

OPINION NO. 86-019

Syllabus:

1. When the state is seized of a freehold estate in land which it holds for highway purposes, the state is an "owner" for purposes of R.C. 709.02.
2. A conservancy district that is seized of a freehold estate in land is an "owner" for purposes of R.C. 709.02.

To: Betty D. Montgomery, Wood County Prosecuting Attorney, Bowling Green, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, March 21, 1986

I have before me your request for my opinion regarding interpretation of the word "owner," as that term is used in R.C. 709.02, for purposes of annexation. I have restated your questions as follows:

1. Where the land over which a state highway passes is owned in fee simple by the state, is the state an owner for purposes of annexation proceedings under R.C. 709.02?
2. Is a conservancy district an "owner" for purposes of annexation proceedings under R.C. 709.02?

Before answering your questions I must examine the statutory provisions providing for annexation. R.C. 709.01 permits "[t]erritory [to] be annexed to, or detached from, municipal corporations, in the manner provided in sections 709.01 to 709.47 of the Revised Code."

You have specifically inquired about the requirements for annexation contained in R.C. 709.02, which states in part, that:

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; except that individuals, firms, and corporations holding easements are not included within such meanings; and no person, firm, trustee, or private corporation that has become an owner of real estate by a conveyance the primary purpose of which is to affect the number of owners required to sign an annexation petition is included within such meanings. (Emphasis added.)

Therefore, pursuant to R.C. 709.02, a petition for annexation must contain the signatures of a majority of owners, as defined in said section.

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R.C. 709.02 contains exceptions to those who may be defined as owners. You have informed me that in the situation you pose there are no easements involved and also, that no one has purposely become an owner "to affect the number of owners" needed to sign an annexation petition. Therefore, I will not address either of these exceptions set forth in R.C. 709.02.

You first ask whether the state is considered the "owner" of a state highway for purposes of R.C. 709.02, where title to the property over which the road passes is held in fee simple by the state. In order to qualify as an "owner," pursuant to R.C. 709.02, the state must be "seized of a freehold estate in [the] land" and be either an adult individual, firm, trustee, or private corporation.

In interpreting the phrase "freehold estate," as used in R.C. 709.02, one of my predecessors stated: "The Ohio courts have adopted the common law definition of a freehold estate, which is an estate for life or in fee simple" (citation omitted). 1971 Op. Att'y Gen. No. 71-004 at 2-10. I note that, pursuant to statute, the State of Ohio has the authority to purchase or appropriate property, in fee simple or in any lesser estate or interest, that is needed for highway purposes. See, e.g., R.C. 5501.31-.33; R.C. 5501.36; R.C. 5519.01. See generally In re Appropriation of Lands for Highway Purposes: Masheter v. Diver, 20 Ohio St. 2d 74, 253 N.E.2d 780 (1969) (concluding that the Director of Highways (now the Director of Transportation) has the authority to purchase property in fee simple for highway purposes in the name of the state); Director of Highways v. Lordstown Realty Co., 23 Ohio App. 2d 233, 236, 262 N.E.2d 570, 573 (Trumbull County 1970) (concluding that "[i]f the state does not need 'all right, title and interest [in land],' it has the prerogative of acquiring only that which it does need"). When the state acquires property in fee simple, such acquisition confers a right of title in the state for such property. See In re Appropriation of Lands for Highway Purposes: Masheter v. Diver (syllabus, paragraph one) ("[a] fee simple is the highest right, title and interest that one can have in land. It is the full and absolute estate in all that can be granted"). You have informed me that in the situation you pose the state owns the highway in fee simple. Based upon this information, I must conclude that with respect to the highway about which you ask, the State of Ohio is seized of a "freehold estate" in land.

In addition to being seized of a freehold estate in land, the state must also fall within one of the four categories listed in R.C. 709.02 in order to qualify as an "owner" under that statute. It is obvious that the state is not an adult individual, firm, or private corporation. The only remaining category is that of "trustee." Hence, in order to qualify as an "owner" for purposes of R.C. 709.02, it must be established that the state holds the highway as a "trustee."

In three previous opinions my predecessor addressed the question of whether a public entity which is seized of a freehold estate in land may be considered a trustee and, therefore, an "owner" for purposes of R.C. 709.02. The syllabus of 1982 Op. Att'y Gen. No. 82-060 states: "A board of park commissioners which is seized of a freehold estate in land as trustee under a trust agreement or as trustee for the general public pursuant to R.C. 1545.11 is an 'owner' of such real estate for the purposes of R.C. 709.02..." (emphasis added). In that opinion my predecessor stated that although a board of trustees of a local park district is expressly

authorized by R.C. 1545.11 to acquire lands in trust by gift or devise, the board also has authority to acquire title to lands by gift or devise, purchase or appropriation. My predecessor then stated that such lands are "clearly acquired and held for the benefit and welfare of the general public....Thus, the board of park commissioners is properly considered a trustee of the real property to which it holds title, regardless of the manner in which the property is acquired" (citations omitted). Op. No. 82-060 at 2-174. The opinion then concludes that where the board is seized of a freehold estate in property, it qualifies as an "owner" of such property for purposes of R.C. 709.02. See 1980 Op. Att'y Gen. No. 80-034 (syllabus) (a board of education which owns real estate "holds that real estate in a trust capacity for its school district. Accordingly, the board of education is an 'owner' as that term is defined in R.C. 709.02"); 1979 Op. Att'y Gen. No. 79-043 (concluding that a board of education holds real property in a trust capacity for the school district and is, therefore, an "owner" for purposes of R.C. 709.02).

Applying my predecessor's analysis to the question whether the state may be considered a trustee of the property owned for highway purposes, and thus an owner for purposes of R.C. 709.02, I note that the court in Gerspacher v. City of Cleveland, 21 Ohio Op. 537, 538 (C.P. Cuyahoga County 1941) stated:

[I]t is in the very nature of a street or sidewalk to serve a distinct, exclusive public purpose....The intrinsic objective is to subserve the needs of the people in the interest of free travel and to provide a means for the transportation of all things essential to public requirement. The basic principle pointed to in all the cases, therefore, is that all highways are held in trust for the public to these ends....

See Louisville & Nashville Railroad Co., 76 Ohio St. 481, 81 N.E. 983 (1907) (syllabus, paragraph one) ("[p]ublic streets, squares, landings and grounds are held in trust for the public, and being so held they are, for the use for which they were dedicated or acquired..."). Therefore, the state holds land for highway purposes in trust for the benefit of the public, and when the state is seized of a freehold estate in such land, it is an "owner" for purposes of annexation pursuant to R.C. 709.02. In the situation you pose the state must, therefore, be included as an owner in determining if the "majority of owners" have signed an application for annexation.

Your second question asks whether a conservancy district is an "owner" for purposes of R.C. 709.02. In order to qualify as an owner, for purposes of R.C. 709.02, a conservancy district, like the state, must be seized of a freehold estate in land and be an adult individual, firm, trustee, or private corporation.

Conservancy districts are established pursuant to R.C. 6101.08, which states in part, that:

A [conservancy] district...shall be a political subdivision of the state and a body corporate with all the powers of a corporation, and shall have perpetual existence, with power to sue and be sued, to incur debts, liabilities, and obligations, to exercise the right of eminent domain and of taxation and assessment as provided in such sections, to issue bonds, and to do all acts necessary and proper for the carrying out

of the purposes for which the district was created and for executing the powers with which it is invested.

A conservancy district may be established for any of the purposes listed in R.C. 6101.04, including, preventing floods, R.C. 6101.04(A), and providing for irrigation, R.C. 6101.04(D).

As set forth in R.C. 6101.08, a conservancy district has the authority to do those things necessary to carry out the purposes of the district. Included within this authority is the right to acquire an interest in land by eminent domain. Pursuant to R.C. 6101.15(K) the board of directors of a conservancy district may also: "[h]old, encumber, control, acquire by donation, purchase, or condemnation, construct, own, lease, use, and sell real and personal property...." Thus, a conservancy district is clearly authorized to acquire real property. 1955 Op. Att'y Gen. No. 6061, p. 689 (syllabus, paragraph one) ("[a] conservancy district, organized pursuant to [R.C. Chapter 6101], is a political subdivision of the state, and lands owned or acquired by a conservancy district are not lands owned or acquired by the state"). The type of interest in land which a conservancy district may acquire is not limited by statute. It appears, therefore, that the district's authority to acquire an interest in land establishes that a conservancy district may acquire and be "seized of a freehold estate in land."

In order to constitute an "owner," for purposes of R.C. 709.02, a conservancy district must also fit within one of the four categories of owners, adult individual, firm, trustee or private corporation, as listed in R.C. 709.02. As set forth above, a conservancy district is a body corporate and a political subdivision of the state. R.C. 6101.08. The board of directors of the conservancy district is empowered to acquire property for the purposes of the district. See R.C. 6101.08; R.C. 6101.15(K). I can find no basis for distinguishing the capacity in which a conservancy district owns property from the capacity in which other political subdivisions own property. I must, therefore, conclude that a conservancy district holds the property of the district in trust for the public, and is, therefore, a trustee, as that term is used in R.C. 709.02. See generally Op. No. 80-034 (concluding that public bodies and public corporations are considered owners, for purposes of R.C. 709.02 and derive authority to act under that section "solely from the fact that they hold real estate in trust"). Consequently, a conservancy district must, when it is seized of a freehold estate in land, be considered an "owner" for purposes of annexation proceedings pursuant to R.C. 709.02.

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

1. When the state is seized of a freehold estate in land which it holds for highway purposes, the state is an "owner" for purposes of R.C. 709.02.
2. A conservancy district that is seized of a freehold estate in land is an "owner" for purposes of R.C. 709.02.