

OPINION NO. 1184**Syllabus:**

Under Section 709.17, Revised Code, the question of annexing contiguous territory to a municipal corporation must be submitted to a vote of the electors of the entire unincorporated area of the township and not merely to the electors of the territory to be annexed. (Opinion No. 745, Opinions of the Attorney General for 1949, approved and followed. Informal Opinion No. 532, Opinion of the Attorney General for 1962 overruled).

To: Garver Oxley, Hancock County Pros. Atty., Findlay, Ohio
By: William B. Saxbe, Attorney General, July 1, 1964

Your recent request for my opinion reads as follows:

"Village A desires to annex territory adjacent to it which is owned by a private corporation B, upon which there are no resident freeholders. B is desirous of having the annexation take place. I understand, pursuant to 1956 OAG 6223 that a private corporation is not qualified to petition for annexation of its property.

"I have been of the opinion that, under Sec. 709.13 O.R.C. et seq., the Municipal Corporation may petition for said annexation, but that a vote by the 'electors of the unincorporated area of the township shall be taken---'. This I have distinguished from electors of the territory to be annexed. I have consistently advised that under the proceedings pursuant to O.R.C. 709.13, that a vote is required by the electors of all

of the township which is unincorporated. However, I am advised that your office in an informal opinion dated November 14, 1962, being Opinion No. 532, to the Prosecuting Attorney of Tuscarawas County, rendered an opinion that under similar circumstances such vote was not required.

"Therefore, I respectfully request your opinion as to whether or not, pursuant to O.R.C. 709.13, where the territory to be annexed is owned by a private corporation with 'no resident freeholders', a vote is required and if so, what persons have the right to vote."

The 1962 Informal Attorney General's Opinion, No. 532, referred to in your request, cited and followed an earlier opinion (Opinion No. 6759, Opinions of the Attorney General for 1944) which was based on Section 3561-1, General Code (now Section 709.17, Revised Code). The pertinent part of Section 3561-1, General Code, was as follows:

"A vote, by the electors residing in the contiguous territory, shall be taken under the election laws of the state of Ohio at the next general or primary election occurring more than thirty days after council passes the ordinance mentioned in section 3559 of the General Code. Thereupon all annexation proceedings shall be stayed until the result of the election shall be known. If a majority favor annexation, proceedings shall begin within ninety days to complete annexation, and if a majority vote is against annexation, no further proceedings shall be had for annexation for at least five years."

(Emphasis added)

The (1944) opinion, and I believe rightly so, based on the statutory language at that time, concluded, that "(T)he purpose of this act is manifestly grounded solely on a recognition of the right of the inhabitants residing in the territory in question to have a voice in the matter."

However, in 1947, the section in question was amended so as to read:

"A vote by the electors of the unincorporated area of the township shall be taken under the election laws of this state at the next general or primary election occurring more than thirty days after the legislative authority of a municipal corporation passes the ordinance mentioned in section 709.14 of the Revised Code. Thereupon all annexation proceedings shall be stayed until the result of the election is known. If a majority of the electors of such area voting in the elec-

tion favor annexation, proceedings shall begin within ninety days to complete annexation and if a majority of the electors voting in the election is against annexation, no further proceedings shall be had for at least five years.

"Whenever the territory sought to be annexed is owned by a county, and when the electors residing in such territory are inmates of or resident employees of a county institution the provisions of this section relative to a vote shall not apply.

"If such territory is annexed subsequent to the day upon which taxes become a lien, the new municipal corporation tax rate shall not apply until the day preceding the second Monday of April next following when the lien of the state for taxes levied attaches. In the meantime the old township tax rate shall apply."

(Emphasis added)

The underlined language was added to this section in 1947. It would appear that the Legislature, by this amendment, intended a broader participation by electors.

This change in statutory language was analyzed in Opinion No. 745, Opinions of the Attorney General for 1949 as follows:

"Prior to 1941 there was no requirement that an election of the inhabitants of the area be held in case the adjacent municipality should desire to annex unincorporated territory. Section 3561-1 as enacted in 1941, introduced the election requirement by providing that a vote shall be taken of the 'electors residing in the contiguous territory.' In 1947 the section was amended to require that the vote be by the electors of the entire unincorporated area of the township involved. (I suspect that this amendment resulted in part from the situation before the Attorney General in 1944 Opinions of the Attorney General, page 138. In dispute was the question of annexation of territory at the instance of the adjacent municipality, in which there were no electors residing. Residents of the remaining unincorporated area of the township objected to the annexation and filed a petition with the township trustees praying for the incorporation of a village which would include the area sought to be annexed. The then Attorney General ruled in effect against the residents of the unincorporated area; and on the first question raised held that since Section 3561-1 as then in force, provided

for a vote only of the electors residing within the territory to be annexed and since there were no electors residing there it would not be necessary to go through the formality of holding an election.)

"The first paragraph of Section 3561-1 (709.17, Revised Code, which reads the same) as now in force reads as follows:

"'A vote, by the electors of the unincorporated area of the township shall be taken* * *'

"It is readily seen that the purpose of the above section is to prevent a municipality from annexing adjacent unincorporated territory against the will of a majority of the electors of the entire unincorporated area of the township concerned. The section is so phrased that it is clear the election requirement is an integral part of the procedure when the annexation is undertaken upon the application of the municipality."

(Emphasis added)

The 1962 Opinion did not cite this 1949 opinion and concluded that there was no substantial change in the statute through the change in language. A conclusion with which I can not agree. The change in language appears clearly to have been intended to broaden the area of election from the territory sought to be annexed to the unincorporated area of the entire township. A conclusion which finds support in State ex rel. Loofbourrow v. Board of Commissioners, 167 Ohio St., 156; the first branch of the syllabus of which is as follows:

"1. As to proceedings by a municipal corporation, under Sections 709.13 to 709.21, Revised Code, for the annexation of contiguous unincorporated territory of a township, Section 709.17 provides for a vote by the electors of the unincorporated area of the township, and that all annexation proceedings shall be stayed until the result of the election shall be known. If, in such election, a majority of the electors of the unincorporated area vote in favor of annexation, proceedings shall begin within 90 days to complete it, but if a majority of the votes in the election are against annexation, no further proceedings by petition of a municipal corporation for annexation shall be had for at least five years."

(Emphasis added)

This in no way affects the conclusion reached in Opinion No. 6223, Opinions of the Attorney General for 1956, i.e., that a private corporation is not qualified

to petition for annexation and that a private corporation is not entitled to vote, as provided in Section 709.17, Revised Code, since that section refers only to electors of the unincorporated area.

The only time a vote would not have to be taken, under Section 709.17, Revised Code, is when there are no qualified electors in the entire unincorporated area or when the area to be annexed falls into the "exception" categories provided in Section 709.17, Revised Code.

Therefore, and you are hereby advised, that under Section 709.17, Revised Code, the question of annexing contiguous territory to a municipal corporation must be submitted to a vote of the electors of the entire unincorporated area of the township and not merely to the electors of the territory to be annexed. (Opinion No. 745, Opinions of the Attorney General for 1949, approved and followed. Informal Opinion No. 532, Opinions of the Attorney General for 1962 overruled).