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1. ANNEXATION—ORDINANCE OF ACCEPTANCE ADOPTED—LEGISLATIVE AUTHORITY OF MUNICIPAL CORPORATION—ORDINANCE APPROVED BY ELECTORATE—LEGAL REQUIREMENTS COMPLIED WITH—RESIDENCE IN MUNICIPALITY—PERSONS RESIDING IN ANNEXED TERRITORY—DATE OF PASSAGE OF ORDINANCE OF ACCEPTANCE IN COUNCIL.—DETERMINATION OF RESIDENCE QUALIFICATIONS—SECTIONS 709.02 ET SEQ., 709.10 RC.
2. ELECTION DATE—TO DETERMINE PRIOR RESIDENCE IN VILLAGE—CANDIDATE, MEMBER OF LEGISLATIVE AUTHORITY OF VILLAGE—DATE OF GENERAL ELECTION—SECTION 731.12 RC.

SYLLABUS:

1. Where an ordinance accepting an annexation pursuant to the procedure contemplated by Section 709.02, et seq., Revised Code, has been adopted by the legislative authority of a municipal corporation and where by subsequent referendum the electorate of the municipality has approved said ordinance, and where all other procedures required by said statutes have been complied with, the date to be used in determining the qualifications by way of residence in the municipality, of persons residing in the territory annexed, is the date of passage of the ordinance of acceptance in council, as provided by Section 709.10, Revised Code.

2. The date of election as provided in Section 731.12, Revised Code, to be used in determining prior residence in a village of a candidate for member of the legislative authority of said village, is the date of the general election, and not the date when the results thereof are certified.

Columbus, Ohio, May 5, 1955

Hon. Ted W. Brown, Secretary of State
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which is predicated upon the following facts:

On or about December 29, 1953, proceedings for annexation to a municipality were instituted upon the application of a citizen of the terri-

tory proposed to be annexed, pursuant to Section 709.02, Revised Code. Thereafter and on January 17, 1954, the board of county commissioners approved the petition and annexation and filed same with the clerk of the municipality concerned. On May 3, 1954, an ordinance accepting the annexation, (hereinafter referred to as ordinance of acceptance,) was introduced in the council of the municipality. On June 14, 1954, the ordinance of acceptance was passed by the council. Final publication was made on June 24, 1954. Thereafter, on July 13, 1954, a petition was filed in the Court of Common Pleas of the county concerned, attacking the ordinance of acceptance on the grounds of alleged invalid procedure in council. As an incident to this litigation the court granted a temporary injunction which, by its terms, generally prohibited the municipal officials from taking any further action with respect to the annexation petition. Concurrently with this litigation a referendum petition was likewise filed in the municipality for the purpose of having the ordinance of acceptance submitted to the electors of the municipality at a general election to be held on November 2, 1954. Thereafter, pursuant to the provisions of Section 731.29, Revised Code, on November 2, 1954, the ordinance was voted upon by the electors of the municipality and on November 15, 1954, the county board of elections certified the official vote on the referendum to the clerk of the municipality, which vote, in effect, approved the ordinance of acceptance. November 20, 1954, was the fifth day following the certification of the official vote within the purview of that portion of Section 731.31, Revised Code, which provides as follows:

“* * * Ordinances proposed by initiative petition and referendums receiving an affirmative majority of the votes cast thereon, shall become effective on the fifth day after the day on which the board of elections certifies the official vote on such question.”

Thereafter, on December 17, 1954, the petition for injunction relative to the annexation proceedings was dismissed and the temporary injunction dissolved. On December 16, 1954, the clerk of the municipality filed a certified copy of the annexation proceedings with the county recorder, as required by Section 709.06, Revised Code.

Your inquiry comprehends the question of when the inhabitants of the area annexed become residents of the territory to which they were annexed, under the foregoing statement of facts, in view of the provisions of that portion of Section 731.12, Revised Code, which provides as follows:

“Each member of the legislative authority of a village shall have resided in the village one year next preceding his election, and shall be an elector of the village. * * *”

An enumeration of the possible dates on which it might be urged that the inhabitants of the territory annexed became residents of the territory to which they were annexed, is as follows:

- (a) June 14, 1954, the date when the ordinance of acceptance was passed in council.
- (b) June 24, 1954, the date of final publication of said ordinance.
- (c) November 2, 1954, the date when the electors of the municipality voted affirmatively on the referendum.
- (d) November 20, 1954, the date when the referendum would become effective as provided by the pertinent provision of Section 731.31, *supra*.
- (e) December 16, 1954, the date when a certified copy of the annexation proceedings were filed with the county recorder as required by Section 709.06, *supra*.
- (f) December 17, 1954, the date of entry of the judgment in favor of the municipality dissolving the temporary injunction and dismissing the petition for permanent injunction.

We may, at the outset, eliminate the date of the dissolution of the injunction as a possible date for consideration in this question. Clearly, if the annexation had become effective prior to the issuance of the temporary injunction, such injunction could not have had the effect of voiding the annexation already accomplished. Nor did the injunction by its terms purport to do so. It is equally clear that if further steps were required to be taken to effect such annexation as of the time the injunction issued, the fact that the injunction was subsequently dissolved would be in no way germane except insofar as the dissolution of the injunction would serve to permit such further steps. In any event, the date when the necessary action was taken would be controlling.

The date of the general election on the referendum would likewise be immaterial. If the effective date of the annexation were dependent upon

the referendum, that portion of Section 731.31, *supra*, previously quoted, would manifestly obtain and the effective date would be the fifth day following certification as therein provided.

The resolution of the remaining alternatives requires a consideration and comparison of two seemingly inconsistent sections of the Revised Code.

Section 709.10, formerly Section 3556, General Code, provides:

“When the resolution or ordinance accepting annexation of adjacent territory has been adopted by the legislative authority of a municipal corporation, such territory is deemed a part of the municipal corporation, and the inhabitants residing therein shall have all the rights and privileges of the inhabitants within the original limits of such municipal corporation.”

Section 731.29, Revised Code, formerly Section 4227-2, General Code, provides in pertinent part as follows:

“Any ordinance or other measure passed by the legislative authority of a municipal corporation shall be subject to the referendum except as provided by section 731.30 of the Revised Code. No ordinance or other measure shall go into effect until thirty days after it is filed with the mayor of a city or passed by the legislative authority in a village, except as provided by such section.”

The section then provides for the mechanics of a referendum and states:

“No such ordinance or measure shall go into effect until approved by the majority of those voting upon it. * * *”

If the legislative intent inherent in Section 709.10, *supra*, is to be given any effect at all, regardless of the question of its possible restriction or limitation by the quoted portion of Section 731.29, *supra*, it is clear that the effective date is dependent upon the ordinance of acceptance and not upon the compliance with those ministerial requirements which the relevant statutes clearly contemplate shall be met subsequent to the ordinance. Therefore, the date when the transcript of the annexation proceedings are filed with the county recorder as required by Section 709.06, Revised Code, is not controlling. This conclusion is in accordance with the decision in *State, ex rel. South Brooklyn v. Craig*, 11 O.C.D., 348. The second headnote of this case reads as follows:

“Upon the passage and legal publication of an ordinance accepting an application for the annexation of territory, such

territory at once becomes part of the corporation. The fact that the transcript, map and other papers were not filed for record until a later date does not affect the question.”

In an analogous case, it was held that notwithstanding the requirement of Section 709.12, Revised Code, formerly Section 3157-1, General Code, that any existing indebtedness should be apportioned as between the respective territories and that an ordinance accepting such apportionment was necessary to the validity of the annexation, such annexation was nevertheless effective upon the passage of the ordinance of acceptance of the annexation subject to being voided by the subsequent failure of a municipality to accept, by ordinance, the apportionment. *Roettker v. Cincinnati*, 56 Ohio App., 464.

The question then resolves itself into a choice between the date when the referendum was effective and the date of passage or publication of the ordinance of acceptance of the municipal council. The only authority which has apparently passed upon this precise question is *Board of Education v. Board of Education*, 48 Ohio Opinions, 254, affirmed 48 Ohio Opinions, 264.

In commenting upon this issue, the court stated in part at page 260:

“It is also argued that the ordinance did not go into effect until thirty days after September 26, 1930, because of the provisions of General Code Section 4227-2, which reads in part as follows:

‘Any ordinance, or other measures passed by the council of any municipal corporation shall be subject to the referendum except as hereinafter provided. No ordinance or other measure shall go into effect until thirty days after it shall have been * * * * passed by the council in a village, except as hereinafter provided.’

“There is an inconsistency between this section and General Code 3556 which provides that when the ordinance of acceptance is adopted the territory shall be deemed a part of the municipality. The inconsistency is explained by the fact that the referendum law was passed by the legislature a considerable time after the enactment of General Code Section 3556. However, since General Code Section 3556 has not been expressly repealed, both sections must be given full force and effect if possible. It is clear that under General Code Section 3556 the territory becomes annexed upon the passage of the ordinance. General Code Section 4227-2 makes the ordinance subject to a referendum, that is, the ordinance will be void only if there is a referendum within thirty days

and the voters of the municipality cast an unfavorable vote; otherwise the ordinance is valid from the date of its passage on September 26, 1950. * * *

I am in agreement with the expression of the court in this regard. The statutes concerning annexation relate to a particular and unique proceeding for the accomplishment of a particular purpose. I cannot assume that the legislature in passing those statutes applying the referendum procedure to ordinances in general, intended to repeal by implication those provisions of the law applicable to a limited and restricted field. On this point the language of Sutherland on Statutory Construction, Vol. 1, page 486, Section 2021, is persuasive:

“The enactment of a general law broad enough in its scope and application to cover the field of operation of a special or local statute will generally not repeal a statute which limits its operation to a particular phase of the subject covered by the general law, or to a particular locality within the jurisdictional scope of the general statute. An implied repeal of prior statutes will be restricted to statutes of the same general nature, since the legislature is presumed to have known of the existence of prior special or particular legislation, and to have contemplated only a general treatment of the subject matter by the general enactment. Therefore, where the later general statute does not propose an irreconcilable conflict, the prior special statute will be construed as remaining in effect as a qualification of or exception to the general law.”

I am not unaware that the endeavor to apply both of these seemingly inconsistent statutes could result in further problems under varying circumstances. These problems are not, however, before me. For example, the status of the inhabitants with respect to their right to require municipal services during the period from the passage of the ordinance of acceptance in council and the final decision of the electorate on the referendum is not a matter for decision at this juncture; nor do I consider the principles applied herein as necessarily applicable to such an issue. Suffice it to say that once the conditions of (1) the proper publication of the ordinance of acceptance, (2) the expiration of the thirty day period required by Section 731.29, *supra*, or (3) if a referendum is called for, the favorable vote by the electorate on the issues raised by the referendum, and (4) such other statutory requirements as are necessary to completely effectuate annexation, have been complied with, the date which determines the residence status of the citizens of the territory annexed must relate back

to the date of the adoption of the ordinance in council. Having so concluded, it follows that the date of final publication of the ordinance is not a determining factor, but is likewise a condition which must be properly complied with at the hazard of avoiding the annexation. This conclusion is implicit in the holding of *Board of Education v. Board of Education*, supra, which likewise considered the date of the *passage* of the ordinance of acceptance by the municipal council as controlling.

You have likewise submitted a subsidiary question as to what is the date of the "election" of a member of the legislative authority of a village for the purpose of determining his prior year's residence as required by Section 731.12, supra. The only possible dates which could reasonably be considered as determinative in this connection would be (a) the date of the general election, (b) the date when the local board of elections certifies the result of the election to the Secretary of State, and (c) the date when the local board of elections issues its certificate of election to the candidate.

Without regard to the meaning of the terms "election" or "elected" as they may appear in other statutes, it is apparent that there is only one date of the three suggested which is determined and determinable as of the time of candidacy, and that is the date of the general election. Obviously, the date when the results of the election are certified by the local board of election and the date when such board issues its certificate of election may and will vary with circumstances, and to decide that either of these latter two dates is controlling would create such an area of confusion as to negate the principal purpose of Section 731.12, supra. In short, a candidate who resided in the municipality for less than one year prior to the date of the general election would be in constant doubt as to his eligibility as a candidate until such time as circumstances dictated when the result of the vote would be certified to the Secretary of State or when the local board of election would issue his certificate of election.

Accordingly, and in specific answer to the questions raised by your request, it is my opinion that :

1. Where an ordinance accepting an annexation pursuant to the procedure contemplated by Section 709.02, et seq., Revised Code, has been adopted by the legislative authority of a municipal corporation and where by subsequent referendum the electorate of the municipality has approved said ordinance, and where all other procedures required by said statutes

have been complied with, the date to be used in determining the qualifications by way of residence in the municipality, of persons residing in the territory annexed, is the date of passage of the ordinance of acceptance in council, as provided by Section 709.10, Revised Code.

2. The date of election as provided in Section 731.12, Revised Code, to be used in determining prior residence in a village of a candidate for member of the legislative authority of said village, is the date of the general election, and not the date when the results thereof are certified.

Respectfully,

C. WILLIAM O'NEILL

Attorney General