

OPINION NO. 90-027**Syllabus:**

1. For purposes of R.C. 709.02, a municipal corporation may be a trustee and, thus, may be an owner that may petition to annex municipally-owned real property to a municipal corporation.
2. When a municipal corporation is an "owner" as defined in R.C. 709.02, it may proceed with annexation of its land either as provided in R.C. 709.02 through R.C. 709.12 or as provided in R.C. 709.13 through R.C. 709.21.
3. When a municipal corporation is an "owner" as defined in R.C. 709.02, and proceeds with an annexation as provided in R.C. 709.02 through R.C. 709.12, no election under R.C. 709.17 is required.
4. When a municipal corporation utilizes R.C. 709.13 through R.C. 709.21 to annex land owned by the municipal corporation, the election under R.C. 709.17 is required to be held, unless the only land to be annexed is owned by the municipality *and* such territory is located entirely within the same county as the municipal corporation seeking annexation.
5. Pursuant to R.C. 709.11 and R.C. 709.18, if a municipality located in one county seeks to annex adjacent land in another county, the petition for annexation must be filed with and decided by the board of county commissioners of the county in which the land sought to be annexed is located.

To: Kevin J. Baxter, Erie County Prosecuting Attorney, Sandusky, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, April 11, 1990

I have before me your request for my opinion regarding the annexation, pursuant to R.C. Chapter 709, of municipally-owned territory. You have asked whether an election must be held pursuant to R.C. 709.17 or whether proceedings may be confined to those set forth in R.C. 709.02 through R.C. 709.12 when the municipally-owned territory sought to be annexed is adjacent to the municipality but is wholly located in a county other than the county in which the municipality is located. As additional background, your letter relates that the City of Bellevue is located in both Sandusky and Huron counties. The city has petitioned the Board of Erie County Commissioners to annex to the City of Bellevue an adjacent tract of city-owned land located entirely within Erie County.

Annexation of territory to an existing municipal corporation is controlled by R.C. 709.01 through R.C. 709.47. R.C. 709.01. R.C. Chapter 709 authorizes two separate and distinct methods for the annexation of unincorporated territory. *State ex rel. City of Toledo v. Board of Comm'rs of Lucas County*, 32 Ohio St. 3d 352, 513 N.E.2d 769 (1987); *Board of Trustees of Perry Township v. Cicchinelli*, 35 Ohio App. 3d 173, 174, 520 N.E.2d 235, 236 (Stark County 1986) ("[t]hese two methods are distinctly different and are distinguished by the procedural requirements set forth in the statutes"); 1988 Op. Att'y Gen. No. 88-102.¹

¹ Various sections of R.C. Chapter 709 also permit other types of annexation or attachment of territory to a municipal corporation. These methods affect real property already incorporated into a municipal corporation. R.C. 709.22 through R.C. 709.34 permit one municipality to agree to be annexed by another. The effect of this type of annexation is a merger of the two municipalities into one. R.C. 709.34. Merger of municipal corporations may also be accomplished under R.C. 709.43 through R.C. 709.50. Additionally, when two adjoining municipal corporations agree

The first method, detailed in R.C. 709.02 through R.C. 709.12, is annexation by a petition of landowners. As explained by the court in *Cicchinelli*, consent to an annexation pursuant to R.C. 709.02 through R.C. 709.12 is demonstrated by the landowner's signature on the petition. The petition is then filed in the office of the board of county commissioners, R.C. 709.03, and a hearing on the petition is had pursuant to R.C. 709.032 to determine, *inter alia*, that the number of signatures on the petition constitutes a majority of the owners of real estate in the territory proposed to be annexed. R.C. 709.033.

Because the City of Bellevue holds the title in fee simple to the land that is the subject of an annexation request, your inquiry raises the question whether the city is an owner for purposes of R.C. 709.02 and, thus, whether the landowner petition method is available. R.C. 709.02 states, in part:

The owners of real estate 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 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, and signed by a majority of the owners of real estate in such territory....

As used in sections 709.02 to 709.21 and 709.38 and 709.39 of the Revised Code, "owner" or "owners" means any adult individual seized of a freehold estate in land who is legally competent and any firm, trustee, or private corporation that is seized of a freehold estate in land.... (Emphasis added.)

Pursuant to R.C. 709.02, the general rule is that all owners of a freehold estate in real property, including a public entity as a "trustee," may petition to have their land annexed. Op. 88-102. Under this rule a public entity holds the land in trust for the public. Therefore, a municipality could be a trustee, and consequently, an owner under R.C. 709.02. See also 1986 Op. Att'y Gen. No. 86-019 (State of Ohio and a conservancy district may be owner); 1982 Op. Att'y Gen. No. 82-060 (board of park commissioners may be owner); 1979 Op. Att'y Gen. No. 79-043 (board of education of local school district may be owner). Further, one Ohio court has reached the conclusion that a city may be an owner under R.C. 709.02. *In Re: Annexation of 109.528 Acres of Land in Perry Township to be Annexed into the City of Massillon, Ohio*, No. CA-6206 (Ct. App. Stark County August 31, 1983) ("[t]he trial judge erred in affirming that a city is not an 'owner'"). I conclude, therefore, that as an "owner," as defined in R.C. 709.02, a municipal corporation may be a petitioner for annexation and may use the landowner petition method outlined in R.C. 709.02 through R.C. 709.12.

The second method to annex unincorporated territory to a municipality, as set forth in R.C. 709.13 through R.C. 709.21, permits annexation of landowners' real property without the landowners' consent on an annexation petition. Instead, the annexation is initiated on the application of a municipal corporation, under an ordinance of its legislative authority. R.C. 709.15. In most circumstances this method requires a vote, under R.C. 709.17,² by the affected electors of the unincorporated area of the township on the question of the annexation. Inasmuch as R.C. 709.13 through R.C. 709.21 does not require the consent of the landowners to the petition, R.C. 709.13 through R.C. 709.21 contemplates a municipality actively

to adjust the boundaries between them, R.C. 709.37 permits the transfer of territory. Further, even the unincorporated area of a township may be merged into a municipal corporation under the authority of R.C. 709.43 through R.C. 709.50.

² R.C. 709.17 provides, in part:

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 not less than seventy-five days after the legislative authority of a municipal

seeking to bring lands of township landowners within the municipal corporation limits without the initial involvement of the landowners.

When a municipal corporation is an "owner" under R.C. 709.02, it may utilize either of the two annexation procedures, the landowner petition method in R.C. 709.02 through R.C. 709.12 or the municipal ordinance method in R.C. 709.13 through R.C. 709.21.³ Under R.C. 709.02 through R.C. 709.12, the municipality may sign a landowners' petition to annex its land separately or in conjunction with that of other landowners. Similarly, under R.C. 709.13 through R.C. 709.21, the city or village may initiate an annexation by ordinance, whether the municipal land is the only land to be annexed or whether it is marshaled together with other owners' land. If the ordinance procedure is used, an election is required by R.C. 709.17 unless excepted pursuant to R.C. 709.16(B) or R.C. 709.16(C). See n.2, *supra*. If the municipality opts to proceed under R.C. 709.02 through R.C. 709.12, however, no election under R.C. 709.17 is required, since no provision of R.C. Chapter 709 makes R.C. 709.17 applicable to the landowners' petition method of annexation. In the absence of a statutory provision which provides for an election on the question of an annexation, a popular vote is not required. See generally *Powers v. County Comm'rs of Wood County*, 8 Ohio St. 285 (1858); *Blanchard v. Bissel*, 11 Ohio St. 96 (1860); *State ex rel. Village of Riverside v. City of Cincinnati*, 52 Ohio St. 419, 40 N.E. 508 (1895).

In those circumstances where, as may be present in the instant case, only municipal land is sought to be annexed under the ordinance method, R.C. 709.16 is applied.⁴ R.C. 709.16, states, in pertinent part:

(A) When a petition for the annexation of contiguous territory by a municipal corporation is presented to the board of county

corporation certifies the ordinance mentioned in section 709.14 of the Revised Code to the board of elections. 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 election 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.

A vote adverse to the annexation is a veto upon the annexation proceedings, but, a favorable vote means the county commissioners are still required to exercise their discretion to allow or deny the petition for annexation. *State ex rel. Loofbourrow v. Board of County Comm'rs of Franklin County*, 167 Ohio St. 156, 146 N.E.2d 721 (1957). R.C. 709.16(E), however, eliminates the necessity for an election pursuant to R.C. 709.17 if the provisions of R.C. 709.16(B) or R.C. 709.16(C) apply. R.C. 709.16(C) applies to an annexation where the only territory involved is land owned by the county, a factual situation not reflected by your letter and not addressed in this opinion.

³ I note that the annexation petition signed on behalf of the City of Bellevue does not indicate whether it was intended to be a petition under R.C. 709.02 through R.C. 709.12 or under R.C. 709.13 through R.C. 709.21. The petition states "[t]his application is made under the authority of...Chapter 709 of the Ohio Revised Code."

⁴ The nature of R.C. 709.16 is explained by the Ohio Supreme Court in *State ex rel. City of Toledo v. Board of Commissioners of Lucas County*, 32 Ohio St. 3d 352, 356, 513 N.E.2d 769, 772-773 (1987):

It is clear that R.C. 709.16 is not a separate, independent substantive annexation mechanism. The plain language of R.C. 709.16 expressly indicates its interrelationship with the overall municipal annexation procedure. R.C. 709.16(A) provides that petitions by municipal corporations are subject to review

commissioners, proceedings shall be had in all respects, so far as applicable, as are required by sections 709.02 to 709.12 of the Revised Code.

(B) If the only territory to be annexed is contiguous territory owned by the municipal corporation seeking annexation and if such territory is located entirely within the same county as the municipal corporation seeking annexation, upon receipt of the petition required by section 709.15 of the Revised Code, the board of county commissioners shall, by resolution, approve the annexation and make such adjustments of funds, unpaid taxes, claims, indebtedness, and other fiscal matters as the board determines to be proper. The annexation shall be complete upon the entry, pursuant to the board's resolution, of an order upon the journal of the board authorizing such annexation.

Thus, when the annexation is by municipal ordinance, R.C. 709.16 provides an abbreviated procedure by dispensing with the R.C. 709.17 election if the prerequisites of R.C. 709.16(B) are met. R.C. 709.16(B), by its terms, however, applies only where two tests are met. R.C. 709.16(B) may be used where only municipally owned land is involved in the petition *and* the territory sought to be annexed is entirely within the same county as the municipality. Because your inquiry concerns territory sought to be annexed that is not in the same county as the municipality, R.C. 709.16(B) does not apply. Since R.C. 709.16(B) is not applicable, the city of Bellevue must submit its annexation request to the township residents for an election if it proceeds under R.C. 709.13 through R.C. 709.21. R.C. 709.17.

Your request presents an additional question as to which board of county commissioners is to hear and decide the petition. Where territory within the annexing municipality or the unincorporated area sought to be annexed is in more than one county, either R.C. 709.11 or R.C. 709.18, depending on the annexation method used, dictates which board of county commissioners is required to hear and decide the annexation petition. R.C. 709.11, which applies to petitions filed under R.C. 709.02 through R.C. 709.12, states:

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 shall be in the county in which the territory sought to be annexed, or some part of it, is situated.

When the territory sought to be annexed to a municipal corporation is partly in the county in which such municipal corporation is situated and partly in another county, the annexation proceedings shall be in that county in which there is the largest number of qualified voters residing in the territory sought to be annexed.

If the City of Bellevue elects to proceed with an annexation petition filed under R.C. 709.02 through R.C. 709.12, the annexation proceedings shall be in Erie County both because Bellevue is "situated in two...counties" and because "the territory to be annexed is situated in a different county" than Bellevue. On the other hand, R.C. 709.18, which applies to annexation petitions filed under R.C. 709.13 through R.C. 709.21, states:

proceedings by the board of county commissioners in accordance with R.C. 709.02 to 709.12. R.C. 709.16(B) refers to "receipt of the petition required by section 709.15 of the Revised Code" (emphasis added) as a condition precedent to the board's duty to consider the issues involved in the annexation.

There is no doubt that R.C. 709.15 requires the filing of a municipal petition with the board of county commissioners to commence an annexation proceeding under R.C. 709.13 to 709.21, and that R.C. 709.16(B) is a subsidiary, dependent provision which affords accelerated treatment to certain types of municipal annexation petitions.

When a municipal corporation, seeking to annex contiguous territory, is situated in two or more counties, or the territory to be annexed is situated in a county other than that in which such municipal corporation or some part of it is situated, the annexation proceedings shall be in the county in which the territory to be annexed, or some part of it, is situated.

Thus, since the territory to be annexed is in Erie County, while the City of Bellevue is in Sandusky and Huron counties, R.C. 709.18 requires the annexation proceedings to take place in Erie County. Both R.C. 709.11 and R.C. 709.18, therefore, require the Erie County Board of Commissioners to hear and decide the annexation petition.

Therefore, it is my opinion, and you are hereby advised that:

1. For purposes of R.C. 709.02, a municipal corporation may be a trustee and, thus, may be an owner that may petition to annex municipally-owned real property to a municipal corporation.
2. When a municipal corporation is an "owner" as defined in R.C. 709.02, it may proceed with annexation of its land either as provided in R.C. 709.02 through R.C. 709.12 or as provided in R.C. 709.13 through R.C. 709.21.
3. When a municipal corporation is an "owner" as defined in R.C. 709.02, and proceeds with an annexation as provided in R.C. 709.02 through R.C. 709.12, no election under R.C. 709.17 is required.
4. When a municipal corporation utilizes R.C. 709.13 through R.C. 709.21 to annex land owned by the municipal corporation, the election under R.C. 709.17 is required to be held, unless the only land to be annexed is owned by the municipality *and* such territory is located entirely within the same county as the municipal corporation seeking annexation.
5. Pursuant to R.C. 709.11 and R.C. 709.18, if a municipality located in one county seeks to annex adjacent land in another county, the petition for annexation must be filed with and decided by the board of county commissioners of the county in which the land sought to be annexed is located.