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1. TERRITORY ANNEXED TO MUNICIPALITY—VOTE BY ELECTORS OF UNINCORPORATED AREA OF TOWNSHIP—APPLICATION MADE BY ADJACENT MUNICIPALITY TO ANNEX TERRITORY WITHIN TOWNSHIP—PROVISIONS OF SECTION 3561-6 G. C. DO NOT APPLY WHEN ANNEXATION IS UPON APPLICATION OF RESIDENT FREEHOLDERS OF TERRITORY.
2. PETITIONERS HAVE THE RIGHT TO AMEND PETITION REQUESTING ANNEXATION OF TERRITORY TO MUNICIPALITY SUBJECT TO PERMISSION OF COUNTY COMMISSIONERS TO AMEND—SECTION 3521 G. C.

SYLLABUS:

1. The provisions of Section 3561-1, General Code, requiring a vote by the electors of the unincorporated area of the township when application is made by the adjacent municipality to annex territory within the township, do not apply when the annexation is undertaken upon the application of the resident freeholders of the territory.

2. Under Section 3521, General Code, the petitioners have the right to amend the petition requesting the annexation of territory to a municipality, subject to obtaining the permission of the county commissioners to so amend.

Columbus, Ohio, July 19, 1949

Hon. William M. McLain, Prosecuting Attorney
Trumbull County, Warren, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“A petition signed by a majority of the resident freeholders of an unincorporated area adjacent to the Village of Hubbard, Ohio, is about to be filed with the Trumbull County Commissioners’ Office for the purpose of annexing adjacent territory, pursuant to Section 3548 and related sections under the title: ‘ANNEXATION ON APPLICATION OF CITIZEN.’

Two questions have arisen:

“1. Must a vote by the electors of the unincorporated area about to be annexed under this procedure be held at the next general or primary election, as provided for in Section 3561-1?

“2. Section 3521 provides that ‘Any person interested may appear, in person or by attorney, and contest the granting of the prayer of the petition, and affidavits presented in support of or against the prayer of the petition shall be considered by the commissioners, and the *petition may be amended by their leave.*’

“In view of this section, who is permitted to amend, the commissioners or the original petitioners?”

Separate provision has been made in the General Code of Ohio for the creation of municipal corporations and the annexation to municipalities of adjacent territory (a) upon the application of residents of the territory and (b) upon the application of the municipality concerned.

Sections 3548 to 3557 inclusive of the General Code deal specifically with annexation upon application of the residents of the territory to be annexed. However, it is often necessary to look beyond these particular sections in order to determine the procedure to be followed in such cases. It has been held by the Supreme Court of Ohio that statutory provisions relating to the general subject of creation of villages and to the annexation of territory to villages already created are to be treated as one act for purposes of construction. *Shugars, Clerk v. Williams, et al.* 50 O. S. 297. Also, it is specifically provided in Section 3549 that when the petition for annexation of territory signed by a majority of the adult resident freeholders of the territory is presented to the county commissioners” * * * the same proceedings shall be had as far as applicable, and the same duties in respect thereto shall be performed by the commissioners and other officers as required in case of an application to be organized into a village under the provisions of this division.

To restate your first question, you ask whether the election requirement of Section 3561-1, which is found among the sections dealing with annexation of adjacent territory upon the application of the municipality, applies to annexation upon the application of resident freeholders of the territory concerned. 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 as now in force reads as follows:

“A vote, by the electors of the unincorporated area of the township 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 of the electors of the unincorporated area of the township voting in said election 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. Provided, however, that when the territory sought to be annexed is owned by a county and when the electors residing in said territory so owned are inmates of or resident employees of a county institution the foregoing provisions relative to a vote shall not apply.”

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. It has already been stated that previous to the enactment of this section a municipality could proceed with the annexation of adjacent unincorporated territory without consulting the will of the inhabitants of the territory or township concerned. It would appear to follow from this that the legislation was drafted and enacted to protect the residents of unincorporated territory

adjacent to a municipality from annexation by the municipality against their will. And it appears reasonable to suggest that the legislators did not intend to add the election requirement to the procedure to be followed when the annexation is undertaken upon the application of the inhabitants of the territory. This conclusion is reinforced by the fact that under Section 3548 the petition which the inhabitants are required to present to the county commissioners must be signed "by a majority of the adult freeholders residing on such territory." In other words, under the statutory procedure pertaining specifically to the situation you have before you provision is made for consulting the will of the majority of the people most directly concerned; and, therefore, it does not appear necessary to resort to the safeguard provided by Section 3561-1.

I do not feel that this conclusion is inconsistent with the ruling in *Shugars v. Williams et al.* supra, which simply requires that the various sections of the General Code pertaining to creation of a municipality and annexation of territory thereto be construed together. Therefore, in specific answer to your first question I am of the opinion that the provisions of Section 3561-1 requiring a vote by the electors of the unincorporated area of the township when application is made by the adjacent municipality to annex territory within the township, do not apply when the annexation is undertaken upon the application of the resident freeholders of the territory in accordance with Section 3548 et seq.

Your second question concerns interpretation of Section 3521, General Code, which provides as follows:

"The hearing (on the petition) shall be public, and may be adjourned from time to time, and from place to place, according to the discretion of the commissioners. Any person interested may appear, in person or by attorney, and contest the granting of the prayer of the petition, and affidavits presented in support of or against the prayer of the petition shall be considered by the commissioners, and the petition may be amended by their leave. If any amendment is permitted, whereby territory not before embraced is added, the commissioners shall appoint another time for the hearing, of which notice shall be given, as specified in the last preceding section." (Parenthetical matter added.)

You ask whether the language "the petition may be amended by their leave", applies to the commissioners or to the original petitioners. There is no question but that the procedure provided for by Section 3521 applies to proceedings initiated by inhabitants of the area to be annexed. This

was decided by the Shugars case supra, and Section 3549, General Code, so requires. I think it is reasonably clear that the provision in question extends to the petitioners the right to request amendment of the petition but reserves to the commissioners the right to determine whether or not the amendment should be permitted. In at least two instances courts of Ohio have had before them situations where the petition had been amended by petitioners and it was not suggested in either case that the amendment should have been by the commissioners. See *Shugars v. Williams et al.* supra, and *Urner et al v. Pickelheimer*, 45 O. A. 343. I should probably call specific attention to a portion of the ruling in the latter case since it may prove relevant to subsequent proceedings in the pending annexation. In the *Urner* case the court held that the agent for petitioners to secure the annexation had only limited powers to amend the original petition and was not authorized to change the area sought to be annexed either by extending or diminishing the bounds thereof.

Therefore, in specific answer to your second question I am of the opinion that under Section 3521, General Code, the petitioners have the right to amend the petition requesting the annexation of territory to a municipality subject to obtaining the permission of the county commissioners to so amend.

Respectfully,

HERBERT S. DUFFY,
Attorney General.