

OPINION NO. 71-019**Syllabus:**

1. The word "shall" in Section 709.033, Revised Code, is mandatory in that the board of county commissioners must hear and decide an annexation petition if it is reasonably possible to do so within the ninety day period allowed by the act; but failure to take action within that time does not deprive the board of jurisdiction.

2. The board has broad discretion in determining whether the territory to be annexed is unreasonably large, and whether the general good of the territory to be annexed will be served by annexation.

To: Richard J. Rinebolt, Hancock County Pros. Atty., Findlay, Ohio
By: William J. Brown, Attorney General, May 21, 1971

Your request for my opinion reads as follows:

"(1) Is the use of the word 'shall' mandatory or directory in Ohio Revised Code Section 709.033?

"(2) Under Part (D) of Ohio Revised Code Section 709.033, what discretion does the Board of Commissioners have in annexations, and what is the interpretation of 'the general good of the territory sought to be annexed'?"

Your first question appears to relate primarily to the use of the word "shall" in two contexts in Section 709.033, Revised Code, although the word does appear a third time, in the last paragraph, respecting entry on the journal of all of the board's orders, etc. The two pertinent appearances of the word are in the first paragraph (requiring the board to approve an annexation if it should make certain findings), and in the next to last paragraph (directing the board to act on an annexation petition within ninety days after hearing). Section 709.033, supra, reads, in part, as follows:

"After the hearing on a petition to annex, the board of county commissioners shall enter an order upon its journal allowing the annexation if it finds that:

"(A) The petition contains all matter required in Section 709.02 of the Revised Code.

"(B) Notice has been published as required by section 709.031 [709.03.1] of the Revised Code.

"(C) The persons whose names are subscribed to the petition are owners of real estate located in the territory in the petition, and as of the time the petition was filed with the board of county commissioners the number of valid signatures on the petition constituted a majority of the owners of real estate in the territory proposed to be annexed.

"(D) The territory included in the annexation petition is not unreasonably large; the map or plat is accurate; and the general good of the territory sought to be annexed will be served if the annexation petition is granted.

"The board of county commissioners shall grant or deny the petition for annexation within ninety days after the hearing set pursuant

to section 709.031 [709.03.1] of the Revised Code.

"* * *

* * *

* * *"

(Emphasis added)

From the statutory language, it becomes clear that the direction to approve the annexation petition depends upon the findings required to be made in Divisions (A) through (D) and that Division (D) involves the exercise of discretion and judgment by the board. I understand your second question to relate to the extent of such discretion. Accordingly, I will discuss it first.

The discretion vested in the board under Division (D) is twofold. In allowing annexation, it must determine that (1) the territory is "not unreasonably large", and (2) the "general good of the territory sought to be annexed" will be served. While exercise of judgment in these areas might be read restrictively, boards of commissioners have, in fact, been accorded broad scope for the use of their judgment.

In dealing with earlier similar language respecting a board's judgment on territory "unreasonably large or small", the Supreme Court in State, ex rel. Loofburrow v. Board of County Commissioners, 167 Ohio St. 156 (1957), held in the second branch of the syllabus:

"The election provided for in Section 709.17, Revised Code, operates as a veto upon such annexation proceedings if it is adverse to such annexation, but, if it is favorable to annexation, such election does not constitute a mandate to the county commissioners to act in a ministerial capacity to effectuate such annexation, the commissioners are still required to exercise their discretion to either allow or deny the petition for annexation, and their denial thereof in good faith, for the reasons that the territory proposed to be annexed is unreasonably large and that it is not right or equitable that the petition for annexation be allowed, is determinative of the issue."

The relator in that case also alleged that the board had abused such discretion as it did possess, by denying the annexation petition. In disposing of that allegation, the Court said:

"* * * Obviously, the commissioners must act in good faith, and there are no allegations in the petition indicating any abuse of discretion or any bad faith upon the part of the commissioners, and, since the hearing of March 21, 1955, apparently was full and complete and the commissioners denied the petition for annexation upon the merits of the facts presented at such hearing, we must conclude that relator is not entitled to a writ of mandamus."

In State, ex rel. Dickerson v. Rike, 113 Ohio App. 228 (1960), a similar result was reached, the Court reiterating that the relator must show affirmatively that an abuse of discretion had occurred. It said, at page 232:

"While mandamus will lie to test the question of an abuse of discretion, the petition must allege facts which, if proved, would tend to show an abuse of discretion. In our opinion the petition in this case is strikingly similar to the petition in the Loofburrow case, in that it fails to allege facts indicating any abuse of discretion or any bad faith upon the part of the commissioners.
* * *

A statutory requirement of affirmative showing by one attacking the allowance of an annexation petition, is now contained in Section 709.07 (A) (2), Revised Code.

While not as immediately pertinent as the foregoing, other decisions reflect a similar view of the extent of the discretion vested in boards of commissioners in these matters. See State, ex rel. Maxson v. Board of County Commissioners of Franklin County, 167 Ohio St. 458 (1958), (holding the Board to have power to alter its determination even after certification and delivery of its journal transcript to the clerk of the annexing municipality); Dabkowski v. Baumann, 175 Ohio St. 89 (1963), (dealing with the accuracy of the map of the territory; the place of posting of the notice of hearing; the amendment of the annexation petition by the agent; and the practical necessity for broad discretion to be vested in such boards. See also State, ex rel. Hannan v. DeCourcy, 18 Ohio St. 2d 73, 82 (1969).

Thus, it may be concluded that Section 709.033 (D), supra, authorizes the board to exercise broad powers of discretion and judgment in the two categories delineated in that paragraph, summarized above. Those powers, of course, must be exercised in good faith and not arbitrarily or capriciously.

As to the time limits within which hearing must be held and decisions made, the requirements of the Section are explicit. They have been held to be mandatory on boards of commissioners, subject to excuse, however, in unusual circumstances. The first branch of the syllabus in State, ex rel. Hannan v. DeCourcy, supra, is as follows:

"1. When a duty is enjoined by statute upon an administrative board to hear and decide an issue within a specific time limitation, it is mandatory that the board act accordingly, unless to do so would lead to an inevitable conflict with rights which are superior to those of the party for those benefit the duty is to be discharged."

It should be noted, however, that failure by a board to

act within the specified time limits appears not to deprive it of jurisdiction. The first branch of the syllabus in Garverick, et al. v. Hoffman, et al., 20 Ohio Misc. 34 (1969), is as follows:

"1. The failure of a board of county commissioners to grant or deny a petition for annexation of territory to a municipal corporation within ninety days after hearing, as required by Section 709.033, Revised Code, does not deprive the board of jurisdiction of the proceedings."

As that Court pointed out, mandamus would lie to force a board to hear and decide an annexation petition, in accordance with its mandated duties, so that annexation procedures could not become clogged.

Thus, a board is required to hear and decide an annexation petition within the time limits set forth in Section 709.033, supra; those time limits, however, may be extended by the board where proceeding would lead to conflict with superior rights; the board, otherwise, is subject to mandamus to force it to hear and to decide; but its failure to comply with the time limits does not deprive it of power to act afterward.

In specific answer to your questions, it is my opinion and you are advised that:

1. The word "shall" in Section 709.033, Revised Code, is mandatory in that the board of county commissioners must hear and decide an annexation petition if it is reasonably possible to do so within the ninety day period allowed by the act; but failure to take action within that time does not deprive the board of jurisdiction.

2. The board has broad discretion in determining whether the territory to be annexed is unreasonably large, and whether the general good of the territory to be annexed will be served by annexation.