

**OPINION NO. 88-066**

**Syllabus:**

1. A county prosecuting attorney has no duty pursuant to R.C. 309.09(A) to represent a board of township trustees before a board of county commissioners in a hearing on a petition to annex territory to a municipal corporation pursuant to R.C. Chapter 709.

2. Additional legal counsel authorized by R.C. 309.09(A) may not be employed to represent a board of township trustees in annexation matters pursuant to R.C. Chapter 709.
3. A board of township trustees, pursuant to R.C. 505.62, may enter into a contract with an attorney to represent the township in annexation matters pursuant to R.C. Chapter 709.
4. A board of county commissioners is prohibited from paying from county funds for the services of an attorney contracted for under R.C. 505.62 to represent the board of township trustees in municipal annexation matters pursuant to R.C. Chapter 709.

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**To: Gregory A. White, Lorain County Prosecuting Attorney, Elyria, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, September 12, 1988**

I have before me your request for an opinion concerning the prosecuting attorney's duty to serve as legal adviser of boards of township trustees in municipal annexation matters and the source of payment for other counsel to represent the township trustees in such matters. After conversations between our respective staffs, I have restated your specific questions as follows:

1. Does a county prosecuting attorney have a duty pursuant to R.C. 309.09(A) to represent a board of township trustees before a board of county commissioners in a hearing on a petition to annex territory to a municipal corporation pursuant to R.C. Chapter 709?
2. May additional legal counsel authorized by R.C. 309.09(A) be employed to represent a board of township trustees in municipal annexation matters pursuant to R.C. Chapter 709?
3. Is the board of county commissioners required or permitted to pay from county funds for the services of an attorney contracted for under R.C. 505.62 to represent the board of township trustees in municipal annexation matters pursuant to R.C. Chapter 709?

The general authority to participate in municipal annexation proceedings is found at R.C. 709.032 which states, in pertinent part:

The hearing provided for in section 709.031 of the Revised Code shall be public. *Any person* may appear, in person or by attorney, and support or contest the granting of the prayer of the petition provided for by section 709.02 of the Revised Code. Affidavits presented in support of or against the prayer of such petition shall be considered by the board. (Emphasis added.)

R.C. 505.62 specifically permits a board of township trustees to participate in annexation proceedings in its official capacity:

A board of township trustees may enter into a contract with, and appropriate township general revenue fund moneys for the services of, an attorney to represent the township at annexation hearings before the board of county commissioners and upon any appeal of the board's decision pursuant to section 709.07 or Chapter 2506. of the Revised Code.

The board of township trustees of a township that includes territory that is proposed to be annexed has standing in any appeal of the board of county commissioners' decision on the annexation of township territory that is taken pursuant to section 709.07 or Chapter 2506. of the Revised Code, if the board of township trustees was represented at the annexation hearing before the board of county commissioners.

Thus, it must be concluded that boards of township trustees are authorized to participate in municipal annexation proceedings. However, the role of a board of township trustees in municipal annexation proceedings has been judicially construed to be a narrow one:

The procedure for annexation of territory to municipal corporations has been defined by R.C. Chapter 709. This court recognizes the important role played by township trustees in the process. In fact, public policy considerations mandate that township trustees be given the opportunity to actively participate. In response to those considerations the General Assembly has made provisions for notice to township trustees and has further enabled them to participate in annexation hearings before the county commissioners. However, the extent of participation by township trustees must be confined to the scope outlined by R.C. Chapter 709.

*In Re Appeal of Bass Lake Community, Inc.*, 5 Ohio St. 3d 141, 142, 449 N.E.2d 771, 773 (1983).

The role has been further explained: "The manifest intention of the legislature in this statutory scheme was to allow township trustees to have a public forum where errors in the annexation proceedings could be pointed out and aired." *Bd. of Trustees of Perry Township v. Cicchinelli*, 35 Ohio App. 3d 173, 178, 520 N.E.2d 235, 240 (Stark County 1986), *motion to certify record overruled*, No. 87-382 (Ohio Sup. Ct. April 8, 1987).

Historically, boards of township trustees were prohibited from meaningful participation in municipal annexation matters. Prior to the amendment of R.C. 709.032, *see* 1979-1980 Ohio Laws 409 (Am. S.B. 151, eff. Jan. 17, 1980), boards of township trustees were not authorized to enter into a controversy involving municipal annexation. *See* 1966 Op. Att'y Gen. No. 66-061 ("a board of township trustees are not, in their official capacity, interested parties in annexation" at syllabus 1.). Boards of trustees were held *not* to be interested parties in annexation matters, including injunction proceedings and other appeals from the decision of the board of county commissioners, irrespective of their status as "any person" under R.C. 709.032. Interested parties were held to be only those who owned real estate in the territory sought to be annexed. *Bass Lake, supra*; *Eaton v. Board of County Comm'rs.*, 45 Ohio App. 2d 316, 345 N.E.2d 87 (Summit County 1973) *motion to certify record overruled*, No. 73-502 (Ohio Sup. Ct. Sept. 14, 1973); *Weber v. Williams*, 32 Ohio App. 2d 65, 288 N.E.2d 322 (Defiance County 1972). Following *Bass Lake*, the legislature amended R.C. 505.62. 1983-1984 Ohio Laws 2196 (Sub. H.B. 175, eff. Sept. 26, 1984). In its present form R.C. 505.62 specifically grants standing to boards of township trustees to pursue R.C. 709.07 injunctions and to participate in R.C. Chapter 2506 appeals. In considering the effects of the above legislative history, the Stark County Court of Appeals summarized the annexation statutes:

The township trustees were also given the power to hire an attorney and spend funds to appeal the granting of an annexation. But the legislature did not make the trustees "interested persons." The trustees could benefit from these proceedings only tangentially, where another party, who is "interested," has an injunction granted on his behalf.

*Bd. of Trustees of Perry Township v. Cicchinelli, supra*, at 178.

R.C. 505.62, by its express terms, permits a board of township trustees to hire an attorney to represent the township at annexation hearings before the boards of county commissioners and subsequent appeals. Prior to the enactment of R.C. 505.62 township trustees were "non-parties" to annexation proceedings before boards of county commissioners. *Carlyn v. Davis*, 1 Ohio App. 3d 75, 439 N.E.2d 463 (Summit County 1981) *motion to certify record overruled*, No. 81-459 (Ohio Sup. Ct. May 20, 1981).<sup>1</sup> Even after the enactment of R.C. 505.62, a careful reading of

<sup>1</sup> Am. S.B. 151, enacting R.C. 505.62 and amending R.C. 709.032 to allow any person to participate in annexation matters, likewise did not bestow

R.C. Title 5 and R.C. Title 7 reveals no duty imposed on a board of township trustees to participate in annexation proceedings. Absent a specific legal right or interest to protect, namely, being the owner of real estate in the territory sought to be annexed, the permissible role to be played is that of advocate, not that of interested party. Therefore, a board of township trustees, although allowed to participate in an official capacity, is under no duty to participate and has no legal rights to protect.

The prosecuting attorney of a county is the legal adviser and legal counsel<sup>2</sup> of the board of township trustees. R.C. 309.09(A) explicitly states, in relevant part, that:

Such prosecuting attorney shall be the legal adviser for all township officers. When the board of township trustees deems it advisable or necessary to have additional legal counsel it may employ an attorney other than the prosecuting attorney of the county, either for a particular matter or on an annual basis, to represent the township and its officers in their official capacities and to advise them on legal matters. No such counsel or attorney may be employed, except on the order of the board of township trustees, duly entered upon its journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund.

R.C. 505.62, however, specifically authorizes a board of township trustees to retain an attorney to represent it in annexation proceedings. I, therefore, conclude that the county prosecuting attorney does not have a duty to represent the board of township trustees when it elects to participate in an annexation proceeding. I find support in this conclusion in the historical development of the caselaw and in the enactment of R.C. 505.62, and its subsequent amendment. In Op. No. 66-061 it was concluded that there was no authority for a board of township trustees to participate in an annexation proceeding. Implicit in that conclusion is the corollary rule that since the board had no authority to participate, the prosecuting attorney had no duty to represent the board. It was not until 1980 with the enactment of R.C. 505.62 that a township was permitted to participate in such proceedings. Am. S.B. 151. However, this very statute which conferred standing begins with the following language:

A board of township trustees may enter into a contract with, and appropriate township general revenue fund moneys for the services of, an attorney to represent the township at annexation hearings before the board of county commissioners and upon any appeal of the board's decision pursuant to section 709.07 or Chapter 2506. of the Revised Code.

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"party" status upon township trustees. The Ohio Supreme Court stated:

Although R.C. 709.032 permits the township trustees to appear at the hearing and contest the granting of an annexation petition, there is nothing which confers upon them the status of necessary parties to an appeal. Rather, that section merely permits persons who have a concern about the proceedings to appear and contest.

*Bass Lake, supra*, at 144.

<sup>2</sup> Historically, an inherent distinction existed between the functions of legal adviser and legal counsel. A cogent analysis of the differences is found at *State ex rel. Hunt v. Hamilton County Comm'rs.*, 20 Ohio Dec. 679, 8 Ohio N.P. (n.s.) 281 (C.P. Hamilton County 1909), *aff'd sub. nom. Ireton v. State*, 81 Ohio St. 562, 91 N.E. 1131 (1910). A "legal adviser" is charged with the giving of opinions, while "legal counsel" is charged with the prosecution and defense of actions. *Hunt, supra*; see also *State v. Stafford*, 11 Ohio Dec. 720, 8 Ohio N.P. 470 (C.P. Clark County 1901); *State ex rel. Will v. Taylor*, 16 Ohio Dec. 66, 3 Ohio N.P. (n.s.) (C.P. Franklin County 1905).

Inasmuch as R.C. 309.09 already permitted the board to hire additional counsel whenever it deemed such counsel necessary or advisable, it is clear that the General Assembly did not view R.C. 309.09 as providing authority for the board to hire counsel for an annexation proceeding. Had the General Assembly viewed R.C. 309.09 as providing such authority, then R.C. 505.62, as it was originally enacted, would have been superfluous. *Charles v. Fowley*, 71 Ohio St. 50, 72 N.E. 294 (1904)(the General Assembly is presumed to have acted with knowledge of all relevant statutory provisions previously adopted). In context, therefore, it is clear that the General Assembly conferred standing upon a board of township trustees to participate in annexation proceedings, but limited representation of the township to counsel hired at township expense. Am. S.B. 151.

R.C. 505.62 controls responsibility for payment for legal services for representation of a board of township trustees in annexation proceedings. By the clear terms of R.C. 505.62, the township trustees are responsible for payment of legal counsel employed for legal representation in municipal annexation matters.

Inasmuch as R.C. 505.62 clearly places the responsibility for payment for legal services in representing the board of trustees in municipal annexation matters upon the board of trustees to "appropriate township general fund moneys" and no permission for payment is granted elsewhere in the Revised Code, a board of county commissioners cannot expend county funds to pay for such representation. This conclusion is based upon

[t]he legal principle [which] is settled in this state that county commissioners, in their financial transactions, are invested only with limited powers, and that they represent the county only in such transactions as they may be expressly authorized so to do by statute. The authority to act in financial transactions must be clear and distinctly granted, and, if such authority is of doubtful import, the doubt is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county.

*State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571 (1916).

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

1. A county prosecuting attorney has no duty pursuant to R.C. 309.09(A) to represent a board of township trustees before a board of county commissioners in a hearing on a petition to annex territory to a municipal corporation pursuant to R.C. Chapter 709.
2. Additional legal counsel authorized by R.C. 309.09(A) may not be employed to represent a board of township trustees in annexation matters pursuant to R.C. Chapter 709.
3. A board of township trustees, pursuant to R.C. 505.62, may enter into a contract with an attorney to represent the township in annexation matters pursuant to R.C. Chapter 709.
4. A board of county commissioners is prohibited from paying from county funds for the services of an attorney contracted for under R.C. 505.62 to represent the board of township trustees in municipal annexation matters pursuant to R.C. Chapter 709.