

OPINION NO. 69-118

Syllabus:

(1) A municipal corporation located in two counties which wishes to annex territory must follow the procedures set forth in Section 709.11, Revised Code; (2) the fact that adult freeholders in the territory to be annexed reside in only one county does not preclude the annexing municipal corporation from following Section 707.22, Revised Code; (3) the municipal corporation which wishes to annex territory which is situated within three miles of two or more municipal corporations must follow Sections 707.01 through 707.14, Revised Code, so far as practicable in order to insure that the annexation procedure is not negated by a strict reading of the procedural requirements.

To: John J. Malik, Jr., Belmont County Pros. Atty., St. Clairsville, Ohio
By: Paul W. Brown, Attorney General, September 19, 1969

I have before me your opinion request wherein you ask three related questions which are paraphrased below:

(1) Does an annexation procedure by a municipal corporation located within two counties follow Section 709.02 or Section 709.11, Revised Code?

(2) Does Section 707.22, Revised Code, apply when adult freeholders residing in the territory to be annexed all reside in one county?

(3) Should it be decided that Section 709.11, Revised Code, is applicable, is it mandatory for an annexation proceeding to follow literally the requirements of Section 707.02 (D), Revised Code, as referred to in Section 707.22, Revised Code?

Section 709.02, Revised Code, reads as follows:

"The inhabitants residing on territory adjacent to a municipal corporation may, at their option, cause such territory to be annexed thereto, in the manner provided by sections 709.03 to 709.11, inclusive, of the Revised Code. Application for such annexation shall be by petition, addressed to the board of county commissioners of the county in which the territory is located, signed by a majority of the adult freeholders residing in such territory. If the territory sought to be annexed is completely surrounded by a municipal corporation and there are no adult freeholders residing in such territory, the petition may be signed by a majority of the owners of real estate in such territory. Such petition shall contain:

"(A) A full description and accurate map or plat of the territory sought to be annexed;

"(B) A statement of the total number of adult

freeholders residing in the territory sought to be annexed, or of the number of owners of real estate in the territory proposed to be annexed together with a statement that there are no adult freeholders residing in the territory sought to be annexed;

"(C) The name of a person or persons to act as agent for the petitioners."

Section 709.11, Revised Code, reads as follows:

"If a municipal corporation is situated in two or more counties, or the territory to be annexed is situated in a different county from that in which the municipal corporation or some part of it is situated, the annexation proceedings, so far as practicable, shall be as provided by section 707.22 of the Revised Code." (Emphasis added.)

Since Section 709.11, supra, is specifically mentioned in Section 709.02, supra, the obvious answer to your first question is that the former section must be followed here because the municipal corporation in question is located in two counties. Therefore, the proper procedural starting point in annexing new territory is Section 709.11, supra.

Section 707.22, Revised Code, referred to in Section 709.11, supra, reads as follows:

"When adult freeholders residing in two or more counties, desire the organization of such territory into a village, the petition shall be made to the board of county commissioners of the county in which the largest number of qualified voters of the proposed municipal corporation reside, and a statement to that effect shall be set forth in the petition. The transcript of the proceedings of the board, and the other papers relating to the incorporation shall be recorded in the county in which the petition is filed in the manner provided by section 707.09 of the Revised Code. Within ten days after such recording the county recorder shall make a certified transcript of such record for each of the other counties in which any portion of the territory is situated, and shall forward such transcript to the recorders of such counties, who shall record them in the manner required for original papers.

"In all other respects, the proceedings to establish such municipal corporation, or review the action of the board, shall be as provided in sections 707.01 to 707.14, inclusive, of the Revised Code."

The answer to your second query is more difficult because, as you point out in your opinion request, all of the adult freeholders reside in one county. In order to answer this question we must return to the language of the controlling statute, which indicates that Section 707.22, Revised Code, be followed so far as practicable. This language seems to indicate that the intent of the legislature was to require annexation proceedings under Section 707.22, supra, whenever the municipal corporation involved

is situated in two or more counties. Thus the fact that the freeholders reside in but one county should not take the annexation procedure out of the purview of Section 707.22, supra.

In answer to your third question, we must look at the last paragraph of Section 707.22, supra. This paragraph refers to Sections 707.01 through 707.14, Revised Code, as the proper sections to follow. Section 707.04, Revised Code, reads as follows:

"Prior to fixing the time and place of the public hearing pursuant to section 707.05 of the Revised Code, the board of county commissioners shall determine whether any of the area proposed to be incorporated includes territory within three miles of any portion of the boundary of an existing municipal corporation. If the board so finds, it shall make an order in its journal of such finding and forward a copy of such entry to the clerk of the legislative authority of such municipality. The board shall therefore take no action on the incorporation petition so long as any of the area proposed to be incorporated includes territory within three miles of the boundary limits of any existing municipality. However, the board may proceed with the incorporation petition even though some or all of the territory proposed to be incorporated would be within the three mile area if the board finds either of the following:

"(A) An annexation proceeding which included the territory within three miles of an existing municipality has been attempted within two years preceding the date of filing of the incorporation petition under section 709.02 of the Revised Code but failed because the existing municipality took unfavorable action, or because the existing municipality took no action on the petition for a period of one hundred twenty days after the petition was presented to the legislative authority of the municipality as required in section 709.04 of the Revised Code.

"(B) There is furnished the board of county commissioners a copy of a resolution, passed by the legislative authority of each existing municipal corporation within the three mile area approving the petition for incorporation.

"If the board determines that none of the territory within the incorporation petition is within three miles of any portion of the boundary of an existing municipal corporation, the board shall proceed as provided in section 707.05 of the Revised Code."

Section 707.02, Revised Code, reads in pertinent part:

"The petition required by section 707.01 of the Revised Code shall be signed by a majority of the adult freeholders residing within the terri-

tory proposed to be incorporated and shall contain or have attached thereto:

* * * * * * * * *

"(D) A statement that the area consists of not less than two square miles, includes a population of not less than six hundred persons per square mile, and has an assessed valuation of real, personal, and public utility property subject to general property taxation of at least two thousand dollars per capita; provided that if the territory proposed to be incorporated contains a population of not less than twenty-five persons and immediately surrounds a resort, ski area, park, lake, or picnic ground, kept regularly for outing and pleasure, the statements provided for in this division shall not be required."

I am of the opinion that the board of county commissioners must determine whether any of the area proposed to be annexed to a village includes territory within three miles of any portion of the boundary of an existing municipal corporation. As you have indicated in your letter, the board of county commissioners has already determined that the area to be annexed is located within three miles of an existing corporation. This being the case, the board must, pursuant to the statute, make an entry of such finding in its journal and forward a copy of the entry to the clerk of the annexing village.

In regard to Section 707.02, Revised Code, it should be emphasized that the controlling statute, Section 709.11, Revised Code, clearly states that the annexing parties should follow the procedures of Sections 707.01 to 707.14, Revised Code, so far as practicable. Chapter 707, Revised Code, is referred to in annexation proceedings as a procedural requirement and not a substantive requirement and therefore may not prevent the annexation. It was the intent of the legislature to provide a procedural section of the code in regard to annexation but not to hinder the annexation procedure to the point of legislating against a territory or municipality involved in annexation.

Therefore, it is my opinion and you are hereby advised that (1) a municipal corporation located in two counties which wishes to annex territory must follow the procedures set forth in Section 709.11, Revised Code; (2) the fact that adult freeholders in the territory to be annexed reside in only one county does not preclude the annexing municipal corporation from following Section 707.22, Revised Code; (3) the municipal corporation which wishes to annex territory which is situated within three miles of two or more municipal corporations must follow Sections 707.01 through 707.14, Revised Code, so far as practicable in order to insure that the annexation procedure is not negated by a strict reading of the procedural requirements.