September 5, 1997

OPINION NO. 97-041

The Honorable Robert L. Herron
Columbiana County Prosecuting Attorney
105 S. Market Street
Lisbon, Ohio 44432

Dear Prosecutor Herron:

You have asked for an opinion concerning the manner in which an election is held and votes are tallied when a question of merger is raised under R.C. 709.45. Your specific question is as follows:

> When a petition is filed with a Board of Elections pursuant to R.C. Section 709.45, proposing a ballot question of whether a commission should be chosen to draw up a statement of conditions for merger of a township and a municipality, and the territory of the municipality is also the territory of such township, must the Board of Elections, when tallying the votes for determining whether the township electors have approved or rejected the question, count the votes of all township electors (including the electors of the municipality), or count only the votes of the electors within the unincorporated area of such township?

The situation with which you are concerned involves a petition that is being circulated to present to the voters the question whether a commission should be chosen to draw up a statement of conditions for the merger of the unincorporated area of a township with a city. Both the township and the city are located within Columbiana County. The city is located entirely within the township but the boundaries of the two entities are not coextensive. As a result, the territory of the city is part of the township. Electors of the city are also electors of the township, and they are entitled to vote on both city and township issues, except as otherwise provided by statute. *See, e.g.*, 1993 Op. Att'y Gen. No. 93-019; 1990 Op. Att'y Gen. No. 90-048.

In order to answer your question, we must first examine the statutory provisions that govern the proposed merger. The Revised Code defines "merger" to mean "the annexation, one to another, of existing municipal corporations or of the unincorporated area of a township with one or more

municipal corporations." R.C. 709.43. Thus, if the merger in question were to take place, the unincorporated area of the township would be annexed to the city. *See also* R.C. 709.44 ("the unincorporated area of a township may be merged with one or more municipal corporations"). *See generally* R.C. 709.01; 1990 Op. Att'y Gen. No. 90-042.

R.C. 709.45 permits the filing of a petition proposing that the unincorporated area of a township be merged with a municipal corporation. If the board of elections determines that the petition is sufficient, the board submits to the voters the question whether a commission should be chosen to draw up a statement of conditions for merger. The question is submitted "for the approval or rejection of the electors of each political subdivision proposed to be merged and the electors of the municipal corporation to which merger is proposed." R.C. 709.45.[1]

It is clear that the question of forming a merger commission must be submitted both to electors of the city and to electors of the township. The issue is whether, when the question is submitted to electors of the township, the election is restricted to the unincorporated area of the township, which is the portion that will merge with the city if the merger is approved, or whether the election extends also to residents of the city, who, as township residents, are entitled to vote on other township issues. If the city residents are entitled to vote on the merger commission question as electors of the township, their votes will be counted twice — once as those of city voters and once as those of township voters.

The language of R.C. 709.45 quoted above does not indicate clearly whether, in the election on behalf of the township, the question of choosing a merger commission should be submitted to all voters of the township or only to voters of the unincorporated portion of the township. That language uses the term "political subdivision proposed to be merged," which is ambiguous, in that it could mean either the entire township or only the portion proposed to be merged (that is, the unincorporated area of the township).

It is appropriate, in such circumstances, to look at related statutory language and to read the related statutes together as a single scheme. *See, e.g., State ex rel. Adsmond v. Bd. of Educ.*, 135 Ohio St. 383, 387, 21 N.E.2d 94, 96 (1939) (statutory provisions that are *in pari materia* should be construed together and harmonized if possible). It is also appropriate, when a statute is ambiguous, to consider the legislative history of the statute. R.C. 1.49(C).

A review of the history of R.C. 709.45 and related provisions leads to the conclusion that the merger commission question should be submitted to the voters of the unincorporated area of the township, rather than to the voters of the township as a whole. Prior to October 9, 1981, R.C. 709.45

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[1] If the formation of a merger commission is approved and the commission agrees upon a statement of conditions for merger, the conditions of proposed merger are then submitted to the electors. R.C. 709.46-.47. The conditions are submitted "for the approval or rejection of the electors in the portions of such political subdivisions [the political subdivisions proposed for merger]" within each county. R.C. 709.46.

provided only for the merger of municipal corporations. Am. Sub. S.B. 20 amended that statute and related provisions "to allow the unincorporated area of a township to merge with a municipal corporation located adjacent to or wholly or partly within the township." 1981-1982 Ohio Laws, Part I, 73 (Am. Sub. S.B. 20, eff. Oct. 9, 1981) (title). The amendment was accomplished by inserting in various statutes language referring to the unincorporated area of a township merging with a municipal corporation. Where the statutes had previously used the term "municipal corporation" or "municipal corporations" to refer to the entities involved in the merger, the language was changed to "political subdivision" or "political subdivisions," thereby encompassing both municipal corporations and townships. *See* 1981-1982 Ohio Laws, Part I, 73, 73-77 (Am. Sub. S.B. 20, eff. Oct. 9, 1981) (R.C. 709.45-.47).[2]

As noted above, some of the language referring to townships is ambiguous with respect to the question whether the entire township is included or only the unincorporated area is meant. *See, e.g.*, R.C. 709.45; R.C. 709.46 ("[i]f the question of merging...is disapproved by a majority of those voting on it in the township"). The question of who is to vote on a merger question under R.C. 709.45 is, however, addressed clearly in R.C. 709.48. That section was enacted in full by Am. Sub. S.B. 20, *see* 1981-1982 Ohio Laws, Part I, 73, 77-78 (Am. Sub. S.B. 20, eff. Oct. 9, 1981), and amended by 1993-1994 Ohio Laws, Part II, 2407, 2411 (Am. Sub. S.B. 264, eff. Sept. 29, 1994). It provides that, on and after the date on which a petition for the election of a merger commission is filed with the board of elections under R.C. 709.45 for the merger of a municipal corporation and the unincorporated territory of a township, no petition for the annexation of any part of the unincorporated territory of the township may be filed under R.C. 709.03 or 709.15 until one of certain named conditions occurs. The first of those named conditions is: "The question of forming a merger commission is defeated at the election provided for under [R.C. 709.45] *by a majority of the electors of* any one of the municipal corporations or *the unincorporated territory of the township* in which the election is held." R.C. 709.48(A) (emphasis added).[3]

This language indicates that a majority of the electors of the unincorporated territory of the township can defeat the question of forming a merger commission, thereby reflecting a clear

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[2] As amended in 1981, R.C. 709.43-.48 applied to the annexation of the unincorporated area of a township with "a municipal corporation located adjacent to or wholly or partly within the township." 1981-1982 Ohio Laws, Part I, 73, 73 (Am. S.B. 20, eff. Oct. 9, 1981) (R.C. 709.44). That language was changed to "one or more municipal corporations" in 1994. R.C. 709.44; *see* 1993-1994 Ohio Laws, Part II, 2407, 2408 (Am. Sub. S.B. 264, eff. Sept. 29, 1994).

[3] At the time of its enactment in 1981, R.C. 709.48(A) referred to the electors of "either the municipal corporation or the unincorporated territory of the township." *See* 1981-1982 Ohio Laws, Part I, 73, 78 (Am. Sub. S.B. 20, eff. Oct. 9, 1981). The reference was changed to "any one of the municipal corporations or the unincorporated territory of the township" in 1994. *See* 1993-1994 Ohio Laws, Part II, 2407, 2411 (Am. Sub. S.B. 264, eff. Sept. 29, 1994); note 2, *supra*.

Corresponding language relates to the vote on conditions of merger agreed upon by the merger commission. R.C. 709.48(C); *see* note 1, *supra*.

legislative intent that the electors of the unincorporated territory of the township should be the only electors who may vote on the merger commission question as township residents. Residents of a municipal corporation with which merger is proposed may, of course, vote on the issue as electors of the municipal corporation. If any territory of the township is located within a municipal corporation that is not included in the proposed merger, voters of that municipal corporation will not be able to vote on the merger commission question in any capacity. *See City of Englewood v. Village of Clayton,* No. 16219 (Ct. App. Montgomery County Feb. 21, 1997).[4]

The General Assembly's determination that electors of the unincorporated area of the township are the only electors who may vote as township electors on the question of forming a merger commission under R.C. 709.45 is reflected in the language of R.C. 709.45 that requires the petition to contain signatures of electors "of each municipal corporation and *the unincorporated area of the township* proposed to be merged and signatures of electors of the municipal corporation with which merger is proposed, numbering not less than ten per cent of the number of electors residing in *each such political subdivision*" who voted for the office of governor in the previous general election. R.C. 709.45 (emphasis added). Use of the word "such" indicates that, for purposes of the merger commission question, the unincorporated area of the township is considered the relevant political subdivision. *See City of Englewood v. Village of Clayton,* slip op. at 43 ("we believe the phrase _political subdivision_ is used in reference to the unincorporated portion of the township"); *see also* 1990 Op. Att'y Gen. No. 90-042, at 2-172 ("township territory that is incorporated — that is, territory that is already part of a municipal corporation — is clearly excluded from the merger provisions").[5]

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[4] *City of Englewood v. Village of Clayton* involves a situation in which the unincorporated portion of Randolph Township was proposed to be merged with the Village of Clayton. The township also contained two cities, Englewood and Union, that were not involved in the merger. Voters of those cities wanted to vote as township residents on the merger commission question and the approval or disapproval of conditions of merger but the court said that they could not, concluding that the unincorporated area of the township was the political subdivision for the purpose of determining who could vote on merger issues. The court's opinion states, in part:

> The General Assembly, in amending R.C. 709.43 to 709.47 to specifically include the unincorporated area of townships, expressed a clear intent to authorize a mechanism whereby the unincorporated portion of a township could merge with a municipal corporation. The clear intent of these statutes is to limit voting to residents of the areas that will be merging.

City of Englewood v. Village of Clayton, No. 16219, slip op. at 45 (Ct. App. Montgomery County Feb. 21, 1997) (citation omitted).

[5] This conclusion is consistent with the fact that the question whether a municipal corporation may annex contiguous territory pursuant to R.C. 709.14 and 709.17 is submitted to the electors of the unincorporated area of the township. R.C. 709.17.

As noted above, the statutory definition of merger does not speak of the merger of a township with a municipal corporation. Instead, it speaks of the merger of "the unincorporated area of a township" with one or more municipal corporations. R.C. 709.43. This language, as well, is consistent with the conclusion that the question of choosing a merger commission should be submitted to the electors of the unincorporated area of the township, rather than to the electors of the township as a whole. The term "unincorporated area of a township" is used repeatedly throughout the statutory merger provisions. *See, e.g.*, R.C. 709.44-.46. The statutes do occasionally refer simply to the merger of a township and a municipal corporation. *See, e.g.*, R.C. 709.46-.47. This appears, however, to be an oversight or shorthand reference and not to indicate any intent to change the legislative plan regarding voter approval of a merger under R.C. 709.45. *See City of Englewood v. Village of Clayton*; *see generally, e.g.*, Ohio Legislative Service Commission, *Summary of Enactments January, 1981 - August, 1981*, at 37 (1981) (Am. Sub. S.B. 20).[6]

A careful review of the statutory scheme and its history thus leads to the conclusion that, when a petition is filed with a board of elections pursuant to R.C. 709.45, proposing a ballot question on choosing a commission to draw up a statement of conditions for the merger of the unincorporated area of a township with a city, and the territory of the city is included within the territory of the township, the board of elections should submit the question to the electors of the city and also to the electors of the unincorporated area of the township. Electors of the incorporated area of the township are not entitled to vote on the matter as township electors, although electors of the city with which merger is proposed may vote on the question as electors of that city.

For the reasons discussed above, it is my opinion, and you are advised, that when a petition is filed with a board of elections pursuant to R.C. 709.45, proposing a ballot question on choosing a commission to draw up a statement of conditions for the merger of the unincorporated area of a township with a city, and the territory of the city is included within the territory of the township, the

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[6] R.C. 709.50 contains a reference to a situation in which "[t]he electors of the township and the municipal corporation have voted to approve the establishment of a merger commission pursuant to [R.C. 709.45]." Again, however, the reference to the township instead of to the unincorporated area of the township appears to be an oversight or shorthand reference. R.C. 709.50 sets forth a number of criteria that must be met in order to remove the area of a municipal corporation from a township and make the unincorporated territory of the township into a village. That section was enacted in 1993-1994 Ohio Laws, Part II, 2407, 2412 (Am. Sub. S.B. 264, eff. Sept. 29, 1994), and required action for removal to be taken by December 31, 1994. *See also* 1993-1994 Ohio Laws, Part II, 2407, 2428 (Am. Sub. S.B. 264, eff. Sept. 29, 1994) (section 4, uncodified). The reference to R.C. 709.45 was apparently intended to establish a requirement for a particular type of governmental restructuring and not to define which electors of the township were permitted to vote. In *City of Hamilton v. Fairfield Township*, 112 Ohio App. 3d 255, 678 N.E.2d 599 (Butler County), *discretionary appeal not allowed*, 77 Ohio St. 3d 1487, 673 N.E.2d 146 (1996), the Twelfth District Court of Appeals held that R.C. 709.50 violated several provisions of the Ohio Constitution because it was a special law that permitted a municipal corporation to be formed without a vote of the people.

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Respectfully,

BETTY D. MONTGOMERY
Attorney General

September 5, 1997

The Honorable Robert L. Herron
Columbiana County Prosecuting Attorney
105 S. Market Street
Lisbon, Ohio 44432

SYLLABUS: 97-041

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