

[Cite as *Tuscarawas Twp. Bd. of Trustees v. Massillon*, 2009-Ohio-3267.]

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

TUSCARAWAS TOWNSHIP BOARD  
OF TRUSTEES

Plaintiffs-Appellants

-vs-

CITY OF MASSILLON, ET AL

Defendants-Appellees

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Julie A. Edwards, J.

Hon. Patricia A. Delaney, J.

Case No. 2008CA00188

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of  
Common Pleas, Case No. 2008CV02571

JUDGMENT:

REVERSED AND REMANDED

DATE OF JUDGMENT ENTRY:

June 30, 2009

APPEARANCES:

For Plaintiffs-Appellants

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For Defendants-Appellees

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*Delaney, J.*

{¶1} Plaintiffs-Appellants, Tuscarawas Township Board of Trustees, appeals the July 25, 2008 judgment of the Stark County Court of Common Pleas, affirming the decision of the Stark County Board of Commissioners to approve the annexation of 61.852 acres of property located in Tuscarawas Township into the City of Massillon. For the reasons that follow, we reverse and remand the decision of the Stark County Court of Common Pleas.

### **STATEMENT OF THE FACTS AND THE CASE**

{¶2} WTJ, Inc. is the owner of a large parcel of property in Tuscarawas Township, Stark County, Ohio, that it planned to develop into a residential allotment named "Poets Glen." (T. 24). Stark County approved the preliminary plats for Poets Glen in September 2004 and September 2007. (T. 61). Phase I of the proposed subdivision was recorded on March 12, 2008. *Id.*

{¶3} WTJ, Inc. pursued annexation of the allotment into the City of Massillon. On February 5, 2008, Jason Haines, as agent of the petitioners referenced below, filed a petition with the Stark County Board of Commissioners for the annexation of 61.852 acres of real property located in Tuscarawas Township into the City of Massillon. The proposed annexation territory consisted of seven separate parcels of land owned by five separate entities: WTJ, Inc., William P. Broel, Josephine M. Broel, Bison Storage, Inc., and TJ & MG Properties, LLC. The submitted annexation petition was signed by four of the owners of the area to be annexed: WTJ, Inc., William P. Broel, Josephine M. Broel, and Bison Storage, Inc. TJ & MG Properties, LLC refused to sign the petition.

{¶4} William P. Broel and Josephine M. Broel own three lots in their individual capacity within the proposed annexation area. On the annexation petition, William P. Broel and Josephine M. Broel signed their names to the petition for Lot Nos. 72-00132, 72-02381 and 72-02059. William P. Broel and Josephine M. Broel are also the owners of Bison Storage, Inc. Bison Storage, Inc. owns the property located at 1575 Bison N.W., Lot No. 72-05472, also to be annexed. William P. Broel signed his name to the petition for this property as, “William P. Broel, President” and Josephine M. Broel signed her name to the petition for this property as, “Josephine M. Broel, Vice President.” At the bottom of the petition page that listed all four properties with the Broels’ signatures in their separate individual and corporate capacities, this statement was written:

{¶5} “We agree to the annexation of all of the above as long as all the property owned by Bison Storage, Inc. remains zoned commercial.”

{¶6} The statement is dated December 10, 2007 and signed “William P. Broel, Pres.” and “Josephine M. Broel, Sect.”

{¶7} The only area of the annexation territory that is adjacent to the City of Massillon is approximately 531.02 feet of property owned by TJ & MG Properties, LLC. The TJ & MG Properties, LLC, property abuts a bicycle path owned by the City of Massillon. If viewing the total length of the bicycle path from a map, the bicycle path in some locations crosses fully within the territory of the City of Massillon. At other locations, the bicycle path owned by the City of Massillon bisects territory located within Tuscarawas Township. The portion of the bicycle path at issue in the present case bisects the territory of Tuscarawas Township; however, a small portion of the bike path divides TJ & MG Properties, LLC’s land from the City of Massillon.

{¶8} The City of Massillon passed Ordinance No. 37-2008, regarding the annexation. The ordinance reads, “the City will maintain the following roadways for the proposed area to be annexed: partial and full width sections of Bison Avenue NW (27<sup>th</sup> Street NW) and Wooster Road NW which are outlined on the proposed annexation map.” The ordinance states in Section II that the City will “maintain the full width of the pavement along the frontage of the subject area to be annexed.” The City of Massillon ordinance did not include Beaumont Avenue, which is part of the annexation territory. The ordinance also states “Wooster Road” when the correct identification is “Wooster Street.”

{¶9} On April 9, 2008, the Stark County Board of Commissioners held a public hearing on the petition for the Poets Glen annexation. Rick Flory, the Stark County Budget and Property Manager responded to the Board’s questions regarding the validity of the petition. The Board asked if Mr. Flory had identified any procedural defects. (T. 21). Mr. Flory responded:

{¶10} “In the municipal statement of services that were provided by the City, they indicated that they would – in the ordinance that was passed, they indicated that they would provide services to the following roadways for the proposed area to be annexed. Partial and full sections of Bison Avenue Northwest and Wooster Street, which are outlined on the proposed annexation map. The Massillon city ordinance did not include Beaumont Avenue, and Wooster Street was identified as a road.

{¶11} “I spoke with Jason Haines regarding this, and he indicated it was an oversight on both issues and that they will be corrected. As he’s indicated tonight, the City does intend to maintain the section of Beaumont.” (T. 21).

{¶12} The Board then took evidence presented by the City of Massillon and the Township, including testimony from several landowners within the annexed area and those who lived within a one-half mile radius of the area. The parties testified that regardless of the approval or disapproval of the annexation of the territory into the City of Massillon, the planned residential allotment would proceed. (T. 67). David Hayes, the Vice President of WTJ, Inc., testified that if the property was not annexed into the City of Massillon, construction of water and sewer mains to serve the allotment would be more expensive. (T. 29-31). If WTJ, Inc. was required to tap into the Stark County sewer system, the Township property owners along that line would be assessed fees based on the frontage for putting in the line. (T. 32). If the property was annexed into the City of Massillon, the City would absorb those costs. (T. 31).

{¶13} Mr. Hayes further testified that annexation would benefit the residents of the annexation territory because they would have access to police and fire services from the City of Massillon, as opposed to the Stark County Sheriff and the North Lawrence Fire Department. (T. 29, 87).

{¶14} The evidence established that the taxable value of the territory is \$86,810. (T. 20). The annual real estate loss to Tuscarawas Township would be \$913.67. *Id.* The annual real estate gain to the City of Massillon would be \$547.92. *Id.*

{¶15} After reviewing the evidence, briefs, and legal arguments presented by the necessary parties, the Board, in a 2-1 decision, approved the annexation of the 61.852 acres of Tuscarawas Township into the City of Massillon. The resolution was adopted on May 8, 2008.

{¶16} On June 8, 2008, the Tuscarawas Township Board of Trustees filed a notice of administrative appeal in the Stark County Court of Common Pleas. The trial court issued its decision on July 25, 2008, affirming the decision of the Board of Stark County Commissioners to approve the annexation. It is from this decision Appellants now appeal.

{¶17} Appellants raise one Assignment of Error:

{¶18} “I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY AFFIRMING THE DECISION OF THE STARK COUNTY BOARD OF COMMISSIONERS GRANTING THE ANNEXATION AT ISSUE IN THIS CASE.”

{¶19} In an appeal of an annexation decision, the common pleas court must consider the whole record including any new or additional evidence admitted pursuant to R.C. 2506.03 and determine whether the decision of the county board of commissioners is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of the substantial, reliable and probative evidence. *Henley v. City of Youngstown Bd. Of Zoning Appeals*, 90 Ohio St.3d 142, 147, 2000-Ohio-493, 735 N.E.2d 433.

{¶20} In an appeal from the judgment of the common pleas court on a petition for annexation, this Court has a more limited scope of review. *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34, 465 N.E.2d 848. The standard of review for an appellate court is limited to questions of law and does not include the same extensive power to weigh and consider evidence as is granted to the common pleas court. *Id.* Under this standard of review, the judgment of the common pleas court must be affirmed unless, as a matter of law, its decision is not supported by a preponderance of the substantial, reliable, and

probative evidence. *In re American Outdoor advertising, LLC*, Union App. No. 14-02-27, 2003-Ohio-1820, at ¶ 5, citing *Kisil v. Sandusky* (1984), 12 Ohio St.3d, 30, 34, 465 N.E.2d 848. This standard of review is tantamount to an abuse of discretion standard; therefore, an appellate court should reverse the trial court's judgment in such a case only upon a finding that the decision is unreasonable, arbitrary, or unconscionable. *In re American Outdoor Advertising*, supra at ¶ 5; see, also, *Kisil*, supra 12 Ohio St.3d at fn. 4; *In re: Petition to Annex 100.642 Acres of Violet Township into Village of Canal Winchester*, Fairfield App. No. 03CA073, 2004-Ohio-7092, at ¶ 11; *Marsillo v. Stow City Council*, Summit App. No. 22229, 2005-Ohio-473, at ¶ 11; *Anderson v. City of Vandalia*, 159 Ohio App.3d 508, 2005-Ohio-118, 824 N.E.2d 568 at ¶ 22.

{¶21} Appellants argue in their Assignment of Error the trial court erred in affirming the decision of the Stark County Board of Commissioners pursuant to the factors of R.C. 709.033(A)-(E). Before a board of commissioners may grant a petition for annexation, they must consider the petition in light of the factors set forth in R.C. 709.033(A):

{¶22} “After the hearing on a petition for annexation, the board of county commissioners shall enter upon its journal a resolution granting the annexation if it finds, based upon a preponderance of the substantial, reliable, and probative evidence on the whole record, that each of the following conditions have been met:

{¶23} “(1) The petition meets all the requirements set forth in, and was filed in the manner provided in, section 709.02 of the Revised Code.

{¶24} “(2) The persons who signed the petition are owners of real estate located in the territory proposed to be annexed in the petition, and, as of the time the petition

was filed with the board of county commissioners, the number of valid signatures on the petition constituted a majority of the owners of real estate in that territory.

{¶25} “(3) The municipal corporation to which the territory is proposed to be annexed has complied with division (D) of section 709.03 of the Revised Code.

{¶26} “(4) The territory proposed to be annexed is not unreasonably large.

{¶27} “(5) On balance, the general good of the territory proposed to be annexed will be served, and the benefits to the territory proposed to be annexed and the surrounding area will outweigh the detriments to the territory proposed to be annexed and the surrounding area, if the annexation petition is granted. As used in division (A)(5) of this section, ‘surrounding area’ means the territory within the unincorporated area of any township located one-half mile or less from any of the territory proposed to be annexed.

{¶28} “(6) No street or highway will be divided or segmented by the boundary line between a township and the municipal corporation as to create a road maintenance problem, or, if a street or highway will be so divided or segmented, the municipal corporation has agreed, as a condition of the annexation, that it will assume the maintenance of that street or highway. For the purposes of this division, ‘street’ ‘highway’ as the same meaning as in section 4511.01 of the Revised Code.”

{¶29} Appellants have set forth numerous reasons why the Stark County Board of Commissioner’s approval of the annexation, and the trial court’s affirmance of the same, fails to meet the conditions set forth in R.C. 709.033. As the trial court did in its judgment entry, we will address each argument separately.

**A. R.C. 709.02 – VALID SIGNATURES**

{¶30} Appellants argue the annexation petition fails to meet the requirement of R.C. 709.02, as it does not include valid signatures of a majority of the owners of real estate in the territory proposed for annexation. R.C. 709.02(C) states,

{¶31} “(C) The petition required by this section shall contain the following:

{¶32} “(1) The signatures of a majority of the owners of real estate in the territory proposed for annexation. The person who signs or the circulator of the petition also shall write the date the signature was made next to the owner's name. No signature obtained more than one hundred eighty days before the date on which the petition is filed shall be counted in determining the number of signers of the petition. Any owner who signed the petition may have the signature removed before the document is filed by delivering a signed statement to the agent for the petitioners expressing the owner's wish to have the signature removed. Upon receiving a signed statement, the agent for the petitioners shall strike through the signature, causing the signature to be deleted from the petition.”

{¶33} As stated above, there are five property owners making up the annexation territory. William P. Broel and Josephine M. Broel are two of the five property owners. The Broels are President and Vice President of Bison Storage, Inc., which is the third property owner. The petition requesting annexation lists the Broels' properties on a single page. The Broels signed the petition as individuals for the properties they owned individually. As for the property owned by Bison Storage, Inc., the Broels signed the petition as President and Vice President. At the bottom of the same petition page listing their properties, the Broels wrote the following statement:

{¶34} “We agree to the annexation of all of the above as long as all the property owned by Bison Storage, Inc. remains zoned commercial.”

{¶35} The statement is dated December 10, 2007 and signed “William P. Broel, Pres.” and “Josephine M. Broel, Sect.”

{¶36} Appellants argue the petition does not meet the requirements of R.C. 709.02, and therefore R.C. 709.033, because the Broels signed the annexation petition with a condition that the property owned by Bison Storage, Inc. remains zoned commercial. The crux of Appellants’ argument is that the Broels’ condition applied to all of the Broels’ properties listed on the petition. Appellants argue that contingent signatures are not valid signatures for purposes of R.C. Chapter 709. Therefore, all of the Broels’ signatures for their individual and corporate properties are invalid and there is not a majority of owners of the real estate signing the petition.

{¶37} Appellants correctly note there is no case law in Ohio directly on point with this issue. The trial court looked to the administrative record and examined the petition in question. Upon its close examination, the trial court found that the annexation petition still contained a majority of the real estate owners’ signatures. We agree.

{¶38} The Broels signed their names to the annexation petition depending on their ownership status of the property. As to the three properties the Broels owned in their individual capacity, the Broels signed their names as “William P. Broel” and “Josephine M. Broel.” As to the property owned by Bison Storage, Inc., the Broels signed their names as “William P. Broel, President” and “Josephine M. Broel, Vice President.” The Broels signed the conditional statement in the petition as “William P. Broel, Pres.” and “Josephine M. Broel, Sect.” We find the trial court was correct in

stating that the Broels signed the conditional statement on behalf of their corporation, Bison Storage, Inc. As demonstrated by the manner in which the Broels signed the petition depending on their ownership status of the property, if the Broels had chosen to condition their signatures on the petition in their individual capacity as well, the Broels could have signed it that way. We agree that the Broels only conditioned their signatures on the petition as the corporate representatives of Bison Storage, Inc., and that their signatures made in their individual capacity were not conditioned by the statement contained in the petition.

{¶39} Assuming Appellants are correct in arguing that a contingent signature is an invalid signature for purposes of R.C. Chapter 709, we find only the signature of Bison Storage, Inc. is invalid. Invalidating the signature of Bison Storage, Inc. does not invalidate the petition on the basis that it fails to include the signatures of a majority of the owners of real estate in the territory proposed for annexation pursuant to R.C. 709.02. The petition still contains a majority of the owners of real estate as the signatures of WTJ, Inc., William P. Broel, individually, and Josephine M. Broel, individually, still remain valid.

{¶40} Accordingly, we find the trial court did not commit error in affirming the Stark County Board of Commissioners' approval of the annexation petition pursuant to R.C. 709.02 and R.C. 709.033.

#### **B. 709.02 – CONTIGUITY REQUIREMENT**

{¶41} Appellants next argue that the annexation does not meet the contiguity requirements of R.C. 709.02(A). Appellants argue that the annexation creates a balloon

configuration, which does not comply with the requirement that an annexed territory must be adjacent, contiguous, and adjoining. We disagree.

{¶42} R.C. 709.02(A) states, “[t]he owners of real estate contiguous to a municipal corporation may petition for annexation to a municipal corporation in the manner provided by sections 709.02 to 709.11 of the Revised Code.”

{¶43} An annexation may be found to be unreasonable or unlawful if it is not adjacent to, or contiguous with the annexing municipality. “While it is generally agreed that some touching of the municipality and territory to be annexed is required, the law is unsettled as to what degree of touching is needed to fulfill the contiguity requirement.” *Middletown v. McGee* (1988), 39 Ohio St.3d 284, 287, 530 N.E.2d 902, 905, citing, Annotation, What Land is Contiguous or Adjacent to Municipality as to be Subject to Annexation (1973), 49 A.L.R.3d 589, 598, Section 3(a). Although peninsulas are generally discouraged, their existence alone will not impede an annexation unless the decision to create the peninsula was unreasonable, illogical, or arbitrary. *In re appeal of Jefferson Township Bd. Of Trustees* (1992), 78 Ohio App.3d 493, 605 N.E.2d 435.

{¶44} Upon a review of the record, we find the trial court did not err in finding the annexation territory met the requirements of R.C. 709.02. The exhibits demonstrate the annexation territory is adjacent to the City of Massillon through a bicycle path that is owned by the City of Massillon. A majority of the bicycle path that is adjacent to the parcel bisects the territory of Tuscarawas Township, but a portion of bicycle path that is adjacent to the parcel crosses fully within the City of Massillon. We find that this configuration does not create a balloon configuration.

{¶45} Appellants also argue that in this case, the property owner that is adjacent to the City of Massillon objects to the annexation. There is no legal requirement that the owners of the property adjacent to a municipality sign a petition for annexation in order for the annexation to be approved. *Higley v. Clark* (Mar. 24, 1980), 2<sup>nd</sup> Dist. No. 6540.

{¶46} We find the trial court did not err in affirming the decision of the Stark County Board of Commissioners that the annexation territory met the requirements of R.C. 709.02 and R.C. 709.033.

{¶47} Appellants next argue the trial court erred in affirming the decision of the Stark County Board of Commissioners because the annexation failed to meet each of the conditions found in R.C. 709.033(A).

#### **C. R.C. 709.033(A)(4) – UNREASONABLY LARGE**

{¶48} As stated above, R.C. 709.033(A)(4) requires that the territory proposed to be annexed is not unreasonably large. Appellants argue the Stark County Board of Commissioners should have denied the petition for annexation because the territory proposed to be annexed is unreasonably large. Whether or not a territory sought to be annexed is unreasonably large is one of the factors a board of commissioners is required to consider pursuant to R.C. 709.033(A)-(E) prior to granting a petition for annexation.

{¶49} In, *In re Annexation of 1,544.61 Acres*, (1984), 14 Ohio App.3d 231, 232, 470 N.E.2d 486, 489, the Ninth District, in quoting a previous Ninth District case, stated that “ ‘Any issue of ‘reasonableness’ necessitates a comparison, a weighing of pros and cons. Therefore, the determination of [what is] unreasonably large requires a three-pronged analysis ...:

{¶50} “(1) the geographic character, shape and size (acreage) of the territory to be annexed in relation to the territory to which it will be annexed (the city), and in relation to the territory remaining after the annexation is completed (the remaining Township area); \* \* \*

{¶51} “(2) the ability of the annexing city to provide the necessary municipal services to the added territory. (Geographic as well as financial ‘largeness’ may be considered. \* \* \*) [and]

{¶52} “(3) the effect on remaining township territory if annexation is permitted. If the territory sought to be annexed is so great a portion of the township's tax base that the annexation would render the remaining township incapable of supporting itself, then the Board might reasonably conclude the proposed annexation is unreasonably large, although such annexation would benefit the territory sought to be annexed.’ *Herrick v. Bd. of County Commrs.*, Summit App. No. 9425, (Jan. 23, 1980) unreported, at 6.” See also, *Smith v. Orange Township Bd. Of Trustees*, (Feb. 14, 1997), Delaware App. No. 96CA-E-08-043, 1997 WL 116902.

{¶53} The trial court found the territory to be annexed not to be unreasonably large. We agree.

{¶54} The evidence demonstrated the City of Massillon could provide the necessary municipal services to the added territory. The Captain of the Massillon Police Department testified that the police department was capable of providing services to the annexation territory. (T. 40). The Fire Chief of the City of Massillon testified that the fire department was capable of providing services to the annexation territory. (T. 54). Water and sewer services would be provided through the City of

Massillon if the annexation was approved. (T. 29-31). The City of Massillon passed an ordinance to direct the maintenance of the streets and highways.

{¶55} We next find the annexation area to be not so large so as to alter the geographic character, shape, and size of the territory to be annexed in relation to the territory to which it will be annexed (City of Massillon), and in relation to the territory remaining after the annexation is completed (Tuscarawas Township).

{¶56} Finally, there was testimony at the hearing before the Stark County Board of Commissioners that the annexation territory would not be so large so as to render Tuscarawas Township unable to support itself through taxes. Francis Cicchinelli, Mayor of the City of Massillon, testified at the hearing that he had told the Tuscarawas Township Board of Trustees that the City of Massillon would be willing to give Tuscarawas Township 100% of all the real estate taxes generated in the annexation territory. (T. 62-63).

#### **D. R.C. 709.033(A)(5) – GENERAL GOOD**

{¶57} Appellants next argue the trial court erred in affirming the annexation because the petitioners did not meet their burden of proving that, on balance, the benefits of annexation to the territory sought to be annexed and the surrounding area would outweigh the detriments to the same area.

{¶58} As previously stated, R.C. 709.033(A)(5) requires that:

{¶59} “(5) On balance, the general good of the territory proposed to be annexed will be served, and the benefits to the territory proposed to be annexed and the surrounding area will outweigh the detriments to the territory proposed to be annexed and the surrounding area, if the annexation petition is granted. As used in division

(A)(5) of this section, ‘surrounding area’ means the territory within the unincorporated area of any township located one-half mile or less from any of the territory proposed to be annexed.”

{¶60} We note that in enacting statutes governing annexation, one of the intentions of the legislature was “to give an owner of property freedom of choice as to the governmental subdivisions in which he desires his property to be located.” *Toledo Trust Co. v. Bd. Of Commrs.* (1977), 62 Ohio App.2d 121, 124, 404 N.E.2d 764, 766 citing, *In re Lariccia* (1973), 40 Ohio App.2d 250, 318 N.E.2d 871.

{¶61} However, the desires of the majority of owners alone, is not enough to satisfy the general good requirement. *In re Witschey v. Medina Cty. Bd. Of Commrs.*, 169 Ohio App.3d 214, 2006-Ohio-5135, 862 N.E.2d 535. The general good requirement includes both the desires of the property owner and the receipt of some benefit to annexed property and the surrounding area. *Carlisle Twp. Bd. Of Trustees v. Elyria*, Lorain App. No. 07CA009142, 2008-Ohio-1125; *In re Witschey v. Medina Cty. Bd. Of Commrs.*, supra; see also, 709.033(A)(5). Additionally, the existence of some benefit must be supported by facts not simply by speculation, beliefs, or desires. See *In re Witschey v. Medina Cty. Bd. Of Commrs.*, supra; *Copley Township Bd. Of Trustees v. Lorenzetti*, 146 Ohio App.3d 450, 2001-Ohio-1662, 766 N.E.2d 1022; *Libis v. Akron Bd. Of Zoning Appeals* (1972) 33 Ohio App.2d 94, 292 N.E.2d 642.

{¶62} The majority of the owners of real estate in the annexation territory desire annexation into the City of Massillon. Moreover, as was previously discussed, there was evidence presented that the City of Massillon would provide police and fire protection services to the area.

{¶63} One of the most important issues of this proposed annexation to the residents of the annexation territory and to the residents within one-half mile of the territory was the development of the Poets Glen allotment. The Stark County Board of Commissioners remarked upon the large number of residents who attended the hearing and who wished to speak on the record to voice their opposition to the annexation. Much of the testimony presented by the residents concerned the development of Poets Glen and its impact on the local roads and infrastructure.

{¶64} But as was testified to by the developer of the allotment, construction of the allotment will go forward whether the territory is annexed into the City of Massillon or not. Stark County has approved the development of the allotment. In this case, the impact on the roads based upon the construction of the allotment is not part of the balancing of the benefits and detriments of the annexation.

{¶65} However, the infrastructure of the annexation territory, specifically water and sewer, does factor into the weighing of the benefits and detriments to the annexation. The construction of the allotment requires the extension of water and sewer services. Depending on the result of the annexation proposal, the developer will seek water and sewer services through either Stark County or the City of Massillon. As stated above, the provision of those services would be cheaper to the residents of the annexation territory through the City of Massillon than would be through Stark County.

{¶66} Great weight must be given to the property owners within the area to be annexed. *In re Petition to Annex 100.642 Acres of Violet Township into Village of Canal Winchester*, Fairfield App. No. 03CA073, 2004-Ohio-7092, ¶ 21. The managing partner of TJ & MG Properties, LLC, testified at the hearing as to why he and his partner

opposed the annexation of their property into the City of Massillon. (T. 137). The partners purchased the property because there were no zoning regulations; by annexing into the City of Massillon, the property would be grandfathered in as agricultural, taking away the marketing potential for the property. (T. 138). 8.46 acres of the property would be annexed. (T. 139).

{¶67} Upon review of the evidence, we find there was a preponderance of substantial, reliable, and probative evidence to support the trial court's decision that the general good of the territory and the surrounding area would be met through annexation.

#### **E. R.C. 709.033(A)(6) – DIVIDED STREET OR HIGHWAY**

{¶68} In Appellants' final argument, Appellants argue the trial court erred in affirming the decision of the Stark County Board of Commissioners as to R.C. 709.033(A)(6). R.C. 709.033(A)(6) states,

{¶69} "No street or highway will be divided or segmented by the boundary line between a township and the municipal corporation as to create a road maintenance problem, or, if a street or highway will be so divided or segmented, the municipal corporation has agreed, as a condition of the annexation, that it will assume the maintenance of that street or highway. \* \* \*."

{¶70} Appellants state that the annexation would result in numerous divisions or segmentations of streets in the annexation territory. As stated above, the City of Massillon passed Ordinance No. 37-2008 stating that it would maintain the full width of the pavement along the frontage of the subject area to be annexed. The ordinance, however, failed to include Beaumont Avenue and incorrectly identified Wooster Street.

(T. 21). Mr. Flory testified that Jason Haines, the agent for the petitioners, was aware of the oversight on both issues and they would be corrected. Id. Jason Haines indicated that the City intended to maintain the section of Beaumont Avenue. Id.

{¶71} The trial court determined the errors in the ordinance to be procedural defects that were cured at the hearing. As stated by R.C. 709.015,

{¶72} “The procedural requirements set forth in sections 709.02 to 709.21 of the Revised Code are directory in nature. Substantial compliance with the procedural requirements of those sections is sufficient to grant the board of county commissioners jurisdiction to hear and render its decision on a petition for annexation filed under those sections. The board shall cure a procedural defect and shall not deny a petition for annexation solely upon the basis of procedural defects.”

{¶73} In this case, we question the authority of the agent of the petitioners to cure defects in an ordinance passed by the Massillon City Council. The Mayor of the City of Massillon testified at the hearing as well, but he did not testify as to the division of streets and highways or the City of Massillon’s compliance with R.C. 709.033(A)(6).

{¶74} Accordingly, we find the trial court erred in finding the Stark County Board of Commissioners approved the petition for annexation based on compliance with R.C. 709.033(A)(6). R.C. 709.033 states that, “[a]fter the hearing on a petition for annexation, the board of county commissioners shall enter upon its journal a resolution granting the annexation if it finds, based upon a preponderance of the substantial, reliable, and probative evidence on the whole record, that each of the following conditions have been met \* \* \* [.]” We find that based upon the errors in the City of Massillon ordinance, R.C. 709.033(A)(6) had not been met.

{¶75} Accordingly, we sustain Appellants' Assignment of Error on that issue.

{¶76} The judgment of the Stark County Court of Common Pleas is hereby reversed and the matter is remanded to the trial court for further proceedings in accordance with law and consistent with this Opinion.

By: Delaney, J. and

Hoffman, P. J., concur.

Edwards, J. concurs separately.

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HON. PATRICIA A. DELANEY

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HON. WILLIAM B. HOFFMAN

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HON. JULIE A. EDWARDS

PAD:kgb

*Edwards, J., concurring*

{¶77} I concur with the majority as to its analysis and disposition of this case except as to its analysis of whether the annexation petition included the valid signatures of a majority of the owners of real estate in the territory proposed for annexation.

{¶78} I find that the trial court abused its discretion in finding that there was substantial, reliable and probative evidence of a sufficient number of valid signatures. Even though William and Josephine Broel signed the conditional statement as President and Secretary of Bison Storage, the language of the conditional statement indicates that the Broels agree to the annexation of all their property only if the Bison Storage property remains commercial.

{¶79} The signatures seem to indicate that only Bison Storage property is implicated, but the actual language of the statement refers to all the Broels' property. Such a conflict leads me to the conclusion that the trial court erred in finding there were sufficient valid signatures on the petition.

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HON. JULIE A. EDWARDS

