. Medina Cty. Bd. of Commrs.*, 2010-Ohio-5921.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

WADSWORTH TOWNSHIP BOARD OF TRUSTEES	C.A. No. 09CA0036-M
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 06CIV1262
MEDINA COUNTY BOARD OF COUNTY COMMISSIONERS, et al.	
Appellees	

DECISION AND JOURNAL ENTRY

Dated: December 6, 2010

BELFANCE, Judge.

INTRODUCTION

{¶1} In 2004, the Vances and the Olmsteads ("the Petitioners") filed a petition seeking annexation of approximately 139 acres of their property into the City of Wadsworth ("the City"). The Wadsworth Township Board of Trustees ("the Township") opposed the annexation. The Medina County Board of Commissioners ("the Board") granted the petition for annexation. The Wadsworth City Council then passed an ordinance authorizing the annexation. However, in November 2005 the citizens of Wadsworth successfully defeated the ordinance by referendum.

{¶2} In March 2006, the Petitioners again filed a petition seeking annexation of the same land. The Petitioners later amended their petition, reducing the acreage sought for annexation to approximately 91 acres. The Township again opposed annexation. It argued that the Petitioners' annexation petition was barred by res judicata. The Township also argued that the petition should be denied because the requirements of R.C. 709.033 were not met. After a

hearing, the Board again approved the annexation and appeal was taken to the Medina County Court of Common Pleas. The court initially reversed the Board's decision. This Court reversed the Court of Common Pleas in part and remanded the matter to the court for further consideration of the remaining issues. *Wadsworth Twp. Bd. of Trustees v. Medina Cty. Bd. of Commrs.*, 9th Dist. No. 08CA0020-M, 2008-Ohio-5653, at ¶21. The lower court then affirmed the Board's decision to grant the annexation. This Court affirms in part and reverses in part.

STANDARD OF REVIEW

{¶3} R.C. Chapter 2506 governs administrative appeals of a final order, adjudication, or decision of an administrative body such as the Board. Construing the language of R.C. 2506.04, the Supreme Court of Ohio has drawn a distinction between review of an administrative decision by trial courts and courts of appeals. Upon appeal to the common pleas court, that court considers "the 'whole record,' including any new or additional evidence admitted under R.C. 2506.03, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence." (Internal quotations and citations omitted.) *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 147.

{¶4} Upon appeal to the court of appeals,

> "[t]he standard of review to be applied by the court of appeals in an R.C. 2506.04 appeal is *more limited* in scope. This statute grants a more limited power to the court of appeals to review the judgment of the common pleas court only on questions of law, which does not include the same extensive power to weigh the preponderance of substantial, reliable and probative evidence, as is granted to the common pleas court." (Emphasis in original and internal citations and quotations omitted.) Id.

Thus,

> "[a]n appeal to the court of appeals, pursuant to R.C. 2506.04, * * * requires that court to affirm the common pleas court, unless the court of appeals finds, as a

> matter of law, that the decision of the common pleas court is not supported by a preponderance of reliable, probative and substantial evidence." *Kisil v. City of Sandusky* (1984), 12 Ohio St.3d 30, 34; see, also, R.C. 2506.04.

RES JUDICATA

{¶5} The Township's first assignment of error is that the court erred by not finding that the Board's decision to grant the proposed annexation was barred by the doctrine of res judicata.

{¶6} Res judicata is "[a]n issue that has been definitely settled by judicial decision." Black's Law Dictionary (8 Ed. 2004) 1336. Pursuant to the doctrine of res judicata, "a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp*. (1995), 73 Ohio St.3d 379, syllabus. The doctrine of res judicata may also preclude litigation of matters that were determined by a court of competent jurisdiction in a prior action between the same parties or their privies. Id. at 381. The Supreme Court of Ohio has acknowledged that res judicata can apply to administrative proceedings. Id. However, res judicata does not apply to legislative actions. *Cincinnati Bell Tel. Co. v. Pub. Utilities Comm. of Ohio* (1984), 12 Ohio St.3d 280, 283. See also, *Shaheen v. Cuyahoga Falls City Council*, 9th Dist. No. 24472, 2010-Ohio-640 (explaining the distinction between legislative, administrative and quasi-judicial acts). The Township does not dispute that a referendum constitutes a legislative act.

{¶7} In 2004, the Board approved the annexation of approximately 139 acres of the Petitioners' land. After approval of the annexation, there were several legislative acts. First, the Wadsworth City Council issued an ordinance approving annexation of the land. Second, a referendum occurred rejecting the Wadsworth City Council's ordinance. The Township argues that res judicata operates to prevent Petitioners from reapplying for annexation because "City

Council accepted the annexation and they were then overruled by their highest court—the citizens." The Township further argues that the "referendum vote acts like the highest court overruling the annexation decision."

{¶8} The Township cites no authority that provides that a referendum defeating an ordinance of a municipality is a subsequent bar to an annexation petition covering the same or similar land. At first glance, it may appear improper to allow the Petitioners to renew their annexation petition after a successful referendum defeating the City's ordinance. In light of the Board's approval of the 2006 petition, the Township is anticipating that the Wadsworth City Council will adopt a new ordinance permitting the annexation. From the Township's perspective, such an ordinance would be contrary to the wishes of the citizens in light of the 2005 referendum. However, assuming such an ordinance is passed, our democratic process envisions a remedy, namely, the citizen's right to defeat the ordinance via referendum as well as their right to vote for members of city council who will be responsive to their wishes.

{¶9} It is clear that res judicata does not apply in this case. The doctrine of res judicata applies to determinations made by a court or quasi-judicial body. Notably, the Township does not dispute that the referendum process is a legislative act and it has failed to produce any legal authority that provides that a referendum vote is analogous to a court ruling such that the doctrine of res judicata may be invoked. Because the referendum was a legislative act, it necessarily follows there was no judicial determination from which the principles of res judicata could apply.

{¶10} Accordingly, the Township's first assignment of error is overruled.

RESOLUTION TO PROVIDE SERVICES

{¶11} The Township's second assignment of error is that the Court of Common Pleas erred as a matter of law by not finding that the Board's decision to grant the proposed annexation was illegal, arbitrary, capricious, unreasonable and unsupported by the preponderance of the evidence. In support of this assignment of error, the Township argues that because the City did not comply with R.C. 709.03(D), the Board lacked authority to consider or grant an annexation.

{¶12} The Board may grant a petition for annexation if it finds that the conditions contained in R.C. 709.033 have been met. R.C. 709.033 states, in relevant part:

> "(A) After the hearing on a petition for annexation, the board of county commissioners shall enter upon its journal a resolution granting the annexation if it finds, based upon a preponderance of the substantial, reliable, and probative evidence on the whole record, that each of the following conditions has been met:
>
> "* * *
>
> "(3) The municipal corporation to which the territory is proposed to be annexed has complied with division (D) of section 709.03 of the Revised Code."

R.C. 709.03(D) states in pertinent part:

> "Upon receiving the notice described in division (B)(1) of this section, the legislative authority of the municipal corporation shall adopt, by ordinance or resolution, a statement indicating what services the municipal corporation will provide, and an approximate date by which it will provide them, to the territory proposed for annexation, upon annexation."

{¶13} In March 2006, the Petitioners first submitted a petition to annex 139.6205 acres. The City subsequently passed a resolution in which it agreed to provide services to the territory proposed for annexation, namely, the 139.6205 acres identified in the petition for annexation. Specifically, Amended Resolution No. 06-03 provides:

> "**Section 1.** That the services the City of Wadsworth will provide to the territory proposed for annexation from Wadsworth Township by Petition for Annexation of 139.6205 acres to the City of Wadsworth filed by Dorothy I. Olmsted, Lydia H. Vance, Donald M. Vance and Thelma A. Vance, Petitioners, upon annexation are police and fire protection, emergency medical services, electricity,

> communications and trash collection. The approximate date when these services shall be provided shall be the date when the annexation becomes effective. The City of Wadsworth shall also provide water and sanitary sewer services and these will be available approximately two years after the annexation becomes effective, subject to the installation of the on-site and off-site infrastructure improvements. Such on-site and off-site infrastructure improvements shall be subject to being financed by property developers, petitions for special assessment or other agreements."

{¶14} It is undisputed that the territory sought to be annexed in the amended petition for annexation is 91.0765 acres. It is also undisputed that the City did not adopt, by ordinance or resolution, a statement of services it would provide to the 91.0765 acres, which constituted the territory proposed for annexation. Despite the absence of a resolution or ordinance pertaining to the territory proposed for annexation, the Board found that the City had substantially complied with R.C. 709.03(D).

{¶15} R.C. 709.015 provides:

> "The procedural requirements set forth in sections 709.02 to 709.21 of the Revised Code are directory in nature. Substantial compliance with the procedural requirements of those sections is sufficient to grant the board of county commissioners jurisdiction to hear and render its decision on a petition for annexation filed under those sections. The board *shall cure* a procedural defect and shall not deny a petition for annexation solely upon the basis of procedural defects." (Emphasis added).

{¶16} In examining the language of the statute, the legislature has indicated that substantial compliance with the procedural requirements is sufficient to grant the Board *jurisdiction* to hear the matter and to ultimately render its decision. In other words, when faced with a procedural defect, the defect will not be a bar to the Board's legal authority to proceed to hear the matter, provided there has been substantial compliance with the procedure. However, the legislature has also as made clear that "the board shall cure a procedural defect[.]" Id. Thus, R.C. 709.015 does not absolve compliance with the procedural requirements of the statutes; rather it directs the Board to cure any procedural defect. See, e.g., *Lawrence Twp. Bd. of*

Trustees v. City of Canal Fulton, 185 Ohio App.3d 267, 2009-Ohio-6822, at ¶20 (finding that there had been substantial compliance with plat description requirement contained in R.C. 709.02(C)(2) in light of scrivener's error in plat description and that procedural defect had been cured).

{¶17} In its merit brief, the City concedes that any error as to the absence of a resolution would be a procedural error subject to correction by the Board; however, it argues that the Township cannot demonstrate any prejudice by the lack of a resolution pertaining to the 91.0765 acres. Assuming that the absence of a resolution pertaining to the territory proposed to be annexed is a purely procedural defect, it is undisputed that the Board did not cure the defect as required by R.C. 709.015. The City has not provided this Court with any authority that suggests that the Board can ignore the statutory directive to cure the procedural defect.

{¶18} We also disagree with the suggestion that there is no prejudice in failing to comply with R.C. 709.03(D). The issue before us concerns the failure of the City to provide any indication via resolution or otherwise as to the services it would provide to the territory proposed for annexation as identified in the amended petition. It is apparent that in enacting R.C. 709.03(D), the legislature intended to require a municipal body to consider and commit to a plan to offer services to the territory proposed for annexation. This serves a two-fold purpose: it enables the landowner and the public to know what services can be expected with respect to the territory proposed for annexation and when those services will be provided, and it enables the City to evaluate what resources it will commit to the territory proposed for annexation and when it can commit them. When faced with a substantial reduction in the territory proposed for annexation, a municipality could determine that it does not wish to commit the financial resources toward providing certain services to the territory. Indeed, a significant change in the

territory to be annexed could be such that the provision of services is not feasible at all. Thus, when faced with a substantial alteration to the territory proposed for annexation, it is possible that a municipality, although having initially passed a resolution as to the territory originally proposed for annexation, might decline to pass a resolution to provide services to the now-altered territory proposed for annexation—even though the altered territory is part of the original petition for annexation. Alternatively, the municipality might agree to provide some services and not others, or it might alter the timeframe in which the services could be rendered.

{¶19} In this case, when the Petitioners amended their annexation petition, the territory proposed for annexation was reduced by 48.544 acres. The reduction in acreage was not de minus, but represented 35% of the original territory proposed for annexation. Although it is possible that the City would nonetheless agree to provide the same services to the newly identified territory proposed for annexation, it is also possible that the City might decline to pass an ordinance or resolution, or it might substantially alter its commitment of services to the territory proposed for annexation. For example, it could find that it would be too cost-prohibitive to provide services to the remaining 65% of the land, as might be the case if the remaining land were swampland. Furthermore, had the Petitioners reduced 95% of the territory proposed for annexation, leaving only 5% of the territory originally proposed for annexation, it is possible that the City might decline to adopt a resolution or ordinance for the provision of any services to that territory. Because a municipal body might not agree to the provision of services to a substantially different territory proposed for annexation or it might alter the services it would provide, R.C. 709.015 mandates that the Board cure a defect such as the one presented in this case.

{¶20} Because the City did not comply with R.C. 709.03(D) and the Board did not cure the defect, we sustain the Township's second assignment of error.

ERRONEOUS REFERENCE TO STATUTES

{¶21} The Township's third assignment of error is that the court below committed legal error in referring to two statutes in its judgment entry—one that was nonexistent and another that concerns battered woman syndrome testimony. In light of our resolution of the Township's second assignment of error, we find this assignment of error to be moot.

CONCLUSION

{¶22} The judgment of the Medina County Court of Common Pleas is affirmed in part and reversed in part. The matter is remanded for proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.

EVE V. BELFANCE
FOR THE COURT

MOORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

DEAN HOLMAN, Medina County Prosecuting Attorney, and KATHARINA E. DEVANNEY, Assistant Medina County Prosecuting Attorney, for Appellant.

NORMAN BRAGUE, Director of Law, City of Wadsworth, for Appellee.