

February 23, 2017

The Honorable Charles S. Howland
Morrow County Prosecuting Attorney
60 East High Street
Mt. Gilead, Ohio 43338

SYLLABUS:

2017-005

Approval of a petition submitted to a board of county commissioners under R.C. 503.07 to erect a new township out of the territory comprising a village does not deprive the village legislative authority of its power to annex territory to the village or enact an ordinance imposing a municipal income tax.



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OPINION NO. 2017-005

The Honorable Charles S. Howland
Morrow County Prosecuting Attorney
60 East High Street
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Dear Prosecutor Howland:

You have asked us to advise you whether the village of Marengo surrendered its constitutional and statutory powers when the territory comprising the village was erected as a new township pursuant to R.C. 503.07. In 2007 Marengo was located entirely in Bennington Township within Morrow County but did not comprise the whole of the township. That year the village legislative authority expressed its intention, by way of a properly enacted ordinance, to request the board of commissioners of Morrow County to erect a new township out of the village's territory. The village legislative authority submitted a petition to the board of commissioners of Morrow County under R.C. 503.07 for that purpose.

After a public hearing on the petition the Morrow County board of commissioners granted the request of the village legislative authority and passed a resolution erecting a new township "for the portion of Bennington Township which consists of the area of land making up the Village of Marengo." The resolution identified the newly-erected township as Big Walnut Township, and made provision for the allocation of moneys, credits, and properties of Bennington Township among the latter and Big Walnut Township and apportionment of the debt of Bennington Township between the latter and Big Walnut Township. The resolution also declared that Big Walnut Township and Bennington Township were entitled to take each township's "respective share of tax collected by the county treasurer upon the next semiannual assessment and thereafter."

The village of Marengo wishes to enact a municipal income tax and annex territory lying within Bennington Township. You explain that the trustees of Bennington Township "are receiving many questions concerning the activities of" the village, presumably with respect to its plan to enact an income tax and annex Bennington Township territory. You are uncertain whether the village of Marengo retains the authority to enact an income tax under Article XVIII, § 3 of the Ohio Constitution or exercise powers of annexation conferred upon a municipal corporation by pertinent provisions of R.C. Chapter 709 (annexation; detachment). You ask us to explain the legal effect of the erection of Bennington Township in 2007 by the Morrow County board of commissioners pursuant to R.C. 503.07, if any, upon the exercise of powers otherwise granted the village of Marengo by the Ohio Constitution and Revised Code.

R.C. 503.07 declares, in pertinent part, as follows:

When the limits of a municipal corporation do not comprise the whole of the township in which it is situated, or if by change of the limits of such corporation include territory lying in more than one township, the legislative authority of such municipal corporation, by a vote of the majority of the members of such legislative authority, may petition the board of county commissioners for a change of township lines in order to make them identical, in whole or in part, with the limits of the municipal corporation, or to erect a new township out of the portion of such township included within the limits of such municipal corporation.

Upon the presentation of a R.C. 503.07 petition by a city legislative authority, the board of county commissioners shall change the boundaries of the township or erect a new township; upon the presentation of a petition by a village legislative authority, the board of county commissioners may change the boundaries of the township or erect a new township. *Id.* 2002 Op. Att’y Gen. No. 2002-023, at 2-150 (pursuant to R.C. 503.07 a board of county commissioners must change township boundaries when requested by the legislative authority of a city; if a village legislative authority submits such a petition, the board of county commissioners has discretion whether to change the township boundaries); 1959 Op. Att’y Gen. No. 91, p. 42 (same) (overruling 1954 Op. Att’y Gen. 4642, p. 648, syllabus, paragraph 2, and modifying 1958 Op. Att’y Gen. No. 2686, p. 542).

R.C. 503.07 thus authorizes a board of county commissioners to (1) change the boundaries of a township with respect to a municipal corporation that is situated within the township and does not comprise the whole of that township, so that the boundaries of the township are identical with those of the municipal corporation, or (2) erect a new township out of the portion of the township included within the limits of the municipal corporation. *See, e.g.*, 1962 Op. Att’y Gen. No. 3170, p. 601, at 602 (under R.C. 503.07 “the petition may ask that the township lines be changed to make them identical, in whole or in part, with the limits of the city, or may ask that a new township be erected comprising the area of the city”). Our focus here is the second of these two options, otherwise known as a “detachment.”¹ 1962 Op. Att’y Gen. No. 3170, at 602 (“your letter of request refers to ‘detachment of the City,’” which means that the petition “asks for the erection of a new township out of the portion of Washington Township which is located within the limits of the city”). *See also* 1963 Op. Att’y Gen. No. 748, p. 670, at 671 (“[R.C. 503.07] provides the method by which a municipal corporation may withdraw from a township”).

¹ R.C. 709.38 authorizes owners of land in a village to petition a board of county commissioners to order detachment of a portion of territory from a village and its attachment to a contiguous township or erection into a new township. R.C. 709.39 authorizes owners of land in a village to petition a county board of elections to submit to voters the question of detaching a portion of territory from a village and erecting the detached portion into a new township.

In R.C. 503.07 we find no language that expressly provides that a village legislative authority surrenders or is deprived of the powers conferred upon it by the Ohio Constitution and Revised Code by the action of a board of county commissioners granting the legislative authority's petition to erect a new township. On that subject R.C. 503.07 is silent. Further, we discern nothing in the plain language of R.C. 503.07 from which we reasonably may infer such an outcome. We are not warranted in adding language to R.C. 503.07 or resorting to principles of construction when the language enacted by the General Assembly is unambiguous and we find nothing elsewhere in the statute suggesting that the statute's application is intended to curtail or withdraw the powers of a village legislative authority.

We also find nothing in previous explanations of R.C. 503.07's purpose to dispel these initial impressions. Under the statutory plan in Ohio "all territory of the state shall be divided into townships and ... each portion of land within the state shall remain part of one of the state's townships (even if it is also located within a municipal corporation)." 1990 Op. Att'y Gen. No. 90-042, at 2-174. *See* R.C. 503.01 ("[e]ach civil township is a body politic and corporate, for the purpose of enjoying and exercising the rights and privileges conferred upon it by law"). Ohio law authorizes the incorporation of the state's territory into municipal corporations, R.C. Chapter 707, which are classified as cities or villages by Article XVIII, § 1 of the Ohio Constitution, and R.C. 703.01. A municipal corporation remains a part of the township in which the former is incorporated and the act of incorporation makes the township territory bounded by the municipal corporation a part thereof. *State ex rel. Halsey v. Ward*, 17 Ohio St. 543 (1867) (syllabus, paragraph 1) ("[o]n the organization of a city of the second class divided into wards, the boundaries of which city are not coterminous with those of any township, the territory within such city does not cease to be a part of the township or townships within the limits of which it is situate"). The territory incorporated to form the municipal corporation remains a part of the township, absent steps to exclude the incorporated territory from the township. 2005 Op. Att'y Gen. No. 2005-043, at 2-448 ("[a]s discussed in 2005 Op. Att'y Gen. No. 2005-024, the incorporation of township territory into a municipal corporation does not necessarily prevent the territory from being part of a township. Rather, it is possible for territory to be located in both a township and a municipal corporation"); 2005 Op. Att'y Gen. No. 2005-024, at 2-239 to 2-240. In that circumstance "persons who reside in the territory that is part of the township and also part of the municipality are residents of both political subdivisions."² 1990 Op. Att'y Gen. No. 90-048, at 2-203. This means that those persons retain the right to vote in municipal and township elections and are subject to the taxing authority of the municipality and the township. *Id.* *See*

² The same obtains when a municipal corporation annexes township territory. Persons residing in the annexed territory remain residents of the township and at the same time are residents of the municipal corporation. R.C. 709.10 (in the case of an annexation pursuant to R.C. 709.02-11, "[t]he territory annexed is a part of the municipal corporation, and the inhabitants residing therein shall have all the rights and privileges, and shall be subject to the powers, of the municipal corporation as are the inhabitants within the original limits of such municipal corporation"); 2005 Op. Att'y Gen. No. 2005-024, at 2-247.

also 1988 Op. Att’y Gen. No. 88-036, at 2-168 (persons who are residents of both a municipality and a township “have obligations to both the municipal corporation and the township”); 1985 Op. Att’y Gen. No. 85-033, at 2-118 (“[t]axpayers who reside in both the city and the township face extra tax burdens, since they must support the expenses of both the city and the township”); 1977 Op. Att’y Gen. No. 77-031, at 2-114 to 2-115 (“inhabitants of the territory located within the municipality still retain their full voting rights with regard to the election of the various township officers and the property of such territory still remains subject to township tax levies, unless there is some exception in the statute providing for the specific tax”).

The overlap of municipal and township territory, however, may penalize residents of the municipal and township subdivisions, albeit in different ways:

It is, of course, readily foreseeable [*sic*] that where a municipal and a township boundary overlap, in part, inequitable situations may arise both with respect to the citizens of a municipality within the township as well as with respect to citizens of the township without the boundaries of the municipality. For example, the citizens of the municipality might well find themselves subject to taxation both by the township as well as the municipality within which they reside. [1924 Op. Att’y Gen. No. 1213, vol. I, p. 82]. At the same time, assuming a situation where that portion of a township lying within the limits of the municipality was more densely populated in comparison to the rest of the township, the residents of the township without the boundaries of the municipal corporation might well find that their township affairs are virtually controlled by the urban residents who might conceivably have little or no appreciation of the problems peculiar to the non-urban territory.

1954 Op. Att’y Gen. No. 4642, p. 648, at 652.

Accordingly, the General Assembly has authorized procedures to ameliorate the seeming disadvantage of being a resident of both a municipal corporation and a township. R.C. 503.07 supplies one such procedure, which is made available to the members of a municipal legislative authority in the situations described in the statute. The action of a board of county commissioners erecting a new township in response to a petition submitted by a village legislative authority under R.C. 503.07 removes the territory of the village from the township in which the village territory was originally situated. 1972 Op. Att’y Gen. No. 72-016 (syllabus) (“[a] municipality which has created its own township pursuant to Section 503.07, Revised Code, is not within the territorial limits of the original township from which it was removed”). Real property owned by village inhabitants within the territory that has been removed from the township ceases to be subject to the taxing powers of the township’s board of trustees. 1988 Op. Att’y Gen. No. 88-036 (syllabus, paragraph 8) (“[i]f township boundaries are changed pursuant to R.C. Chapter 503 so that a municipal corporation that was located within a township is no longer within that township, residents of the municipal corporation are no longer residents of the township and township taxes may not be levied upon property within the municipal corporation”). And removal of the territory from the township means that village inhabitants no

longer are residents of the township and so do not qualify as electors of the township for the purpose of voting in township elections. 1967 Op. Att’y Gen. No. 67-013 (syllabus) (when a municipal corporation whose boundaries are coterminous with those of a township annexes territory in an adjoining county and successfully petitions under R.C. 503.07 for a change in township boundaries to conform to the municipal corporation’s boundaries, residents of the annexed portion of the adjoining county who otherwise qualify remain electors of that county and become electors of the municipal corporation who vote at municipal precinct polling places, but cease to be electors of the township from which the territory that included their residences was annexed and are not electors for any township offices or issues). *See generally* Ohio Const. art. V, § 1 (qualifications of an elector); R.C. 3503.01 (age and residency requirements for voting).

In our research we find nothing to support the proposition that an ancillary purpose of R.C. 503.07 is to withdraw from a village legislative authority the powers it may exercise under the Ohio Constitution and the Revised Code. To the contrary, the General Assembly has enacted statutory provisions apart from R.C. 503.07 to address that very purpose. R.C. 703.20 authorizes a village to surrender its “corporate powers” upon the submission of a petition to the village legislative authority by at least forty per cent of village electors and by an affirmative vote of a majority of village electors at a special election on that question. The corporate powers of the village “shall cease” if the result of the special election is in favor of the surrender. *Id.* *See generally* 1939 Op. Att’y Gen. No. 872, vol. II, p. 1179; 1925 Op. Att’y Gen. No. 2413, p. 244.

R.C. 703.201 authorizes the surrender of a village’s corporate powers and dissolution of a village upon a showing in an audit report of the Auditor of State that the village meets two or more of the conditions enumerated in the statute. The conditions are: a state of fiscal emergency, R.C. 703.201(A)(1); a failure by the village to follow the election laws for at least two consecutive election cycles, R.C. 703.201(A)(2); the village has been declared to be unauditible in at least two consecutive audits, R.C. 703.201(A)(3); the village does not provide at least two services typically provided by municipal government, R.C. 703.201(A)(4); the village has failed for any fiscal year to adopt a tax budget, R.C. 703.201(A)(5); or a village elected official has been convicted of theft in office under state law or under an equivalent federal criminal statute at least two times in a period of ten years, R.C. 703.201(A)(6). Within twenty days of the receipt of the Auditor of State’s report and his letter to the Attorney General requesting dissolution of a village, the Attorney General may file a legal action in the court of common pleas requesting the dissolution. R.C. 703.201(C). At the hearing on dissolution the court shall determine whether the village has a population of 150 persons or less, consists of less than two square miles, and meets at least two conditions for surrendering corporate powers. If the court so finds, it shall order dissolution of the village and provide for the surrender of corporate powers in accordance with R.C. 703.20. R.C. 703.201(C).

The enactment of R.C. 703.20 and R.C. 703.201 suggests that dissolution of a village and the surrender of its corporate powers are actions of such import that they cannot be deemed by-products of a board of county commissioners approving a petition under R.C. 503.07 to erect a new township. Had the General Assembly intended that result under R.C. 503.07, it could have

made it explicit by including the appropriate language in the statute, and yet the General Assembly has not done that here. Accordingly, we find that approval of a petition submitted to a board of county commissioners under R.C. 503.07 to erect a new township out of the territory comprising a village does not cause the surrender of village corporate powers or the dissolution of the village. Approval of the R.C. 503.07 petition does not deprive the village legislative authority of its power to annex territory to the village or enact an ordinance imposing a municipal income tax.

It is therefore, our opinion, and you are advised that, approval of a petition submitted to a board of county commissioners under R.C. 503.07 to erect a new township out of the territory comprising a village does not deprive the village legislative authority of its power to annex territory to the village or enact an ordinance imposing a municipal income tax.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General