OPINION NO. 90-042

Syllabus:

1. Pursuant to R.C. 709.44, when a township consists of parcels of territory that are disconnected, the unincorporated area of the township may be merged with a municipal corporation that is located adjacent to or wholly or partly within any portion of the township.

2. In a merger between the unincorporated area of a township and a municipal corporation pursuant to R.C. 709.44, the entire

unincorporated territory of the township is merged, even if it consists of disconnected parcels and not all parcels are adjacent to the municipal corporation; subsequent to the merger, the municipal corporation may, accordingly, include parcels of territory that are not physically connected to the rest of the municipal corporation.

3. A petition for merger of the unincorporated area of a township with a municipal corporation is not rendered invalid by the fact that the township consists of disconnected parcels of territory and not all of the parcels are adjacent to the municipal corporation with which merger is sought.

To: Paul R. Leonard, Lieutenant Governor, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, June 21, 1990

I have before me your request for an opinion on the following questions:

(1) May a township that is made up of several or more disjointed parts, be merged with a neighboring city such that the resultant city would be in several or more disjointed parts or must all of the territory be adjacent and contiguous?

(2) Is a merger petition between a township containing several or more parts and a neighboring city valid or invalid, where discontiguous parts of the township are included in the merger petition and not all of the township parts are adjacent to the city for which merger is sought?

Your questions concern the implementation of R.C. 709.44, which states:

> The territory of one or more municipal corporations, whether or not adjacent to one another, may be merged with that of an adjacent municipal corporation, and *the unincorporated area of a township may be merged with a municipal corporation located adjacent to or wholly or partly within the township*, in the manner provided in sections 709.43 to 709.48 of the Revised Code. (Emphasis added.)

The provisions of R.C. 709.43-.48 govern the merger of two or more municipal corporations or a municipal corporation and the unincorporated area of a township. R.C. 709.43 defines "merger," for this purpose, as meaning "the annexation, one to another, of existing municipal corporations or of the unincorporated area of a township with a municipal corporation located adjacent to or wholly or partly within that township." Merger is a particular method for annexing territory to a municipal corporation. R.C. 709.01 states generally: "Territory may be annexed to, or detached from, municipal corporations, in the manner provided in [R.C. 709.01-.47]."

R.C. 709.45 provides for the question of merger to be raised by a petition, signed by electors of each of the political subdivisions that would be involved in the merger and filed with the board of elections. The question whether a commission shall be chosen to draw up a statement of conditions for merger is presented to the electors of such subdivisions and, if approved, the commission proceeds to meet and to formulate conditions for merger. R.C. 709.45-.46. The conditions of proposed merger are submitted to the electors at the next general election. R.C. 709.46. If the conditions of merger are approved, "the territory of each political subdivision proposed to be merged is annexed to and included in the territory and corporate boundaries of the municipal corporation with which the merger is proposed." R.C. 709.47. In proceedings for merger, there is no requirement of approval by the board of county commissioners, as there is in other types of annexation proceedings. *See, e.g.*, R.C. 709.033 (providing that a board of county commissioners may not allow an annexation unless it finds, *inter alia*, that the "territory included in the annexation petition is not unreasonably large" and "the general good of the territory sought to be annexed will be served if the annexation petition is granted"); *City of Middletown v. McGee*, 39 Ohio St. 3d 284, 530 N.E.2d 902 (1988); *State ex rel.*

Loofbourrow v. Board of County Commissioners, 167 Ohio St. 156, 146 N.E.2d 721 (1957).

Your questions concern the situation that arises when a township consists of portions of territory that are not physically connected. That situation may result when portions of a township are included within one or more municipal corporations and the incorporated territory is removed from the township. *See, e.g.*, R.C. 503.03; R.C. 503.07-.09; R.C. 503.14; 1985 Op. Att'y Gen. No. 85-033; 1984 Op. Att'y Gen. No. 84-051. The remaining township territory thus consists of parcels of territory that are not connected with one another.

R.C. 709.44 does not specifically address a situation involving a township that consists of portions of disconnected territory. The language of R.C. 709.44 states simply that "the unincorporated area of a township may be merged with a municipal corporation located adjacent to or wholly or partly within the township." The term "adjacent" is not defined by statute and it is, therefore, appropriate to look at its ordinary meaning. *See* R.C. 1.42. "Adjacent" is defined to mean "near or close (*to* something); adjoining...*adjacent* things may or may not be in actual contact with each other but they are not separated by things of the same kind [*adjacent* angles, *adjacent* farmhouses]." *Webster's New World Dictionary* 17 (2d college ed. 1978); *see also City of Middletown v. McGee; Brubaker v. Montgomery County Board of Elections*, 71 Ohio L. Abs. 99, 128 N.E.2d 270 (C.P. Montgomery County 1955). A municipal corporation is, thus, adjacent to a township if there is no territory separating the municipal corporation and the township. The question is whether a municipal corporation may be considered to be adjacent to a township if it adjoins any part of the township, even though it does not adjoin the entire township. It appears that R.C. 709.44 permits such a construction.

The statutory provisions dealing with merger provide a method for a township to become part of an adjacent municipal corporation. There is no indication in the statutory provisions that the procedure is not available to a township that consists of disconnected parcels of territory, nor is there any indication that any unincorporated portion of a township may be excluded from a merger. Rather, the provisions of R.C. 709.43-.48 deal with a township as an entity, referring to it as a "political subdivision" and providing no exceptions or special provisions for a township that has disconnected parcels of territory. *See, e.g.*, R.C. 709.45-.47. In contrast, township territory that is incorporated - that is, territory that is already part of a municipal corporation - is clearly excluded from the merger provisions. *See, e.g.*, R.C. 709.43-.44.

R.C. 709.48 states that, after a petition for merger involving a township has been filed, "no petition for the annexation of any part of the unincorporated territory of the township shall be filed with a board of county commissioners under [R.C. 709.03 or 709.15], until one of the following occurs": (A) the question of forming a merger commission is defeated by the electors; (B) the merger commission fails to reach timely agreement on conditions of merger; or (C) the conditions of merger are defeated by the electors. R.C. 709.48 thus requires that the entire unincorporated territory of the township remain intact until the merger proceedings are terminated. The implication is that the entire unincorporated territory of the township, including any disconnected parcels, will be involved in the merger.

In *State ex rel. City of Toledo v. Board of Commissioners*, 32 Ohio St. 3d 352, 513 N.E.2d 769 (1987) (syllabus), the Ohio Supreme Court stated:

> After a petition is filed with a board of elections for the election of a merger commission for the merger of a municipal corporation and the unincorporated territory of a township, there is a clear legal duty upon a board of commissioners to refuse to accept for filing any petitions for annexation of land located within the township until the merger procedure has been exhausted by one of the conditions set forth in R.C. 709.48.

The *City of Toledo* case adopted the analysis on this point set forth in *Ambrose v. Cole*, 13 Ohio App. 3d 355, 469 N.E.2d 906 (Summit County 1983). The *Ambrose* court stated expressly: "[T]he language of R.C. 709.48 is clear. It precludes the

filing of any petition for annexation for *any part of the unincorporated territory* of Springfield Township until certain conditions are met. It is logical to assume that the legislature intended that the status quo should be maintained during the pendency of the merger procedure." 13 Ohio App. 3d at 357, 469 N.E.2d at 908 (emphasis by the court). In the *Ambrose* case, the court noted that it had not decided whether the merger statutes exclude portions of a township that are not contiguous; for purposes of that case, the court assumed that merger is limited to contiguous territory. That assumption was clearly made only for the sake of argument. The court concluded that, even granting the relators the assumption that merger is limited to contiguous territory, no petition for annexation of disconnected territory of a township may be filed until the conditions set forth in R.C. 709.48 have been met; if the assumption were not granted, relators' argument that an annexation petition should be allowed would be even more questionable, since any proposed annexation would directly affect the territory that was the subject of the merger petition.

In subsequent consideration of the question, the Summit County Court of Appeals affirmed the lower court's rejection of the argument that the merger provisions are not applicable to disconnected portions of a township. The question was presented in *Holcomb v. City of Cuyahoga Falls*, No. 12610 (Ct. App. Summit County Oct. 1, 1986) (LEXIS, Ohio library, App file). Owners of property located in disconnected parcels of Northampton Township had filed a complaint in the common pleas court for a declaration of their rights. The complaint was filed less than nine hours before a merger between the township and the City of Cuyahoga Falls was to go into effect. The parcels were not contiguous with either the City of Cuyahoga Falls or the rest of Northampton Township but were, instead "islands" surrounded by the City of Akron. The common pleas court dismissed the case. The court of appeals affirmed, rejecting the argument that the lower court erred "by failing to find that non-contiguous parcels of township territory are not included within the merger" of the township to the city. *Holcomb v. City of Cuyahoga Falls*, slip. op. at 2. The decision by the court of appeals states:

> An action for a declaratory judgment will not lie unless there is an actual controversy presenting a justiciable dispute between the parties for which speedy relief is necessary to preserve the rights of the parties. Burger Brewing Co. v. Liquor Control Comm. (1973), 34 Ohio St. 2d 93. An actual controvery [sic] requires that the parties have adverse legal interests.
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> It is not clear here what appellants view as adverse interests or what legal rights are endangered. They argue in their response to the motion to dismiss that services will be adversely affected because the areas are isolated from the rest of Cuyahoga Falls, but that was already the situation. As residents of Northampton Township, they were physically isolated from the rest of the township.
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> There is also a suggestion that appellants would prefer to be a part of Akron. The code provides for annexation of contiguous territory of one municipality to another (R.C. 709.22 et seq.) or adjustment of a common boundary in a proper situation (R.C. 709.37). In either instance, appellants have failed to demonstrate any real controversy which requires judicial resolution to protect legal rights. The assignments of error are overruled and the order of the trial court affirmed.

Holcomb v. City of Cuyahoga Falls, slip op. at 2-3. The *Holcomb* case supports the proposition that disconnected parcels of township territory may be included in a merger. Further, conversations with counsel for the City of Cuyahoga Falls disclose that the merger there proposed has been completed and the City of Cuyahoga Falls currently includes islands of territory that are surrounded by the City of Akron.

It might be argued that it is inappropriate for a municipal corporation to include parcels that are not physically connected to the rest of the municipality. Indeed, there are requirements that, in order for a municipal corporation to be formed, its territory must be compact, *see* R.C. 707.07(D), or, in certain instances, contiguous, *see* R.C. 707.04(C)(5). Further, except for an international airport that is not contiguous to the municipal corporation that owns it, *see* R.C. 709.19, statutes governing annexation procedures other than merger require that

land to be annexed to a municipal corporation be "adjacent," "contiguous," or "adjoining" to that municipal corporation. *See, e.g.,* R.C. 709.02; R.C. 709.13; R.C. 709.14; R.C. 709.16; R.C. 709.22; R.C. 709.23; R.C. 709.24; *City of Middletown v. McGee*, 39 Ohio St. 3d at 287, 530 N.E.2d at 905 ("[w]hile it is generally agreed that some touching of the municipality and the territory to be annexed is required, the law is unsettled as to what degree of touching is needed to fulfill the contiguity requirement"); *Stressenger v. Board of County Commissioners*, 28 Ohio App. 2d 124, 276 N.E.2d 265 (Montgomery County 1971); *Watson v. Doolittle*, 10 Ohio App. 2d 143, 226 N.E.2d 771 (Williams County 1967). Longstanding principles of municipal government support the proposition that municipal corporations are intended to be unified communities that consist of territory that is contiguous and compact. *See, e.g., City of Middletown v. McGee*; *Stressenger v. Board of County Commissioners*; *Watson v. Doolittle*. Those general principles may not, however, prevail over the distinct statutory scheme for merger that is set forth in R.C. 709.43–.48. *See generally, e.g., Wachendorf v. Shaver*, 149 Ohio St. 231, 78 N.E.2d 370 (1948); *State ex rel. Foster v. Evatt*, 144 Ohio St. 65, 56 N.E.2d 265 (1944).

Further, the general concept that a unit of local government should be contiguous and compact may be applied, although to a lesser degree, to townships as well as to municipal corporations. The legislative scheme contemplates that township lines will be drawn so that townships are unified bodies. *See, e.g.*, R.C. 503.03; R.C. 503.08 (providing for the annexation of a township to a contiguous township); R.C. 709.38–.39. *See generally Stressenger v. Board of County Commissioners*. The existence of disconnected parcels of township territory results from situations in which portions of township land are included in municipal corporations and removed from the township. *See, e.g.*, R.C. 503.03; R.C. 503.07–.09; R.C. 503.14; R.C. 703.22. *See generally* 1955 Op. Att'y Gen. No. 5422, p. 304. In a situation involving the merger of a municipality and a township with disconnected property, the concept of a body of local government as a single unit has already been breached. There exist one or more parcels of property that are not physically connected with the governing body of which they are part. Whether those parcels are part of a township or a municipal corporation, problems raised by physical isolation are the same. *See Holcomb v. City of Cuyahoga Falls*. *See generally City of Middletown v. McGee*, 39 Ohio St. 3d at 288, 530 N.E.2d at 906 (granting an injunction against a proposed annexation where the land to be annexed was a roadway leading away from the annexing municipality for several miles and supporting its conclusion with a quotation from *People ex rel. Adamowski v. Village of Streamwood*, 15 Ill. 2d 595, 155 N.E.2d 635 (1959), which states, 15 Ill. 2d at 601, 155 N.E.2d at 638, that a statute requiring contiguity cannot, "under any circumstances, permit a municipality by annexation ordinances to grab a whole maze of roadways, circumscribing and choking off unincorporated areas and causing them to be completely surrounded by a maze of roadways annexed to a municipality"; the *Middletown* case states: "[s]uch a result would be equally undesirable in Ohio, and we do not intend to encourage it by condoning the similar, if less extreme, annexation attempt at issue herein").

The statutory scheme in Ohio provides generally that all territory of the state shall be divided into townships and that each portion of land within the state shall remain part of one of the state's townships (even if it is also located within a municipal corporation) unless, through the inclusion of the land within a municipal corporation, the township government ceases to exist. *See, e.g.,* R.C. 703.22; Op. No. 85–033; 1959 Op. Att'y Gen. No. 888, p. 584. Thus, when a township that includes disconnected parcels of territory merges with a municipal corporation, those disconnected parcels must be included in a municipal corporation, in a township, or in both a municipal corporation and a township. The provisions of R.C. 709.43–.48 contain no indication that any township territory is to remain following a merger. Rather, R.C. 709.47 states expressly:

> On and after such effective date [of the merger] the territory of each political subdivision proposed to be merged is annexed to and included in the territory and corporate boundaries of the municipal corporation with which the merger is proposed....The corporate existence and the offices...of the township proposed to be merged terminate on such date.

This language provides support for the conclusion that all unincorporated areas of a township, even disconnected parcels, are included in a merger under R.C. 709.44.

An attachment to your opinion request suggests that there is "[a]n apparent flaw in the wording" of R.C. 709.43. If, indeed, the General Assembly did not intend the consequences of the language it has enacted, the remedy must be sought through amendment of that language. *See generally, e.g., Board of Education v. Fulton County Budget Commission*, 41 Ohio St. 2d 147, 156, 324 N.E.2d 566, 571 (1975) ("[t]he remedy desired by appellants...must be obtained from the source of their problem – the General Assembly" (footnote omitted)).

It is, therefore, my opinion, and you are hereby advised, as follows:

1. Pursuant to R.C. 709.44, when a township consists of parcels of territory that are disconnected, the unincorporated area of the township may be merged with a municipal corporation that is located adjacent to or wholly or partly within any portion of the township.

2. In a merger between the unincorporated area of a township and a municipal corporation pursuant to R.C. 709.44, the entire unincorporated territory of the township is merged, even if it consists of disconnected parcels and not all parcels are adjacent to the municipal corporation; subsequent to the merger, the municipal corporation may, accordingly, include parcels of territory that are not physically connected to the rest of the municipal corporation.

3. A petition for merger of the unincorporated area of a township with a municipal corporation is not rendered invalid by the fact that the township consists of disconnected parcels of territory and not all of the parcels are adjacent to the municipal corporation with which merger is sought.