

[Cite as *E. Canton v. Stark Cty. Bd. of Commrs.* , 2009-Ohio-2555.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

VILLAGE OF EAST CANTON, et al.

Appellants

-vs-

STARK COUNTY BOARD OF COUNTY
COMMISSIONERS, et al.

Appellees

JUDGES:

Hon. William B. Hoffman, P. J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 2008 CA 00156

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 2007 CV 01171

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

June 1, 2009

APPEARANCES:

For Appellants

For Appellees

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Wise, J.

{¶1} Appellants Village of East Canton, et al., appeal the decision of the Stark County Court of Common Pleas, which affirmed the decision of Appellee Stark County Board of Commissioners following appellants' administrative appeal under R.C. 2506.01 et seq. The relevant facts leading to this appeal are as follows.

{¶2} On November 22, 2006, appellants' agent filed a traditional, non-expedited, annexation petition seeking the annexation of approximately 472 acres from Osnaburg Township, Stark County, into the Village of East Canton, Ohio. We will herein refer to this petition as the "Village Annexation Petition."

{¶3} On December 15, 2006, while appellants' Village Annexation Petition was pending, the City of Canton, Ohio, filed an annexation petition with the Stark County Commissioners to annex to the city approximately 852 acres of land, also situated in Osnaburg Township, some of which overlapped part of the 472-acre Village Annexation land. The Canton petition sought an "Expedited Type I" annexation pursuant to R.C. 709.022. On December 17, 2006, the Commissioners approved the City Expedited Annexation Petition I. However, following the filing of a lawsuit in the Stark County Court of Common Pleas by various affected property owners, an agreed entry was issued wherein said annexation was declared void ab initio. We will herein label this petition as the "City Expedited Annexation Petition 1."

{¶4} On February 6, 2007, the City of Canton filed a second annexation petition with the Stark County Commissioners to annex to the city the approximately 852 acres of land situated in Osnaburg Township. The petition again sought an "Expedited Type I" annexation pursuant to R.C. 709.022. In addition, a Cooperative Economic

Development Agreement (“CEDA”) was executed between the City of Canton and Osnaburg Township in December 2006. Both of these items were attached to the petition. Dominion East Ohio Gas and Wheeling and Lake Erie Railroad, both of whom allegedly held title to some of the land in the 852-acre parcel, did not sign the petition. On February 8, 2007, the Stark County Board of Commissioners passed and approved this annexation, which we will herein refer to as “City Expedited Annexation Petition 2.”

{¶15} On March 30, 2007, Herbert and Donna Robinson, who own land in Osnaburg Township which was not part of the 852-acre annexation parcel, filed a Complaint in the Stark County Common Pleas Court for Writs of Mandamus and Prohibition, Declaratory Judgment and Injunctive Relief. In their Complaint, the Robinsons claimed that Dominion East Ohio Gas and Wheeling and Lake Erie Railroad were “owners” under the annexation statutes and were required to sign the petition.¹ Further, the Robinsons asserted that this failure rendered what we presently call “City Expedited Annexation Petition 2” invalid.

{¶16} On April 12, 2007, the City of Canton filed (1) a motion to dismiss the Robinsons’ requested preliminary injunction and (2) a motion for summary judgment. On April 16, 2007, the court denied the Robinsons’ motion for injunctive relief. In the meantime, on the same day, Canton City Council approved “City Expedited Annexation

¹ See R.C. 709.02(E), which states in pertinent part as follows: “As used in sections 709.02 to 709.21, 709.38, and 709.39 of the Revised Code, ‘owner’ or ‘owners’ means any adult individual who is legally competent, the state or any political subdivision as defined in section 5713.081 of the Revised Code, and any firm, trustee, or private corporation, any of which is seized of a freehold estate in land; except that easements and any railroad, utility, street, and highway rights-of-way held in fee, by easement, or by dedication and acceptance are not included within those meanings. * * *.”

Petition 2.” On May 2, 2007, the trial court granted the motion to dismiss and motion for summary judgment in favor of the City of Canton.

{¶7} The Robinsons thereupon timely appealed to this Court. On September 29, 2008, this Court affirmed the trial court’s decision, holding that the Robinsons lacked standing as a party to seek declaratory judgment or injunctive relief to prevent the City of Canton’s annexation, and that the Robinsons’ assertions did not warrant standing to seek writs of mandamus or prohibition.² See *Robinson v. Stark Cty. Bd. of Commrs.*, Stark App.No. 2007CA00154, 2008-Ohio-5010. On March 4, 2009, the Ohio Supreme Court declined to accept the appeal for review.

{¶8} In the meantime, in the aforementioned Village Annexation, filed by East Canton, appellants requested leave on February 7, 2007, to amend the petition to remove four properties from the territory. The Commissioners denied same on February 8, 2007. The Village Annexation then proceeded to a hearing before the Stark County Commissioners on February 15, 2007. At this hearing, the Commissioners passed a resolution that the land recently annexed by the City of Canton as a result of City Expedited Annexation 2 would not be considered in the regular Village Annexation. The Commissioners also voted to exclude non-contiguous parcels from the Village Annexation, and found the petition invalid because the petition presented separate and unconnected territories.

{¶9} Appellants thereupon filed an administrative appeal in the Village Annexation case to the Stark County Court of Common Pleas pursuant to R.C. 709.07

² Judge Wise authored the opinion; Judge Hoffman and Judge Delaney each filed a separate concurring opinion.

and R.C. Chapter 2506. Via a judgment entry filed June 19, 2008, the common pleas court upheld the decision of the Commissioners.

{¶10} On July 16, 2008, appellants filed a notice of appeal to this Court. They herein raise the following four Assignments of Error:

{¶11} “I. THE TRIAL COURT ERRED IN RULING THAT CITY ANNEXATION NO. 2 COMPLIED WITH R.C. 709.022 AND THE CEDA AMENDMENT NOTICE OF R.C. 701.07.

{¶12} “II. THE TRIAL COURT ERRED IN RULING THAT APPELLEE HELD THE REQUISITE PUBLIC HEARING ON THE VILLAGE ANNEXATION.

{¶13} “III. APPELLEE’S REMOVAL OF TERRITORY FROM THE VILLAGE ANNEXATION WITHOUT CONSENT OF THE AGENT WAS ILLEGAL AND THEREFORE THE TRIAL COURT ERRED IN AFFIRMING SUCH ACTION ON THE PART OF APPELLEES.

{¶14} “IV. APPELLEE’S DENIAL OF THE REQUESTS BY THE AGENT TO AMEND THE VILLAGE ANNEXATION WAS ILLEGAL, ARBITRARY AND CAPRICIOUS AND THE TRIAL COURT ERRED IN AFFIRMING SUCH ACTION ON THE PART OF APPELLEES.”

I.

{¶15} In their First Assignment of Error, appellants contend the trial court erred by ruling, in addressing their R.C. 2506 administrative appeal concerning the Village Annexation, that City Expedited Annexation 2 had complied with R.C. 709.022 and the CEDA amendment notice of R.C. 701.07.

{¶16} “[T]he procedures for annexation and for challenging an annexation must be provided by the General Assembly.” *State ex rel. Overholser Builders, L.L.C. v. Clark Cty. Bd. of Commrs.*, 174 Ohio App.3d 631, 2007-Ohio-7230, ¶ 5, citing *In re Petition to Annex 320 Acres to S. Lebanon* (1992), 64 Ohio St.3d 585, 591, 597 N.E.2d 463. Pursuant to the mandate of R.C. 709.022(B), once a board of county commissioners has granted an expedited type-1 annexation, “[t]here is no appeal from the board's decision under this section in law or in equity.” As we held in *Robinson*, supra, “[t]he General Assembly is completely silent as to *any procedure* for a neighboring landowner to challenge the R.C. 709.022 annexation of adjoining property.” *Id.* at ¶ 15, emphasis added. The same can be said as to procedures for a neighboring village or municipality that is not part of such annexation petition being challenged.

{¶17} Accordingly, under the procedural circumstances of this case, we need not reach the merits of appellants’ arguments in relation to the prerequisites of R.C. 709.022, R.C. 701.07, and R.C. 709.02(E). We find appellants’ utilization of a 2506 administrative appeal stemming from the Village Annexation as a means of reviving the challenge to the validity of the Canton Expedited Annexation 2 is an improper collateral attack on the latter ruling, in violation of the “no appeal” mandate of R.C. 709.022(B). Furthermore, if we were to herein grant the relief requested by appellants, we would have to mandate that the Commissioners reverse their recognition in this matter of the City Expedited Annexation 2, which would contravene the result in *Robinson*.

{¶18} Appellants’ First Assignment of Error is therefore overruled.

II.

{¶19} In their Second Assignment of Error, appellants contend the trial court erred in concluding the Commissioners had conducted a proper hearing on the Village Annexation petition. We disagree.

{¶20} In *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 147, 735 N.E.2d 433, the Ohio Supreme Court stated as follows concerning Chapter 2506 administrative appeals: "The common pleas 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. See *Smith v. Granville Twp. Bd. of Trustees* (1998), 81 Ohio St.3d 608, 612, 693 N.E.2d 219, * * * citing *Dudukovich v. Lorain Metro. Hous. Auth.* (1979), 58 Ohio St.2d 202, 206-207, 12 O.O.3d 198, 389 N.E.2d 1113 * * *."

{¶21} In the case sub judice, the Commissioners became aware that the completed City Expedited Annexation 2 had already encompassed several of the parcels involved in the Village Annexation. At that point, resolutions were passed which recognized that the Village Annexation had effectively lost several parcels to Canton and that a single annexation territory was no longer extant in the proposed Village Annexation. As such, we find allowance of further hearing time under these circumstances would have been tantamount to a vain act, which the law will not require. See *Huntsman v. Perry Local School Dist. Bd. of Edn.*, Stark App.No. 2004CA00347, 2005-Ohio-3294, ¶27, citing *Walser v. Dominion Homes, Inc.* (June 11, 2001), Delaware App. No. 00-CA-G-11-035.

{¶22} Appellants' Second Assignment of Error is therefore overruled.

III.

{¶23} In their Third Assignment of Error, appellants contend the trial court erred in affirming the Commissioners' removal of territory from the Village Annexation petition at the February 15, 2007 hearing, without the consent of their agent, Ms. Comek. We disagree.

{¶24} Appellants direct us to R.C. 709.031(B), which states as follows:

{¶25} "The petition may be amended without further notice by leave of the board of county commissioners and with the consent of the agent for the petitioners if the amendment does not add to the territory embraced in the original petition and is made at least fifteen days before the date of the hearing. The board may refer the legal description of the perimeter, map, or plat to the county engineer if revisions are made in them, for a report on their accuracy. Upon receiving these items, the county engineer shall file, on or before the date of the hearing, a written report with the board based on the engineer's findings, which shall not be conclusive upon the board. Failure of the engineer to make the report shall not affect the jurisdiction or duty of the board to proceed."

{¶26} In the case sub judice, the Commissioners voted to effectively amend the Village Annexation petition to the extent that the parcels that had been recently annexed by the City of Canton (as a result of City Expedited Annexation 2) would not be considered as part of said petition. This was accomplished over the objection of appellants' agent. However, under the unusual circumstances of this case, the Commissioners were faced with a fait accompli as to several of the parcels in the

original proposed Village Annexation; i.e., by the time of the hearing, the City Annexation 2 had caused a disruption in the contiguity of the group of Village Annexation parcels. The purported “amendment” of the petition was instead a recognition by the Commissioners of a fatal flaw in the requested Village Annexation. See *In re Annexation of 561.590 Acres in Perry & Bethlehem Twps.* (1995), 105 Ohio App.3d 771, 777, 664 N.E.2d 1368 (finding an original petition submitted to the Commissioners flawed for the reason that “it combined two different territories in its annexation attempt.”)

{¶27} Accordingly, the trial court did not err in affirming the Commissioners’ “amendment” of the Village Annexation petition. Appellants’ Third Assignment of Error is overruled.

IV.

{¶28} In their Fourth Assignment of Error, appellants argue the trial court erred in affirming the Commissioners’ denial of appellants’ agent’s request to amend the Village Annexation petition at the February 15, 2007 hearing. We disagree.

{¶29} Under R.C. 709.031(B), quoted supra, the Commissioners are granted discretion concerning allowing requested petition amendments if such an amendment “does not add to the territory embraced in the original petition and is made at least fifteen days before the date of the hearing.” *Id.* Appellants’ agent’s request was thus outside of the scope of the statute, and we find no reversible error in the trial court’s affirmance of the Commissioners’ decision in this regard.

{¶30} Appellants' Fourth Assignment of Error is overruled.

{¶31} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Stark County, Ohio, is affirmed.

By: Wise, J.

Hoffman, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE

/S/ WILLIAM B. HOFFMAN

/S/ PATRICIA A. DELANEY

JUDGES

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IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

VILLAGE OF EAST CANTON, et al.	:	
	:	
Appellants	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
STARK COUNTY BOARD OF COUNTY COMMISSIONERS, et al.	:	
	:	
Appellees	:	Case No. 2008 CA 00156

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to appellants.

/S/ JOHN W. WISE_____

/S/ WILLIAM B. HOFFMAN_____

/S/ PATRICIA A. DELANEY_____

JUDGES