

**IN THE SUPREME COURT OF OHIO**

State ex rel. Board of Trustees of St. Clair :  
Township, Butler County, Ohio, *et al.* :  
 :  
Relators, : Case No. 2017-0563  
 :  
v. :  
 :  
City of Hamilton, Ohio, *et al.* : Original Action in Mandamus  
 :  
Respondents :

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**MOTION TO DISMISS OF RESPONDENTS  
CITY OF HAMILTON, OHIO,  
JOSHUA SMITH, HAMILTON CITY MANAGER AND  
THOMAS VANDERHORST, FINANCE DIRECTOR OF HAMILTON**

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Respondents, City of Hamilton, Ohio, Joshua Smith, Hamilton City Manager and Thomas Vanderhorst, formerly the Finance Director of Hamilton and now the Executive Director External Services, through undersigned counsel, respectfully move the Court to dismiss this action pursuant to Civ. R. 12(B)(6) for failure to state a claim upon which relief may be granted. A memorandum in support is attached.

Respectfully submitted,

/s/ Catherine A. Cunningham

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*Co-Counsel for Respondents*

## MEMORANDUM

### **I. INTRODUCTION**

Relators are St. Clair Township, Butler County, Ohio and its individual Trustees in their official capacities (hereafter collectively “Relators” or “Township” or “St. Clair”). (Amd. Compl. ¶¶3-4). Respondents are the City of Hamilton in Butler County, Ohio and its City Manager and the former Finance Director in their official capacities (hereinafter collectively “Respondents” or “City” or “Hamilton”). (Amd. Compl. ¶¶6-8). Relators filed a Complaint on April 26, 2017, that they Amended on May 1, 2017, for a writ of mandamus seeking two specific things: (1) to compel the City to calculate the Township’s lost real property tax revenue for the 2016 tax year and for each relevant tax year that follows (Amd. Compl. p. 15 ¶1); and (2) to compel the City to pay the Township the calculated lost taxes revenue it claims are due within thirty (30) days after the date the Butler County Treasurer makes tax distributions (for the 2016 tax year and for any relevant tax year that follows). (Amd. Compl. p. 15 ¶2, 3).

The Township claims these duties arise under R.C. 709.19 as a result of the conformity of the City’s municipal boundaries in 2016 pursuant to R.C. 503.07. (Amd. Compl. ¶¶15-17, 23, 25). Ohio Revised Code Section 709.19 is an annexation statute that was significantly modified as part of comprehensive annexation reform in 2002. Am.Sub.S.B. No. 5 (“Senate Bill 5”), 149 Ohio Laws, Part I, 621. Relators’ entire case erroneously depends upon the application of R.C. 709.19 to annexations that occurred before its effective date and an affirmative duty lacking a basis of the City to determine Township real estate taxes and pay the Township for its claimed lost tax revenues.

The terms of R.C. 709.19 as amended by Senate Bill 5 do not apply here. They only apply to properties annexed after its March 27, 2002 effective date. All of those properties annexed

before that date were subject to the application of the prior version of R.C. 709.19 in effect at the time of annexation. Further, even if the current version of R.C. 709.19 were to apply, none of the territory in the City whose boundaries were conformed meets the conjunctive criteria of the statute that the property is both annexed to the municipality and its boundaries are conformed within a defined period (up to 12 years) following annexation. Thus, the City owes no payment to Relators.

In addition, the City has no duty or even ability to calculate the Township's alleged lost tax revenue. The City and its officials are the only Respondents here. As a matter of law, it is the duty of a county auditor to determine and levy taxes on each tract or lot of real property in the county, including township and municipal levies, not the City. R.C. 319.30. It is undisputed that no Township real estate taxes were assessed, collected or distributed by the Butler County Auditor for any property located in the City for the 2016 tax year or any prior tax year, making the calculation of so-called lost township tax revenues by the City, and the identification of the property to which any such taxes may apply, an impossibility.<sup>1</sup>

Relators have no right to the relief they request and Relators' Amended Complaint states no claims against Respondents for which this Court may grant them relief. Respondents therefore respectfully request Relators' Amended Complaint be dismissed with prejudice.

## **II. STATEMENT OF FACTS**

### **A. Factual Background**

The City includes territory that was annexed to the City over the course of its more than 200 years existence from four (4) townships in Butler County, Ohio. (Amd. Compl. ¶9). St. Clair is one of those four townships. The three other townships, which are not parties to these

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<sup>1</sup> It is also the duty of the county auditor to maintain a list of all real property in the county and identify the township and municipality in which the property is located. R.C. 319.28. The City has no such duty to keep a list or identify the property to which Relators may be referring.

proceedings, are Fairfield Township, Ross Township and Hanover Township. (Amd. Compl. ¶9).<sup>2</sup> Property was annexed at the request of property owners to the City from those four surrounding townships over many decades. (Amd. Compl. ¶12 and Exhibit A). Following each of these historical annexations, Butler County treated the annexed territory as being located exclusively in the City for both voting and tax purposes and not in any active township. (Amd. Compl. ¶12 and Exhibit A).

In other words, following annexation of territory from any township to the City, for decades the residents in the annexed territory did not vote in any township elections or vote upon or pay any township taxes. Likewise, the townships did not provide any services or exercise any jurisdiction within former unincorporated township territory after it was annexed. The Butler County Auditor did not include the townships as part of any taxing district within the City and townships did not receive any real property taxes, including inside millage, from annexed territory. (Amd. Compl. ¶12 and Exhibit A). The Butler County Board of Elections did not include the annexed territory in any active township voting district and no elector in the City voted in any township elections. (Amd. Compl. ¶12 and Exhibit A).

## **B. Legal Background**

Ohio statutes have long provided for the annexation of territory from a township to a municipality. R.C. 709.02 *et seq.* Ohio statutes have also long permitted a municipality to petition a board of county commissioners to have its boundaries conformed to change township lines to make them identical, in whole or in part, with its municipal boundaries or to form a new township.

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<sup>2</sup> Relators' Amended Complaint presumes the entire City was created through annexation and the annexed territory also remained within a township. There would have been an initial incorporation that may or may not have left territory within the township(s). There is no certainty that the law over the last 200 years provided that all territory in the City remained within a township.

R.C. 503.07. “With the passage of Am.Sub.S.B. No. 5 (“Senate Bill 5”) in 2001, 149 Ohio Laws, Part I, 621, the General Assembly accomplished a comprehensive reform of Ohio’s laws regarding annexation, principally through amendments to R.C. Chapter 709. *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery*, 112 Ohio St.3d 262, 2006-Ohio-6411, 858 N.E.2d 1193, ¶ 3. The version of R.C. 709.19, that the Relators seek to have this Court apply, was passed as part of that annexation reform. It established a new method of compensation following annexation and only applies to annexations filed after March 27, 2002 when the ‘new’ statute became effective. *See Thornton v. Salak*, 112 Ohio St.3d 254, 2006-Ohio-6407, 858 N.E.2d 1187, ¶ 12. (Amd. Compl. ¶¶31-33). A copy of R.C. 709.19 now in effect is attached as Appendix pp. A-1 to A-3.

The prior version of R.C. 709.19 had a different method for compensating townships for lost tax revenues prior to 2002 that applied immediately upon the annexation of the territory, irrespective of whether municipal boundaries were conformed. *See* Appendix pp. A-4 to A-7. For property annexed prior to Senate Bill 5, any compensation due a township from annexation would have long been paid.

### **C. Facts**

In 2016, for the first time, the Township raised questions with the Butler County Auditor about the Township’s status as a taxing authority for all property annexed into the City from the Township. (Amd. Compl. ¶12, Exhibit A and Exhibit G). The Township claimed a right to a share of a portion of the unvoted (inside) millage on territory annexed from the Township it had not previously received. (Amd. Compl. ¶12 and Exhibit A). In order to address any voting and tax entitlement issues that may have been created by the previously unchallenged historic practice of the county, on September 21, 2016, the City filed a petition with the Butler County Commissioners pursuant to R.C. 503.07, to conform the boundaries of all parcels of real property within the City except approximately fifty (50) acres that was annexed by the City after 2002. (Amd. Compl.

¶¶12, 15, 17, 28 and Exhibits A and F). That ‘excluded’ fifty acres was annexed after 2002 utilizing a special annexation process that prohibits the City from petitioning to have the boundaries of the annexed territory conformed. (Amd. Compl. ¶14 and Exhibit B ¶17), R.C. 709.023.

The City’s petition requested that, with the exception of that 50 acres, all township boundary lines within the City be conformed with the City boundaries in order to make them identical with the City within its municipal boundaries. (Amd. Compl. ¶14-17 and Exhibit B). The petition also included a request that the Commissioners erect a new township (‘Hamilton Township’) out of the portion of the four townships within the limits of Hamilton. (Amd. Compl. ¶16, Exhibit B), R.C. 503.07. This type of township is commonly referred to as a ‘paper township’ because its boundaries are coextensive with the City and by operation of law all township offices are then abolished and the municipality assumes all governmental functions. (Amd. Compl. ¶16), R.C. 703.22. The City and townships within its boundaries have operated this way for decades. The City’s petition included a map of the territory whose boundaries would be conformed and a list of all of the parcels in the City that were included within the petition and boundaries being conformed. (Amd. Compl. ¶15 and Exhibit E). The parcel list does not distinguish which township any parcel had been located in before it was annexed or otherwise became part of the City because such records were not maintained by the Butler County Auditor. The Auditor or the Auditor’s tax parcel numbers did not identify any townships or township taxing authorities within the City. (Amd. Compl. ¶¶14-15 and CD marked Exhibit E).

The Butler County Commissioners approved the City’s petition for a boundary adjustment on October 3, 2016 and formed “Hamilton Township,” a paper township to which the boundaries of all of the townships located within the City of Hamilton were conformed. (Amd. Compl. ¶21-22

and Commissioners' Resolution 16-10-03663 attached as Exhibit D). Relators do not dispute the City's Petition, Commissioners' Resolution including all of its attachments identifying each parcel of property whose boundaries were conformed or that the City's boundaries were properly conformed. (Amd. Compl. ¶23). Rather, Relators claim that the Township is due reparation payments from the City for lost tax revenues they claim the Township should have been receiving. Relators also claim it is the clear legal duty of the City to determine all elements necessary to calculate and to pay those reparations. (Amd. Compl. ¶¶25, 32, 33).

In order to calculate reparations under current R.C. 709.19, Respondents would have to: (1) identify the relevant parcels formerly in the Township that are now in the City, (2) determine a 2016 tax rate for the portions of the Township within the City that was never assessed by the Auditor, (3) determine the 2016 real estate taxes the Township should have been paid from such relevant parcels, and (4) apply R.C. 709.19 to calculate the percentage of Township's lost tax revenues required to be paid. Importantly, the Township does not identify in its Amended Complaint the parcels of real property from which it claims to have lost tax revenue, the tax rate it believes should have been determined and assessed by the county auditor, or tax revenue it claims it lost. It simply claims the City should figure it out and pay them. That is not what R.C. 709.19 prescribes.

The Township's allegation that it is 'currently in Fiscal Emergency' is not relevant to the Amended Complaint for Mandamus or the statutory duties of the City nor was it caused by the County Commissioners' conforming the City's boundaries or the formation of a paper township. (Amd. Compl. ¶34). It appears to be pled as a means to invoke the sympathy of the Court to distract it from applying the law and denying Relators' request for a writ of mandamus.

### III. LAW AND ARGUMENT

#### A. Standard of Review

“A court can dismiss a mandamus action under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted if, after all factual allegations of the complaint are presumed true and reasonable inferences are made in relator's favor, it appears beyond doubt that he can prove no set of facts entitling him to the requested writ of mandamus.” *State ex rel. Ethics First-You Decide Ohio Political Action Comm. v. DeWine*, 147 Ohio St.3d 373, 2016-Ohio-3144, 66 N.E.3d 689 ¶ 8, citing, “*State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, 931 N.E.2d 110, ¶ 6, quoting *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, 856 N.E.2d 966, ¶ 9.” A motion to dismiss for failure to state a claim challenges the sufficiency of the complaint itself, not evidence outside of the complaint. *Volbers-Klarch v. Middletown Mgmt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11.

In reviewing a motion to dismiss a mandamus action for failure to state a claim upon which relief can be granted, it must appear, beyond doubt, that Relators’ Amended Complaint does not provide mandamus relief or the right to an extraordinary writ under any possible theory. Civ.R. 12(B)(6), S.Ct.Prac.R. 12.04(A)(1). Nevertheless, unsupported conclusions of a complaint for mandamus “are not considered admitted and are not sufficient to withstand a motion to dismiss.” *State ex. rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490, 633 N.E.2d 1128 (1994). “In mandamus cases, “ ‘the facts submitted and the proof produced [by the Relator] must be plain, clear and convincing’ before a writ will be granted.” *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, ¶ 55.

In this case, Relators have failed to state a claim upon which relief can be granted and the request for a writ against the City must be dismissed.

**B. Relators’ Request for Writ of Mandamus Must Fail as a Matter of law.**

“To be entitled to a writ of mandamus, a relator must establish, by clear and convincing evidence, (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of the respondent to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law.” *State ex rel. Ebersole v. City Council of Powell*, 149 Ohio St.3d 501, 2017-Ohio-509, 75 N.E.3d 1245, ¶ 10 citing *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452, ¶ 6. A relator must plead and prove it is entitled to the writ by clear and convincing evidence. *State ex rel. Paluch v. Zita*, 141 Ohio St.3d 123, 2014-Ohio-4529, 22 N.E.3d 1050, ¶ 9.

Here, Relators’ action for writ of mandamus against the City must be dismissed, because they seek relief to which Relators are not entitled under any theory and attempt to impose a duty upon the City that clearly does not exist. “Parties seeking extraordinary relief bear a more substantial burden in establishing their entitlement to this relief. In mandamus cases, this heightened standard of proof is reflected by two of the required elements—a “clear” legal right to the requested extraordinary relief and a corresponding “clear” legal duty on the part of the respondents to provide it.” *State ex rel. Doner v. Zody, supra* at ¶ 56.

Relators have not pled, and cannot prove, on the undisputed facts of this case that they are entitled to a writ of mandamus against the City, who are the only named Respondents.

**1. Relators do not have a clear legal right to the relief requested.**

As previously stated, R.C. 709.19 that is now effective does not apply in this case and even if it did, the City does not owe Relators any payments under the amended statute. By the express terms of Section 3 of Enrolled Senate Bill 5, the new annexation law does not apply to any annexation filed before the law became effective. Am.Sub.S.B. No. 5, 149 Ohio Laws, Part I, 621,

uncodified law, attached in relevant part as Appendix pp. A-8 to A-10. The Enrolled Bill specifically provides:

SECTION 3. The provisions of Section 1 of this act shall apply only to annexation petitions filed on or after the effective date of this act. All annexation petitions filed before the effective date of this act shall be processed under the provisions of Chapter 709. of the Revised Code in effect at the time a particular petition was filed.

Senate Bill 5 amended the former annexation compensation statute and enacted new R.C. 709.19 to specifically provide new potential remedies for annexations to municipalities that were filed and accepted after the new law became effective. The prior version of R.C. 709.19 provided for the payment of compensation by municipalities to a township for lost township taxes resulting from the impact on the taxable value of property in the unincorporated township from all annexations in the township to any municipality during a continuously rolling annexation period. *See* Appendix A-4 to A-7. Former R.C. 709.19 applied when both territory was annexed and the requisite thresholds were met within a defined annexation period. It applied to every annexation irrespective of whether the township boundaries were conformed. That statute also applied to all of the property whose boundaries were conformed by the City annexed prior to 2002 during its effective dates, including any territory that may have been located in the Township.

In other words, the Township would have already been paid any compensation it qualified for and was entitled to as a result of any annexation prior to 2002 and is not now entitled to be compensated under new statutes that were amended or enacted by Senate Bill 5 including the amended reparations statute [R.C. 709.19] or newly enacted R.C. 5705.315 providing for the reallocation of unvoted (inside) millage only for property annexed after Senate Bill 5 became effective. It is undisputed that none of the property which boundaries were conformed with the

City that is involved in this case was annexed to the City after March 27, 2002 when Senate Bill 5 became effective. (Amd. Compl. Exhibits B, D and ¶23, 32).

Assuming *arguendo* R.C. 709.19 could be applied to annexations filed prior to March 2002, the new statute conjunctively requires that property be both annexed and excluded from the township within a defined period of a maximum of twelve (12) years from the date of annexation. R.C. 709.19(C)(1)(a)-(e). Both factors must be met to require any payment. Under the statute, the amount of payment, if due, decreases in percentage depending on how long it has been since the annexation and exclusion have both occurred. R.C. 709.19(C) and (D). Again, Relators have not identified any property that was both annexed and excluded from the Township within 12 years of annexation, the outside period in which any compensation could be due a township under the express terms of the statute. There are no such properties. By the express terms of the City Petition and Commissioners' Resolution conforming boundaries, no property annexed after Senate Bill 5 became effective was included in the petition or became part of Hamilton Township. It has been fifteen (15) years since Senate Bill 5 became effective. (Amd. Compl. Exh. B and D).

Finally, although Relators claim a right to "lost tax revenue" and presume they should receive compensation under R.C. 709.19, the Butler County Auditor has never assessed, collected or distributed any township taxes from any properties in the City to the Township, even when Relators were in a joint jurisdiction as they now claim, including the 2016 tax year for which Relators claim reparations are due. (Amd. Compl. p. 15, ¶¶1-2). The City had no role in the Auditor's determination or assessments that went unchallenged by Relators for decades or any subsequent duty to determine Township property or taxes.

Relators have no clear legal right to receive any payment from Respondents for historic annexations or to have Respondents calculate monies the Township claims it is due.

**2. Respondents do not have a clear legal duty to provide the relief requested.**

If this Court determines the Relators have no clear legal right, the case should be dismissed and no determination of any duty of the City is necessary. However, should the Court determine Relators may have some legal right, R.C. 709.19 does not impose upon Respondents the duty to calculate or cause to be calculated any “township tax in the annexed territory that would have been due the township \* \* \* if no annexation had occurred” particularly under the undisputed facts in this case. R.C. 709.19(C)(1)(a)-(e). Furthermore, the City has no clear legal duty to make any payments to the Township because none are due.

The Township alleges it has a right to lost tax revenues, yet it does not plead and has not presented a scintilla of evidence on what those revenues are, the properties from which the revenues derive or even the taxes that are to be applied. The Township simply attempts to shift its burden to prove any case to the City by erroneously claiming R.C. 709.19 establishes a clear legal duty for the City to establish its case then pay it compensation. It cannot. In the Township’s letter to the City attached to the Amended Complaint, the Township claimed ‘the present Butler County Auditor and his predecessors are largely to blame for not properly allocating and distributing inside millage over the past half century’ from territory where the Township provided no services, had no electors and exercised no jurisdiction. The Township implored the City to “recogniz[e] a ‘moral obligation’ to St. Clair Township to make amends for the financial loss here inflicted on St. Clair Township.” (Amd. Compl. Ex. G p. 1 and 2). Such an obligation is not a clear legal duty under any theory.

The duties Relators claim Respondents have under current R.C. 709.19, assuming *arguendo* it applies, are not clear and unambiguous and many of them fall within the duties of the county auditor, not the City. R.C. 709.19(B) expressly imposes the following **single duty** on a

municipality that, when territory is both annexed pursuant to R.C. Chapter 709 and excluded from a township under R.C. 503.07 within the prescribed time periods: “the municipal corporation that annexed the territory shall make payments to the township from which the territory was annexed only as provided in this section” (or by mutual agreement which is not applicable here). R.C. 709.19(B). The statute prescribes that compensation due a township is based upon taxes “that would have been due the township \* \* \* if no annexation had occurred” and must be calculated “using the property valuation for the year that the payment is due” based on the use of the property. *See* R.C. 709.19(C)(1)(a)-(e) as to real property classified by the county auditor as commercial and industrial and (D)(1)-(4) as to real property classified by the county auditor as residential and retail. The statute does not prescribe who has the obligation to identify the property or calculate the taxes that would have been due the township but for the annexation and conformity of boundaries or when any payment is required to be made to the Township for the “year” calculated. The Township advocates this must be the duty of the City to determine and compute solely because it has an obligation to “make payments to the township.” The Township’s desire does not create a ‘clear legal duty’ of the City. Furthermore, there is no language in the statute to support the Township’s claim that the City has a clear legal duty to make any required payments “within thirty days of the date the Butler County Treasurer makes each and every distribution of real estate tax to Respondent Hamilton \* \* \*.” (Amd. Compl. ¶32, p. 15, ¶4). Again, there is no clear legal duty for a City to make payments on a schedule desired by a Township.

The City does not have the records, duty or ability to assess or determine township taxes, property valuations, or taxes that would have been due a township if no annexation had occurred. The City also does not have a duty to keep records of real property that is or was located in the Township or have the ability to determine the historic boundaries of the Township that are the

subject of Relators' First Amended Complaint. The City has no authority to 'cause to be calculated' by the county auditor or any other person the payments the Township claims it is due. (Amd. Compl. p. 15 ¶1).

It is the duty of a county auditor to maintain a general tax list identifying, among other things each township and municipality in which the property is located and maintain a permanent parcel numbering system. R.C. 319.28. A county auditor also determines the sums to be levied on each tract "[a]fter receiving from officers and authorities empowered to determine the rates or amounts of taxes to be levied for the various purposes authorized by law" and calculates the taxes for properties in the county. R.C. 319.30(A). The county budget commission determines and approves the allocation of minimum levies within the 10-mill limitation (inside millage), including any inside millage that the Township may receive. R.C. 5705.31. Either a township asserting a right to receive compensation, a county auditor or some other authority must compute the taxes under R.C. 709.19(C) and (D) that would be due a township if no annexation had occurred, not a municipality, who does not have the duty, information or expertise to do so.

The Township's Amended Complaint also fails to establish that the City has any clear legal duty to make any payment to the Township. As previously stated, any compensation due the Township for territories annexed prior to 2002 would have already been paid. Furthermore, the current version of R.C. 709.19 does not clearly provide that Respondents must compensate the Township for taxes that have never been assessed or collected or paid to Relators for indeterminate property that was annexed over a long period that ended more than a decade ago. While the Township claims a right to receive a portion of inside millage for these historic annexations in 2016, no Township inside millage was ever assessed in the City and R.C. 5705.315 provides that only properties annexed after Senate Bill 5 are entitled to a reallocation of unvoted (inside) millage

following annexation. That statute does not apply in this case and no inside millage or other taxes were assessed or allocated to the Township by Butler County within the City in 2016.

Relators have not and cannot establish, by clear and convincing evidence, that the City has a clear legal duty to calculate or cause to be calculated any lost tax revenues claimed by the Township under R.C. 709.19 as a result of the conforming of the City's boundaries. There is no express language in R.C. 709.19 creating that duty and facts required to make that determination are not maintained by the City or within its expertise. The City cannot determine or assess taxes including inside millage. Relators provided no evidence or law imposing a duty on the City to determine the 2016 Township taxes that have never been established or assessed by the county auditor within the City. Neither R.C. 709.19 nor any other statute or law imposes such duty on the City.

Likewise, Relators have not pled and cannot prove, by clear and convincing evidence, any amount of money that 'is lawfully and properly due Relator St. Clair Township under the terms of R.C. 709.19(B), (C), and (D)' or that any payment is actually due. (Amd. Comp. p. 15, ¶(2)). The City does not owe the Township any payment, irrespective of which version of R.C. 709.19 is applied in this case and Relators' Amended Complaint must be dismissed.

### **3. Relators have an adequate remedy in the ordinary course of law.**

It is well-recognized that mandamus does not lie where the relator has an adequate remedy at law. *See* R.C. 2731.05; *State ex rel. Manley v. Walsh*, 142 Ohio St.3d 384, 2014-Ohio-4563, 31 N.E.3d 608. Relators do not actually plead they currently have 'no adequate remedy in the ordinary course of law.' Instead, Relators only allege no adequate remedy "which is complete,

speedy and beneficial” to the Township. (Amd. Compl. ¶34). This does not meet the heavy burden of an extraordinary writ of mandamus.

Relators’ claims against the City are for the payment of some amount of money based upon facts that have not been pled, arising from the annexation and conformity of boundaries of property from the Township that has not been identified, for taxes that have never been assessed or determined. For a writ of mandamus to issue the right to relief must be clear and any amount due established with certainty. *Id.* at ¶25. Relators have not met that standard.

While Respondents recognize that the availability of an action for declaratory judgment is not alone sufficient to establish an adequate remedy at law, where, as here, Relators have not established with certainty sufficient facts to support their claims and no injunction is sought or pled, the case is not appropriate for the extraordinary relief of mandamus. To the extent Relators’ Amended Complaint could be construed as making a viable claim that requires the construction of the law, establishing facts, and potentially including additional parties, those claims are appropriate for a separate declaratory judgment action to resolve disputed facts and applicable law on the validity of Relators’ claims. R.C. 2721.03, *State ex rel. McGarvey v. Zeigler*, 62 Ohio St.2d 320, 321, 405 N.E.2d 722, 16 O.O.3d 363, (1980).

#### **IV. CONCLUSION**

For the foregoing reasons, Respondents respectfully request that this Court dismiss Relators’ Amended Complaint for a writ of mandamus.

Respectfully submitted,

/s/ Catherine A. Cunningham  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was served by electronic mail upon Gary L. Sheets @glsheets@fuse.net, 1731 Cleveland Avenue, Hamilton, OH 45013 on this 7<sup>th</sup> day of November, 2017.

/s/ Catherine A. Cunningham  
Catherine A. Cunningham (0015730)

**APPENDIX**

Ohio Revised Code 709.19 (effective August 5, 2016) .....A-1

Ohio Revised Code 709.19 (effective February 2, 1982) .....A-4

Amended Substitute Senate Bill 5 (pages 1 and 37 only).....A-8

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

R.C. § 709.19

709.19 Payments to township from which territory was annexed

Effective: August 5, 2016

Currentness

(A) As used in this section:

(1) "International airport" means any airport that is:

(a) Designated as an international airport or a landing rights airport by the United States secretary of the treasury;

(b) Owned and operated by a municipal corporation;

(c) An unincorporated area not contiguous to the municipal corporation that owns it.

(2) "Commercial," "industrial," "residential," and "retail," in relation to property, mean property classified as such by the tax commissioner for the purposes of valuing property for taxation, except that "commercial," in relation to property, does not include any property classified as "retail."

(B) If unincorporated territory is annexed to a municipal corporation and excluded from a township under section 503.07 of the Revised Code, upon exclusion of that territory, the municipal corporation that annexed the territory shall make payments to the township from which the territory was annexed only as provided in this section, except that, if the legislative authority of the municipal corporation enters into an agreement under section 701.07, 709.191, or 709.192 of the Revised Code with the township from which the territory was annexed that makes alternate provisions regarding payments by the municipal corporation, then the payment provisions in that agreement shall apply in lieu of the provisions of this section.

(C)(1) Except as provided in division (C)(2) of this section, the municipal corporation that annexed the territory shall make the following payments to the township from which the territory was annexed with respect to commercial and industrial real, personal, and public utility property taxes using the property valuation for the year that the payment is due:

(a) In the first through third years following the annexation and exclusion of the territory from the township, eighty per cent of the township taxes in the annexed territory that would have been due the township for commercial and industrial real, personal, and public utility property taxes if no annexation had occurred;

(b) In the fourth and fifth years following the annexation and the exclusion of the territory from the township, sixty-seven and one-half per cent of the township taxes in the annexed territory that would have been due the township for commercial and industrial real, personal, and public utility property taxes if no annexation had occurred;

(c) In the sixth and seventh years following the annexation and exclusion of the territory from the township, sixty-two and one-half per cent of the township taxes in the annexed territory that would have been due the township for commercial and industrial real, personal, and public utility property taxes if no annexation had occurred;

(d) In the eighth and ninth years following the annexation and exclusion of the territory from the township, fifty-seven and one-half per cent of the township taxes in the annexed territory that would have been due the township for commercial and industrial real, personal, and public utility property taxes if no annexation had occurred;

(e) In the tenth through twelfth years following the annexation and exclusion of the territory from the township, forty-two and one-half per cent of the township taxes in the annexed territory that would have been due the township for commercial and industrial real, personal, and public utility property taxes if no annexation had occurred.

(2) If there has been an exemption by the municipal corporation of commercial and industrial real, personal, or public utility property taxes pursuant to section 725.02, 1728.10, 3735.67, 5709.40, 5709.41, 5709.45, 5709.62, or 5709.88 of the Revised Code, there shall be no reduction in the payments owed to the township due to that exemption. The municipal corporation shall make payments to the township under division (C)(1) of this section, calculated as if the exemption had not occurred.

(D) The municipal corporation that annexed the territory shall make the following payments to the township from which the territory was annexed with respect to residential and retail real property taxes using the property valuation for the year that the payment is due:

(1) In the first through third years following the annexation and exclusion of the territory from the township, eighty per cent of the township taxes in the annexed territory that would have been due the township for residential and retail real property taxes if no annexation had occurred;

(2) In the fourth and fifth years following the annexation and exclusion of the territory from the township, fifty-two and one-half per cent of the township taxes in the annexed territory that would have been due the township for residential and retail real property taxes if no annexation had occurred;

(3) In the sixth through tenth years following the annexation and exclusion of the territory from the township, forty per cent of the township taxes in the annexed territory that would have been due the township for residential and retail real property taxes if no annexation had occurred;

(4) In the eleventh and twelfth years following the annexation and exclusion of the territory from the township, twenty-seven and one-half per cent of the township taxes in the annexed territory that would have been due the township for residential and retail real property taxes if no annexation had occurred.

(E) If, pursuant to division (F) of this section, a municipal corporation annexes an international airport that it owns, the municipal corporation shall pay the township one hundred per cent of the township taxes in the annexed territory that would have been due the township if no annexation had occurred for each of the twenty-five years following the annexation.

(F)(1) Notwithstanding any other provision of this chapter, a board of county commissioners may authorize a municipal corporation to annex an international airport that the municipal corporation owns. Unless a contract is entered into pursuant to division (F)(2) of this section, any municipal corporation that annexes an international airport under this division shall make payments to the township from which the international airport is annexed, in the manner provided in division (E) of this section. No territory annexed pursuant to this division shall be considered part of the municipal corporation for the purposes of subsequent annexation, except that the board of county commissioners may authorize subsequent annexation under this division if the board determines that subsequent annexation is necessary to the continued operation of the international airport.

(2) The chief executive of a municipal corporation that annexes territory pursuant to this division may enter into a contract with the board of township trustees of the township that loses the territory whereby the township agrees to provide the annexed territory with police, fire, or other services it is authorized to provide in exchange for specified consideration as agreed upon by the board of township trustees and the chief executive. In no instance shall the consideration received by the township be less than the payments that would be required under division (F)(1) of this section if no contract were entered into.

#### CREDIT(S)

(2016 H 233, eff. 8-5-16; 2001 S 5, eff. 3-27-02 (*Thornton v. Salak*); 1981 H 19, eff. 2-2-82; 1980 H 1238, H 814; 1979 S 138)

R.C. § 709.19, OH ST § 709.19

Current through 2017 File 23 of the 132nd General Assembly (2017-2018).

**\*15199 R.C. § 709.19**

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

*Current through 2000 portion of 123rd G.A.,  
Files 124, 128, 129, 131 to 133, and 135 to 248,  
apv. 10/20/2000*

**709.19 REDISTRIBUTION OF TAX  
REVENUES FOLLOWING CERTAIN  
MUNICIPAL ANNEXATIONS**

(A) As used in this section:

(1) "Annexation period" means a period of one, two, or three consecutive twelve-month periods, whichever is less, during which one or more municipal corporations annex territory of a township that includes at least fifteen per cent but less than one hundred per cent of the total taxable value of the real, public utility, and tangible personal property subject to taxation in that township in the base year. No annexation period shall include a month that is part of another annexation period.

(2) "Base year" means the calendar year immediately preceding an annexation period.

(3) "Taxes" means the real and public utility property taxes charged by a township in the base year or, in an annexation under division (F) of this section, the real, public utility, and tangible personal property taxes that would have been charged by the township, if no annexation had occurred, in the year immediately preceding the year in which the payment is made, and payable after the reduction required by section 319.301 of the Revised Code but prior to the reduction required by section 319.302 of the Revised

Code, and the taxes levied for such year by the township against tangible personal property. "Taxes" excludes taxes for the payment of debt charges.

(4) "Township taxes in the annexed territory" means the taxes against the real, public utility, and tangible personal property subject to taxation in the base year in territory annexed from the township to a municipal corporation during an annexation period or, in an annexation under division (F) of this section, the taxes against the real, public utility, and tangible personal property that would have been subject to taxation in the annexed territory in the year immediately preceding the year in which the payment is to be made, if no annexation had occurred.

(5) "International airport" means any airport that is:

(a) Designated as an international airport or a landing rights airport by the United States secretary of the treasury;

**\*15200** (b) Owned and operated by a municipal corporation;

(c) An unincorporated area not contiguous to the municipal corporation that owns it.

(B) If the annexation of territory of any township by one or more municipal corporations under this chapter constitutes an annexation period of twelve consecutive months, except as provided in division (G) of this section, each municipal corporation that annexed territory of that township during that annexation period shall pay the township during each of the seven years following the annexation period:

(1) In each of the first three years, one hundred per cent of the township taxes in the annexed territory;

(2) In the fourth year, eighty per cent of the township taxes in the annexed territory;

(3) In the fifth year, sixty per cent of the township taxes in the annexed territory;

(4) In the sixth year, forty per cent of the township taxes in the annexed territory;

(5) In the seventh year, twenty per cent of the township taxes in the annexed territory.

(C) If the annexation of territory of any township by one or more municipal corporations under this chapter constitutes an annexation period of thirteen to twenty-four consecutive months, except as provided in division (G) of this section, each municipal corporation that annexed territory of that township during that annexation period shall pay the township during each of the six years following the annexation period:

(1) In each of the first two years, one hundred per cent of the township taxes in the annexed territory;

(2) In the third year, eighty per cent of the township taxes in the annexed territory;

(3) In the fourth year, sixty per cent of the township taxes in the annexed territory;

(4) In the fifty [sic] year, forty per cent of the township taxes in the annexed territory;

(5) In the sixth year, twenty per cent of the township taxes in the annexed territory.

(D) If the annexation of territory of any township by one or more municipal corporations under this chapter constitutes an annexation period of twenty-five to thirty-six consecutive months, except as provided in division (G) of this section, each municipal corporation that annexed territory of that township during that annexation period shall pay the township during each of the five years following the annexation period:

(1) In the first year, one hundred per cent of the township taxes in the annexed territory;

\*15201 (2) In the second year, eighty per cent of the township taxes in the annexed territory;

(3) In the third year, sixty per cent of the township taxes in the annexed territory;

(4) In the fourth year, forty per cent of the township taxes in the annexed territory;

(5) In the fifth year, twenty per cent of the township taxes in the annexed territory.

(E) If, pursuant to division (F) of this section, a municipal corporation annexes an international airport that it owns, the municipal corporation shall pay the township one hundred per cent of the township taxes in the annexed territory that would have been due the township, if no annexation had occurred, for each of the twenty-five years following the annexation.

(F)(1) Notwithstanding any other provision of this chapter, a board of county commissioners may authorize a municipal corporation to annex an international airport that the municipal corporation owns. Unless a contract is entered into pursuant to division (F)(2) of this section, any municipal corporation that annexes an international airport under this division shall make payments to the township from which the international airport is annexed, in the manner provided in division (E) of this section. No territory annexed pursuant to this division shall be considered part of the municipal corporation for the purposes of subsequent annexation, except that the board of county commissioners may authorize subsequent annexation under this division if the board determines [sic] that such annexation is necessary to the continued operation of the international airport.

(2) The chief executive of a municipal corporation that annexes territory pursuant to this division may enter into a contract with the board of township trustees of the township that loses the territory whereby the township agrees to provide the annexed territory with police, fire, or other services it is authorized to provide

in exchange for specified consideration as agreed upon by the board of township trustees and the chief executive. In no instance shall the consideration received by the township be less than the payments that would be required under division (F)(1) of this section if no contract were entered into.

(G) If after an annexation period for which payments are being made or are to be made to a township by one or more municipal corporations under division (B), (C), or (D) of this section, the remainder of the unincorporated territory of the township is annexed to another municipal corporation or incorporates as a municipal corporation, the balance of the payments due the township under division (B), (C), or (D) of this section shall be made to the municipal corporation to which the remainder of the township territory was annexed or to the municipal corporation incorporated from the remainder of the township territory.

**\*15202** No payment shall be made to a municipal corporation pursuant to this division unless the remainder of the unincorporated territory of the township referred to in this division constitutes at least fifty per cent of the area of the unincorporated area of the township prior to the annexation period.

(H) After consultation with the chief executive officer of the municipal corporation and the board of township trustees, the county auditor shall determine by which of the following methods the municipal corporations that annexed township territory shall pay the township the amounts prescribed in divisions (B) to (F) of this section, except that if the payments are made pursuant to division (G) of this section, they shall be made by the first method listed below:

(1) The county auditor shall issue a warrant semiannually against the taxes charged and payable against real and public utility property located in the municipal corporation and the taxes levied against tangible personal property located in the municipal corporation, and the

county treasurer shall distribute such amount to the township or, pursuant to division (G) of this section, to the municipal corporation to which the remainder of the township territory was annexed or to the municipal corporation incorporated from the remainder of the township territory; or

(2) The county budget commission shall pay such amounts to the township from the amount apportioned to the municipal corporations from the undivided local government fund. The payment shall be over and above the amount apportioned to the township pursuant to section 5747.51 or 5747.53 of the Revised Code, and the apportionment of the municipal corporations shall be reduced by like amounts.

(I) Upon written notification to the county auditor and the chief executive officer of each municipal corporation that annexes township territory during an annexation period, a board of township trustees may decline to accept the payments required under divisions (B), (C), (D), and (F) of this section, and a municipal corporation may decline to accept the payments required under division (G) of this section.

A municipal corporation need not make any payment required by this section if its legislative authority enters into an agreement under section 709.191 of the Revised Code.

**RELATED TERMS**

AIRPORTS; ANNEXATION; BOUNDARIES; JURISDICTION; MUNICIPAL CORPORATIONS; REAL PROPERTY; TOWNSHIPS **\*15203**

**CREDIT(S)**

*(1981 H 19, eff. 2-2-82; 1980 H 1238, H 814; 1979 S 138)*

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

**HISTORICAL NOTES**

**HISTORICAL AND STATUTORY NOTES**

Ed. Note: Former 709.19 repealed by 1969 H 491, eff. 11-21-69; 1953 H 1; GC 3563.

Pre-1953 H 1 Amendments: RS 1603a

## REFERENCES

### CROSS REFERENCES

Determination of tax levy where annexed territory is not included for school purposes, 5705.311

### LIBRARY REFERENCES

Municipal Corporations § 36(4).

WESTLAW Topic No. 268.

C.J.S. Municipal Corporations §§ 79, 80.

OJur 3d: 20, Counties, Townships, and Municipal Corporations § 448, 449, 451, 453, 462

Am Jur 2d: 56, Municipal Corporations, Counties, and Other Political Subdivisions § 93 to 96

Baldwin's Ohio Township Law, Text 55.13

Gotherman & Babbit, Ohio Municipal Law, Text 2.19

## ANNOTATIONS

### NOTES OF DECISIONS AND OPINIONS

#### Constitutional issues 1

#### Fifteen per cent threshold 2

#### Taxes charged by township 3

##### 1. Constitutional issues

Although RC 709.19 does not apply until after township territory has been annexed by a municipality, its provisions do not constitute an impermissible intrusion on the powers of home rule granted to cities by O Const Art XVIII§3 and 7; the legislature has authority not only to prescribe the procedure for annexation, but also to set out in advance the burdens which may accompany an annexation. *Roderer v. Board of Trustees of Miami Tp.* (Montgomery 1983) 14 Ohio App.3d 155, 470 N.E.2d 183, 14 O.B.R. 172, certiorari denied 105 S.Ct. 190, 469 U.S. 859, 83 L.Ed.2d 123.

certiorari denied 105 S.Ct. 190, 469 U.S. 859, 83 L.Ed.2d 123.

That only one international airport in the state may be annexed under the provisions of general state statute does not make the designation of such a class of airports unjust or capricious since such a classification is reasonable in light of the special requirements of an international airport balanced against those of a municipality. *Rauch v Char*, Nos. 7451 and 7622 (2d Dist Ct App, Montgomery, 6-22-82).

#### \*15204 2. Fifteen per cent threshold

In order to determine whether the threshold of fifteen per cent of total taxable value, as set out in RC 709.19(A)(1), has been reached, a court should consider the taxable value of the real, tangible personal, and public utility property located inside the corporate limits of an attached municipality, as well as such property located in the unincorporated territory of the township. *Roderer v. Board of Trustees of Miami Tp.* (Montgomery 1983) 14 Ohio App.3d 155, 470 N.E.2d 183, 14 O.B.R. 172, certiorari denied 105 S.Ct. 190, 469 U.S. 859, 83 L.Ed.2d 123.

#### 3. Taxes charged by township

Evidence presented by township as to its loss of tax base was too speculative to form basis for enjoining city's annexation of a portion of township's territory; although township presented charts estimating future increases of per capita expense to maintain its same level of services, it was equally possible that township could undergo significant commercial or business development, thus generating revenue that would actually decrease per capita cost of service. *Washington Twp. Bd. of Trustees v. McLaughlin* (Ohio App. 2 Dist. 1997) 117 Ohio App.3d 570, 690 N.E.2d 1348.

The phrase "taxes charged by a township," as used in RC 709.19(A)(3), includes not only taxes levied by a township itself, but also taxes levied by a township service district. *Roderer v. Board of Trustees of Miami Tp.* (Montgomery 1983) 14 Ohio App.3d 155, 470 N.E.2d 183, 14 O.B.R. 172, certiorari denied 105 S.Ct. 190, 469 U.S. 859, 83 L.Ed.2d 123.

# AN ACT

To amend sections 505.62, 709.02, 709.03, 709.032, 709.033, 709.04, 709.13, 709.14, 709.15, 709.19, 709.21, 929.02, and 5705.31; to enact new sections 709.031, 709.07, 709.11, and 709.16 and sections 709.013, 709.014, 709.015, 709.021, 709.022, 709.023, 709.024, 709.192, and 5705.315; and to repeal sections 709.031, 709.07, 709.08, 709.09, 709.11, 709.16, 709.17, and 709.18 of the Revised Code to revise the laws governing municipal annexations.

*Be it enacted by the General Assembly of the State of Ohio:*

SECTION 1. That sections 505.62, 709.02, 709.03, 709.032, 709.033, 709.04, 709.13, 709.14, 709.15, 709.19, 709.21, 929.02, and 5705.31 be amended and new sections 709.031, 709.07, 709.11, and 709.16 and sections 709.013, 709.014, 709.015, 709.021, 709.022, 709.023, 709.024, 709.192, and 5705.315 of the Revised Code be enacted to read as follows:

Sec. 505.62. A board of township trustees may enter into a contract with, and may appropriate township general revenue fund moneys for the services of, an attorney to represent the township ~~at annexation hearings before the board of county commissioners and upon any appeal of the board's decision pursuant to section 709.07 or Chapter 2506. of the Revised Code.~~

~~The board of township trustees of a township that includes territory that is proposed to be annexed has standing in any appeal of the board of county commissioners' decision on the annexation of township territory that is taken pursuant to section 709.07 or Chapter 2506. of the Revised Code, if the board of township trustees was represented at the annexation hearing before the board of county commissioners, expert witnesses, and other consultants as the board determines are necessary for any potential or pending annexation action, including proceedings before a board of county commissioners or any court. The board also may appropriate general revenue fund moneys for any other expenses it considers necessary that are~~

The majority of Amd. Sub. SB 5 has been  
omitted due to its volume.  
Following is the last page of Amd. Sub. SB 5.

SECTION 3. The provisions of Section 1 of this act shall apply only to annexation petitions filed on or after the effective date of this act. All annexation petitions filed before the effective date of this act shall be processed under the provisions of Chapter 709. of the Revised Code in effect at the time a particular petition was filed.

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*Speaker* \_\_\_\_\_ *of the House of Representatives.*

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*President* \_\_\_\_\_ *of the Senate.*

Passed \_\_\_\_\_, 20\_\_\_\_

Approved \_\_\_\_\_, 20\_\_\_\_

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*Governor.*