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WHERE INHABITANTS OF AN ADJACENT PLATTED AND UNPLATTED TERRITORY, COVERING MORE THAN ONE COUNTY WISH ANNEXATION WITH A MUNICIPALITY ENTIRELY IN ONE COUNTY, THE AUTHORITY FOR DETERMINATION LIES IN THE HANDS OF THE COUNTY COMMISSIONERS OF THE COUNTY WHICH HAS THE MOST QUALIFIED VOTERS IN SAID TERRITORY. §§§709.11, R.C., 707.22, R.C., 709.02, R.C.

SYLLABUS:

Where the inhabitants of adjacent platted and unplatted territory covering an area located in more than one county wish to annex under Section 709.01 *et seq.*, Revised Code, to a municipality located solely in one of said counties, the board of county commissioners in the county in which the largest number of qualified voters of the area proposed to be annexed reside has, pursuant to Sections 709.11 and 707.22, Revised Code, complete and exclusive authority in such matter and its determination will apply to the entire area included in the proposed plan of annexation.

Columbus, Ohio, March 30, 1962

Hon. Robert L. Marrs, Prosecuting Attorney
Butler County, Hamilton, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"Your opinion is respectfully requested on the applicability of Ohio Revised Code Sections 709.11 and 707.22 to the following situation:

"Inhabitants residing within adjacent portions of territory contiguous to the City of Middletown desire the annexation of such territory into said City and are circulating a petition therefor describing the area, which includes *platted and unplatted property in both Butler and Warren Counties*; and said inhabitants desire to submit said petition to the board of Commissioners of Butler County in which the largest number of qualified voters of the proposed annexation area reside (a statement to that effect is set forth in said petition for annexation).

"Ohio Revised Code, Section 709.11 provides 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.'

"Ohio Revised Code, Section 707.22 provides as follows:

" 'When the inhabitants residing within adjacent portions of territory, in two or more counties, laid off into village lots, plats of which have been acknowledged and recorded as required by section 707.02 of the Revised Code, desire the organization of such territory into a village, the petition therefor 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 proceeding of the board, and the map or plat accompanying it, shall be recorded in the county in which the petition is filed, at the time and 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 for-

ward 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 707.02 to 707.14, inclusive, of the Revised Code.’

“Under Section 707.22 R.C. applied through Section 709.11 R.C. may the Board of Commissioners of Butler County legally release for annexation to the City of Middletown the whole area, *including the portion in Warren County*, if a majority of the adult freeholders in the said *two-county area* petition for the annexation to the City of Middletown, which at present is solely in Butler County?”

The provisions of Sections 709.11 and 707.22, Revised Code, quoted in your request will not be restated here.

For the purpose of this opinion, I have assumed that by the phrase, “legally release for annexation,” as used in the last paragraph of your request, you have reference to the authority of the Board of County Commissioners of Butler County to make a determination on the issue raised in the petition for annexation which will apply to such question with equal force in Butler and Warren Counties.

The facts stated in your letter, when applied to Section 709.11, Revised Code, clearly require that the provisions of Section 707.22, Revised Code, be called into play. I note, however, that if the petition involved were one for incorporation, the requirements of Section 707.22, Revised Code, would not have been met, because, as to incorporation, said statute clearly refers to *platted land* only.

In the case of *Wachendorf v. Shaver, Recorder, et al.*, 149 Ohio St., 231, the Supreme Court had before it a question dealing with the formation of a village by the incorporation of platted land. The petition for incorporation in that case was submitted to the board of township trustees under provisions of law now found in Section 707.15 *et seq.*, Revised Code, which permit such petition to be filed by the inhabitants of “any territory.” It was there contended that since the provisions of law relating to incorporation by petition to the board of county commissioners, found now in Section 707.02 *et seq.*, Revised Code, specifically apply to platted land, the incorporation was invalid. The second paragraph of the syllabus in the *Wachendorf* case reads as follows:

“2. The words ‘any territory’ used in Section 3526, General Code, comprehend and include platted as well as unplatted lands, and application for incorporation of platted lands may be properly made to either the county commissioners, under the provisions of Section 3517, or to the township trustees, under the provisions of Section 3526.”

(The provisions of Sections 3517 and 3526, General Code, are now found in Sections 707.02 and 707.15, Revised Code, respectively.)

In the instant question, the petition to be submitted to a board of county commissioners, is submitted pursuant to Section 709.02, Revised Code, which reads, in part, as follows :

“The inhabitants residing in 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.
* * *”

It will be noted from the foregoing quotation that the petitioners involved herein need only be inhabitants residing in the territory proposed to be annexed. There is no requirement that the land included therein be platted, and in accordance with the conclusion in the *Wachendorf* case, *supra*, construing analogous terms, such land may be either platted or unplatted. Furthermore, Section 709.11, *supra*, states that the annexation proceeding only follows the provisions of Section 707.22, *supra*, “so far as practicable.” Accordingly, I am of the opinion that the language of the first sentence of Section 707.22, Revised Code, limiting its terms to areas of platted land, is not applicable to land included in a petition for annexation filed under Sections 709.02 *et seq.*, Revised Code, and governed so far as practicable by the provisions and procedures set up in Section 707.22, Revised Code, as a result of Section 709.11, Revised Code.

As to the effect of the action of a board of county commissioners of one county upon a petition for annexation which includes an area in another county, I call your attention to 14 Ohio Jurisprudence 2nd, 258, Counties, Section 81, which reads, in part, as follows :

“Generally speaking, a board of county commissioners acts for, and in a certain sense acts as, the county, and the courts may not, in the absence of illegality, fraud, or gross abuse of

power, substitute their own opinion or discretion for that of the board in respect to matters which the law has placed within the control of the board. At the same time, however, the authority of the board is strictly limited to that expressly or impliedly conferred upon it by statute, and it can act for and bind the county only within the limits of such authority.

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Your attention is also called to 14 Ohio Jurisprudence 2d, 203, Counties, Section 7, which reads, in part, as follows :

“Generally speaking, the function of the county is to serve as an agency or instrumentality of the state for purposes of political organization and local administration, through which the legislature may perform its duties in this regard more understandingly, efficiently, and conveniently than it could if acting directly. As such agency, the county is a creature in the hands of its creator, subject to be molded and fashioned as the ever-varying exigencies of the state may require. Except as restricted by the state Constitution, the power of the legislature, through which the sovereignty of the state is represented and exercised, over counties, is supreme, and that body may exercise plenary power with reference to county affairs, county property, and county funds. Counties, therefore, possess only such powers and privileges as may be delegated to or conferred upon them by statute.* * *”

The General Assembly is required by Article XVIII, Section 2 and Article XIII, Section 6 of the Ohio Constitution, to provide for the incorporation and organization of municipal corporations. The provisions of Chapters 707. and 709., Revised Code, are obviously enacted pursuant to such authority.

Section 707.22, *supra*, expressly grants authority to a board of county commissioners to act upon a petition for annexation of lands to a municipality located both within and without its county, and under the general scheme of county government and power as set forth above, I am of the opinion that such grant of authority is completely proper. The obvious purpose of such statute is to provide a workable governmental structure through which annexation of lands located in more than one county, such as involved herein, may be accomplished ; and to such end the authority of the board of county commissioners granted jurisdiction under Sections 707.22 and 709.11, Revised Code, is complete and exclusive.

In accordance with the above, I am of the opinion and you are advised that where the inhabitants of adjacent platted and unplatted territory covering an area located in more than one county wish to annex under Section 709.01 *et seq.*, Revised Code, to a municipality located solely in one of said counties, the board of county commissioners in the county in which the largest number of qualified voters of the area proposed to be annexed reside has, pursuant to Section 709.11 and 707.22, Revised Code, complete and exclusive authority in such matter and its determination will apply to the entire area included in the proposed plan of annexation.

Respectfully,

MARK McELROY

Attorney General