[Cite as *Scio v. N. Twp. Bd. of Trustees*, 2023-Ohio-2479.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
HARRISON COUNTY

THE VILLAGE OF SCIO, OHIO et al.,

Appellants,

v.

NORTH TOWNSHIP, C/O NORTH TOWNSHIP BOARD OF TRUSTEES et al.,
(UTICA EAST OHIO MIDSTREAM, LLC),

Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 22 HA 0006

Civil Appeal from the
Court of Common Pleas of Harrison County, Ohio
Case No. CVF 2021-0086

BEFORE:
Carol Ann Robb, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. James F. Mathews, Atty. Brittany A. Bowland, Baker, Dublikar, Beck, Wiley & Mathews, 400 South Main Street, North Canton, Ohio 44720, for Appellants and

Atty. Joseph R. Miller, Atty. John M. Kuhl, Atty. Christopher L. Ingram, Atty. Muna Abdallah, Vorys, Sater, Seymour & Pease LLP, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216, for Appellee Utica East Ohio Midstream, LLC.

Dated: July 19, 2023

Robb, J.

{¶1} Appellants, who are the Village of Scio and the agents for the petitioner-landowners, appeal the judgment of the Harrison County Common Pleas Court, which affirmed the decision of the Harrison County Board of Commissioners denying annexation of territory. In their first assignment of error, Appellants argue the board's decision contained insufficient findings of fact and contend the board and the trial court erred in ruling the statutory requirements on contiguity, services ordinance, and divided road were not satisfied.

{¶2} In their second assignment of error, Appellants argue the trial court erred in modifying the board's decision as requested in a cross-appeal by Appellee Utica East Ohio Midstream, LLC. The court's modification added the following supplemental findings against annexation: the petitioners did not constitute a majority of owners because the electric utilities met the statutory definition of owner; the territory to be annexed was unreasonably large; and the general good of the territory would not be served by annexation with the benefits failing to outweigh the detriments. We agree with the first argument in the second assignment of error and conclude the trial court erred in modifying the board's decision to find the electric utilities were statutory owners. However, the other reasons for denial stand.

{¶3} Accordingly, the decision of the trial court denying annexation is affirmed.

STATEMENT OF THE CASE

{¶4} This annexation action was filed under R.C. 709.02, a non-expedited annexation petition requiring the signatures of a majority of owners. The action proposed two territories for annexation from North Township to the Village of Scio, which petitioners call parcel 1 and parcel 2. Each parcel touches the corporate line of the village at a certain point, but the parcels do not touch each other.

{¶5} Parcel 1 contains 693.831 acres with property owned by Utica East (599.94 acres), Robert Hendricks (59.98 acres), Scio Pottery (2.3 acres), and James and Kathleen Barrett (1.17 acres). The parties do not dispute certain other owners (Harrison County and Ohio Rail Development Commission) were excluded from the statutory

definition of owner, but they disagree on whether the statutory definition would include the electric utility AEP Ohio Transmission Co. (.84 acres).

{¶6} Parcel 2 contains 36.915 acres. The petition listed only the Spiker Trust (34.03 acres) as a statutory owner. Ohio Power owned property (.2731 acres) within the bounds of this parcel but was not listed as a statutory owner due to its status as an electric utility.

{¶7} Four property owners signed the annexation petition: Hendricks, the two Barretts, and the Spiker Trust through its trustees.[1] The agents for these petitioners filed the petition with the board on June 2, 2021. The agents are two attorneys who also serve as counsel for the village. *See* R.C. 709.02(C)(3) (agent for petitioners may be an agent of the municipal corporation to which annexation is proposed). The petition said the four signatures constituted the majority of the six owners, stating the non-signing owners were Utica East and Scio Pottery.

{¶8} The petition was captioned "In re: The Annexation of 693.831 Acres of North Township * * *" and thereafter referred to "693.831 acres, more or less, contiguous to the Village of Scio." The petition asked to annex the territory described in Exhibit A (said to be incorporated by reference). The legal description in Exhibit A related only to "Parcel 1 693.831 acres." The petition also said a map depicting the perimeter of the territory was attached as Exhibit B. The first page of Exhibit B contained a map of part of parcel 1. The second page contained the remainder of parcel 1 and a second parcel. The second parcel was marked with the same lines labeled in the legend as denoting "area to be annexed."

{¶9} On July 26, 2021, the county engineer provided a letter to the board as required by R.C. 709.031(A). The engineer questioned whether the majority requirement was met, noting it was unclear why the required list of owners (Exhibit C) said AEP Ohio Transmission was statutorily excluded as an owner. He also pointed out the list contained

[1] James and Kathleen Barrett were married and owned their lots joint and survivor. When a commissioner questioned the petitioner's agent as to how the Barretts counted as two signatures, it was claimed the law considered them each a separate owner for purposes of reaching the majority of owners in the territory proposed for annexation. This conclusion was not contested by Utica East in the arguments to the board, to the trial court (in their cross-appeal), or to this court.

owners of lots outside the boundary of the 693.831 acres, noting the map outlined an additional parcel of 36.915 acres containing those lots.

{¶10} The petitioners filed an amended petition on August 5, 2021. The caption and body were changed to 730.746 acres, and a legal description was added for parcel 2. Citing to the two-page map attached to the original petition, the petitioners claimed no land was added to the territory proposed for annexation (but noted they nevertheless provided further statutory notice). *See* R.C. 709.031(B). The petitioners also corrected a one-foot discrepancy on the length of a boundary of parcel 1 based on the engineer's letter. Their accompanying letter to the board explained the corrections and disclosed the petitioners' theory that a utility is statutorily excluded as an owner. On review of the amended petition, the county engineer noted corrections should be made regarding a math error and a small length discrepancy on parcel 2.

{¶11} The board held a hearing on August 20, 2021. One of the agents for the petitioners presented arguments in support of annexation. He also presented testimony from the village administrator, who said the annexation would make the village more economically stable and allow it to better serve everyone. (Tr. 40-41). The administrator said the village had a Class I water treatment facility with upgrades in 2018 and would soon have its wastewater treatment facility upgraded. (Tr. 30-31). He explained the village provided water to locations outside of the corporate limits with a 10% rate surcharge. (Tr. 31, 34). Some portions of the territory to be annexed already received water and sewer services from the village, such as Utica East (through the county, which was a village customer); the Barretts received water but no sewer service. (Tr. 33-34, 46-47). The village administrator asserted the annexation would not strain water or sewer services. (Tr. 32). He acknowledged a sewer line collapse earlier in the year, which caused raw sewage to flow down the street and resulted in EPA involvement. Even more recently, the EPA provided notice of two violations for exceeding the limit of discharge of liquid waste into fresh water. (Tr. 44-45).

{¶12} The village administrator claimed the township would not lose its property tax from the annexed territory but acknowledged he was unaware there existed a statutory process for conforming the boundaries of a municipal corporation (which the attorneys agreed could affect the township's tax base). (Tr. 32, 49). He also said the

township had zoning ordinances but the village did not. Fire and emergency medical services were provided to both the village and the township by the same provider. (Tr. 35). The county sheriff patrolled both, but the village paid for enhanced patrols (32 additional hours per week) through a police levy. (Tr. 37-38).

{¶13} As for roads, the village administrator said they had a road crew, a patching machine, a backhoe, two plow trucks, and salt equipment. He said they performed many of their own repairs while contracting with the county if paving was needed. (Tr. 36). He said, upon annexation, the entirety of the maintenance for Leffler Road (including a bridge) would be assumed by the village with no impact on the road and noted snow removal was considered part of maintenance. (Tr. 37, 47). He acknowledged the township road department had an equipment storage building a half mile from Utica East. (Tr. 47).

{¶14} During the hearing, the village informed the board it was attempting to formulate an agreement to appease the township's concerns about future conforming of the boundaries, which would negatively affect the township's property tax base. (Tr. 5-7). However, counsel for the township presented objections to the annexation similar to those of Utica East, arguing: two non-contiguous territories would require two separate petitions; the services ordinance did not apply to parcel 2; segmentation of the roadway would present issues; the utilities were owners and thus the petitioners were not a majority; the territory was unreasonably large; and the general good would not be served. (Tr. 50-55).

{¶15} Testimony was presented by a township trustee who pointed out the township competed with other areas when attracting the Utica East plant. In addition, Utica East was the township's largest contributor to property taxes. The trustee was also concerned the well-paid employees may lose their jobs due to the detriments of annexation. (Tr. 56).

{¶16} Utica East presented arguments against annexation, including a power point presentation (a copy of which was then submitted in place of a hearing brief). The operations director testified the plant (Harrison Hub Fractionation Facility) processes natural liquids and opened eight years earlier based on a partnership with the township and the county. He mentioned the income tax burden the annexation would have on their

employees, which would make recruitment harder in a tight labor market and decrease take home pay resulting in less spending at local businesses. (Tr. 57). He argued the village was not equipped to provide municipal services to the plant, stating the village lacked a full-time road department while praising the road maintenance performed by the township and the county. (Tr. 58). He was also concerned the services ordinance did not mention snow removal, which was imperative for the plant to operate. (Tr. 58-59).

{¶17} The manager of operations at Utica East confirmed road maintenance and snow removal were critical because 102 trucks per day enter the facility (and 80 rail cars). (Tr. 61). He pointed out the plant paid to install its water and sewer lines through agreements with the county, which were introduced as evidence. The sewer line could not be run to a building near the railroad tracks where a permitted septic system was installed. (Tr. 62).

{¶18} The county sheriff spoke against annexation, pointing out the village denied the plant permission to extend water and sewer from where it ended near the sheriff's house, which prompted the plant to find another source. (Tr. 64-65). He pointed out some of the existing village does not have sewer yet and opined fire services would suffer from this annexation. (Tr. 65-66).

{¶19} The chief of the Scio volunteer fire department also spoke in opposition to annexation observing: he had a contract with the township but not with the village; the department relied on tax levies and fundraisers; the village provided water to 13 other houses on Crimm Road but did not seek to annex them; the village chose a path through less occupied land to reach Utica East; and the water was off for 72 hours once when the village could not find a water line break. (Tr. 81-82).

{¶20} The county engineer presented the following opinions: AEP and Ohio Power were not statutorily excluded and thus the majority signature requirement was not met; separate annexation petitions would be required to annex parcels that are not contiguous with each other; and the services ordinance did not commit to service all of Leffler Road (which would be segmented by annexation). (Tr. 78-79).

{¶21} A second township trustee voiced an opinion the village would be able to handle the maintenance of Leffler Road and noted he would be in agreement with annexation if an agreement could be reached with the village on real estate taxes. (Tr.

84-85). A village council member opined the fire department would not lose funding if the village and township reached the property tax agreement; he also disclosed the traffic to Utica East was detrimental to the village's road infrastructure. (Tr. 86-87). Utica East pointed out the primary route to the plant involved a county road and a township road (Leffler), most of which the village wanted to annex.

{¶22} Scio Pottery (another non-consenting lawndowner in parcel 1) sent a representative to voice opposition to annexation. He noted the granting of the petition would start a slippery slope for further annexation of far-flung lots (including more of Scio Pottery's property). (Tr. 79-80). A landowner with property adjacent to the edges of the proposed territory voiced a similar concern for his future. He also gave an example of why he did not think the village fire department could handle a factory fire. (Tr. 80). A representative from Harrison County Community Improvement Corporation said that office took no stance on annexation while noting the negative effects on the future relocation of businesses to the area when the process is used without working together. (Tr. 83-84).

{¶23} On September 15, 2021, the board issued a resolution denying the annexation petition upon finding the requirements on contiguity, services ordinance, and divided road were not satisfied. (Showing the votes as to each requirement, the resolution found the other requirements were met.) Appellants (the village and the agents for the petitioners) filed an appeal to the trial court, and Utica East filed a cross-appeal. The township filed a notice in the trial court stating it would not be participating because the issue concerning the township had been resolved. (12/29/21 Notice).

{¶24} The board filed the record of proceedings, including the petition, the hearing transcript, and exhibits presented at the hearing. The parties stipulated to the addition of certain documents missing from the record, including the petitioners' initial letter to the board with the attached services ordinance, the petitioners' subsequent letter to the board with the attached amended petition, the petitioners' hearing brief, and the engineer's two letters.

{¶25} Appellants' brief in the trial court set forth four assignments of error, claiming the board's findings of fact were insufficient and arguing against each of the three findings the board made in rejecting annexation (on contiguity, services ordinance, and divided

road). Utica East's brief in the trial court set forth three cross-assignments of error, arguing the following additional grounds for denying annexation: a utility owning property in fee which is used as a substation is not statutorily excluded as an owner and thus the petition lacked a majority of owners; the proposed territory was unreasonably large; and the general good of the territory would not be served by annexation with the benefits failing to outweigh the detriments.

{¶26} On June 16, 2022, the trial court rejected Appellants' assignments of error and accepted the cross-assignments of error of Utica East. The court upheld the denial of annexation while modifying the board's decision to add grounds for further denying the petition. Appellants appealed the trial court's decision to this court.

STANDARD OF REVIEW

{¶27} The board shall grant annexation after the hearing on the annexation petition "if it finds, based upon a preponderance of the substantial, reliable, and probative evidence on the whole record, that each of the [listed] conditions has been met * * *." R.C. 709.033(A)(1)-(6). In an appeal to the common pleas court from a final order of a political subdivision's board,

> the court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court.

R.C. 2506.04, citing R.C. 2506.01(A). This standard of review gives the common pleas court "extensive power to weigh" the evidence. *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 735 N.E.2d 433 (2000). Although a trial is not conducted de novo where the proceedings before the board were recorded, in this type of appeal to the trial court from the denial of annexation, "a virtual de novo examination of the record is conducted by the court pursuant to R.C. 2506.04." *In re Petition to Annex 320 Acres to the Village of S. Lebanon*, 64 Ohio St.3d 585, 594, 597 N.E.2d 463 (1992), fn.6.

{¶28} Thereafter, "[t]he judgment of the [trial] court may be appealed by any party on questions of law as provided in the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code." R.C. 2506.04. *See also* R.C. 2505.01(A)(2) ("Appeal on question as law" is defined as "including the weight and sufficiency of the evidence"). The scope of the appellate court's standard of review is more limited, as the ability to review questions of law does not include the same extensive power to determine the preponderance of the evidence. *Henley*, 90 Ohio St.3d at 147. The appellate court can review for an abuse of discretion and shall not substitute its judgment for the administrative agency or the trial court merely because it would have decided the case differently. *Id.* at 147-148.

ASSIGNMENT OF ERROR ONE

{¶29} Appellants set forth two assignments of error, the first of which contends:

"THE TRIAL COURT ERRED, AS A MATTER OF LAW, WHEN IT AFFIRMED THE GROUNDS STATED BY THE BOARD FOR DENIAL OF THE SUBJECT ANNEXATION, INASMUCH AS THOSE GROUNDS WERE WITHOUT MERIT AS A MATTER OF LAW."

{¶30} Appellants' first assignment of error contains four arguments, reflecting the four assignments of error they raised in the trial court where they claimed the board's findings of fact were insufficient and contested the three findings against annexation made by the board.

Sufficient Factual Findings

{¶31} The board's resolution granting or denying annexation "shall include specific findings of fact as to whether each of the conditions listed in divisions (A)(1) to (6) of this section has been met." R.C. 709.033(B). Appellants claim the board's findings of fact are insufficient as a matter of law to support the denial of annexation. Appellants suggest the remedy for a lack of findings is to reverse the board's decision and grant annexation.

{¶32} First, Appellee responds by arguing the remedy for a board's failure to file findings of fact is provided in R.C. 2506.03. This statute begins by explaining, "[t]he hearing of an appeal * * * shall proceed as in the trial of a civil action, but the court shall be confined to the transcript filed under section 2506.02 of the Revised Code unless it

appears, on the face of that transcript or by affidavit filed by the appellant, that one of the [listed circumstances] applies." R.C. 2506.02(A). The first listed circumstance is where "[t]he transcript does not contain a report of all evidence admitted or proffered by the appellant." R.C. 2506.03(A)(1). The last listed circumstance is where "[t]he officer or body failed to file with the transcript conclusions of fact supporting the final order, adjudication, or decision." R.C. 2506.03(A)(5). "If any circumstance described in divisions (A)(1) to (5) of this section applies, the court shall hear the appeal upon the transcript and additional evidence as may be introduced by any party. At the hearing, any party may call, as if on cross-examination, any witness who previously gave testimony in opposition to that party." R.C. 2506.03(B).

{¶33} As the trial court pointed out, the face of the record submitted on appeal contained a resolution wherein the board denied annexation after making eleven separate statutory findings under the annexation statutes (with each commissioner's individual vote on each finding). Pursuant to the agreed scheduling order, anything necessary to complete the record on appeal was to be filed by January 28, 2022 (with subsequent briefing and oral argument dates). On the due date for the record, Appellants essentially asked the trial court to hear the appeal on the transcript filed by the board and the additional evidence introduced through a stipulation, which added certain items missing from the transmitted record.

{¶34} Appellants' "administrative appeal brief" later claimed the findings of fact were lacking. However, Appellants did not seek an evidentiary hearing in the trial court; nor do Appellants now say a further hearing was required. *See, e.g., Premier Dev., Ltd. v. Poland Twp. Bd. of Zoning Appeals*, 7th Dist. Mahoning No. 14 MA 91, 2015-Ohio-2025, ¶ 24-27 ("a right to present additional evidence at a court hearing under R.C. 2506.03(A) can be waived"), citing *Global Country of World Peace v. Mayfield Heights Planning Comm.*, 8th Dist. Cuyahoga No. 924848, 2010-Ohio-2213, ¶ 30 (a party cannot raise the court's failure to take additional evidence due to the board's failure to file conclusions of fact where the party never asked the trial court to do so).

{¶35} Regardless, in the resolution denying annexation, the board specifically referred to its duty to make specific findings of fact, listed each of the conditions in R.C. 709.033 (A)(1) through (6) on which a finding was required, and then showed the vote of

each commissioner on every condition. The first condition was even separated into six parts listing the requirements within that statute and providing statutory citations to some pertinent divisions and subdivisions of R.C. 709.02, with votes on each. For instance, the resolution listed the first condition by stating the petition must meet all requirements in R.C. 709.02, and the sixth finding under the first condition read, "Real estate was contiguous to the municipality to which annexation is proposed (ORC 709.02)" with disclosure of the three "No" votes (specific to each commissioner) on this subcondition.

{¶36} Notably, R.C. 709.033(B) speaks of factual findings "as to whether" (not "as to why") the listed statutory conditions were met. A statutory requirement to "include specific findings of fact as to whether each of the conditions listed in divisions (A)(1) to (6) of [R.C. 709.033] has been met" does not require the board to list reasons in support of the factual findings. *See, e.g., State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37 (where a sentencing statute requires the trial court to make the factual findings listed in the statute, the court "has no obligation to state reasons to support its findings"). The board "filed conclusions of fact supporting the final order" as the phrase is used in R.C. 2506.03(A)(5) and satisfied its obligation to "include [in the resolution] specific findings of fact as to whether each of the conditions listed in divisions (A)(1) to (6) of [R.C. 709.033] has been met" as required by R.C. 709.033(B). Accordingly, Appellants' argument on insufficient findings is without merit.

Contiguity

{¶37} Before granting annexation, the board must first find: "The petition meets all the requirements set forth in, and was filed in the manner provided in, section 709.02 of the Revised Code." R.C. 709.033(A)(1). Pursuant to R.C. 709.02(A), "[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."

{¶38} The board unanimously determined this requirement was not met, finding the real estate was not contiguous to the municipality to which annexation was proposed. In reviewing this finding, the common pleas court noted parcel 1 extends along the corporate line for approximately 1,359 feet and parcel 2 for approximately 42 feet. Appellant states both touchpoints are sufficient to meet the requirement of contiguity with

the village borders. Appellee's brief in the trial court, in addition to arguing the petitioners improperly attempted annexation of two separate territories which were not contiguous to each other (discussed next), cited the contiguity principles on a unified and compact municipality as opposed to irregular boundaries caused by shoestring connectors, citing *City of Middletown v. McGee*, 39 Ohio St.3d 284, 287, 530 N.E.2d 902 (1988). *See also In Matter of Appeal of Williams*, 5th Dist. Stark No. 1995CA144 (Jan. 16, 1996) (affirming the decisions of the board and the trial court finding the territory was not significantly adjacent to the city under *McGee's* explanation of contiguity, where property would be at the end of a peninsula extending into the township connected with the city only through a corridor of a railroad right-of-way and a park).

{¶39} The annexation statutes applicable to this type of annexation do not define the term contiguous. This "statutory silence led [the *McGee* Court] to draw from the caselaw in determining the minimum degree of touching necessary for a territory and an annexing municipality to be contiguous." *State ex rel. Xenia v. Greene Cty. Bd. of Commrs.*, 160 Ohio St.3d 495, 2020-Ohio-3423, 159 N.E.3d 262, ¶ 20. In contrast, for a different category of annexation (type-2 expedited), the legislature "defined the minimum degree of touching necessary" by requiring the territory proposed for annexation to have a boundary running with the municipality for a "continuous length of at least five per cent" of the territory's perimeter. *Id.* at ¶ 21.

{¶40} "In Ohio, courts have frowned upon the use of connecting strips of land to meet the contiguity requirement when annexing outlying territory not otherwise connected to the annexing municipality." *McGee*, 39 Ohio St.3d at 287 (where the Court equated the word "adjacent" in former R.C. 709.02(A) with the word "contiguous"). These disfavored annexation attempts have been called "strip, shoestring, subterfuge, corridor, and gerrymander annexations." *Id.* In considering the contiguity requirement, the Supreme Court indicated courts may inquire into whether an annexing municipality would conform to the basic concept of a municipality as "a unified body" if the annexation took place. *Id.* "[A]s to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separate[d] or segregat[ed]." *Id.* (a collective mass in one locality, not several bodies separated into distinct masses), quoting *Watson v. Doolittle*, 10 Ohio App.2d 143, 149, 226 N.E.2d 771 (6th Dist.1967), quoting 19 Ruling Case Law

734, Section 40 (1917). Although a road's northern length connecting two parts of the city and the length of the road running parallel to the city line satisfied the contiguity requirement, the *McGee* Court found the road's southern length heading away from the city lacked contiguity (and enjoined a portion of the board's decision via an appeal from a statutory injunction action). *Id.* at 288 (also finding annexation of the southern length would not be in the general good of that territory).

{¶41} Appellants claim there were no connector strips used here. However, Parcel 1's border with the village looks like the foot portion of a thin leg that balloons into much larger unrelated areas as it gets further from the border, and parcel 2's border with the village is a small area that proceeds up a corridor at the corner of the village (resembling an island with a bridge to the village). *See* Appellee's Brief at 4 depicting Tr. Ex. J (map); Petition, Ex. B (surveyor's map). We also emphasize the characteristics of the pocket of township land that would be left between the two territories proposed for annexation.

{¶42} Appellants recognize peninsulas, especially those ballooning out to unrelated property, are "generally discouraged," but Appellants say this fact alone will not impede annexation. However, in the cited case, the board granted annexation, the trial court upheld the board's decision, and the appellate court agreed with the trial court's decision on the contiguity condition, noting it would not interfere unless the decision to create the peninsula was unreasonable, illogical, or arbitrary. *Tuscarawas Twp. Bd. of Trustees v. Massillon*, 5th Dist. Stark No. 2008CA00188, 2009-Ohio-3267, ¶ 43, citing *In re appeal of Jefferson Township Bd. Of Trustees*, 78 Ohio App.3d 493, 605 N.E.2d 435 (10th Dist.1992).

{¶43} Here, the board found a lack of contiguity, and the trial court did not reverse that decision. One could reasonably conclude the attempt to annex a non-contiguous landowner by a narrow path of non-statutory owners to create the balloon in parcel 1 would result in a separated rather than unified municipality (and was unconscionable to the objecting party). The segregation is amplified by the second balloon in parcel 2, which also would leave township land sandwiched between the parcels. It was not erroneous as a matter of law or unreasonable to conclude the territories sought to be annexed were not sufficiently contiguous to the village to satisfy R.C. 709.02(A) as interpreted in *McGee*.

{¶44} Instead of specifically discussing the sufficiency of each territory's contiguity with the village border, the trial court emphasized that parcel 1 and parcel 2 were not adjacent to each other. This lacking aspect of contiguity was argued to the board by multiple parties (and could be the reason or an additional reason behind the board's lack of contiguity finding). The trial court adopted the argument and the following holding: "When separate and unconnected territories are to be annexed, separate petitions are required to ensure that in each territory a majority of landowners in that territory has signed the petition as required by R.C. 709.02." *In re Annexation of 561.590 Acres in Perry & Bethlehem Twps.*, 105 Ohio App.3d 771, 777, 664 N.E.2d 1368 (5th Dist.1995). In that case, the Fifth District was concerned with how the owners in one territory contiguous to the municipality could create a majority in favor of annexation by "bootstrapping" a second territory to the petition by finding a territory contiguous with the municipality but non-contiguous to the first territory. *See id.*

{¶45} Notably, the *McGee* case involved one road at two sides of a city (which already had a small portion of the road in the city limits), and thus, the petition involved two territories proposed for annexation. The Court enjoined annexation of the part of the road running away from the city and expressly refused to address the argument that an annexation petition describing two separate territories was illegal under Ohio law because the issue was not raised below (and was irrelevant to the complaining party due to the outcome of the Court's decision eliminating a non-contiguous portion). *McGee*, 39 Ohio St.3d 284 at fn. 4. The Court therefore did not endorse the practice. Moreover, *McGee* was an injunction action filed after a different type of annexation was granted rather than a direct review of a board's decision rejecting an annexation said to be filed by a majority of owners.

{¶46} In a later case, the Fifth District upheld a board's decision to invalidate a petition because "a single annexation territory was no longer extant" where it "presented separate and unconnected territories" (after certain lots were annexed to a different municipality in a separate expedited annexation). *East Canton v. Stark Cty. Bd. of Commrs.*, 5th Dist. Stark No. 2008 CA 00156, 2009-Ohio-2555, ¶ 8, 21, 26. Applying their 1995 annexation case, the Fifth District concluded the "disruption in the contiguity of the group of Village Annexation parcels" constituted a "fatal flaw." *Id.* at ¶ 26.

{¶47} Appellant believes the trial court's adoption of the Fifth District's case law was contrary to the plain language in R.C. 709.02(A). However, we conclude the statutory language, "[t]he owners of real estate contiguous to a municipal corporation may petition for annexation," inherently indicates the referred-to owners must be part of the same contiguity. *See* R.C. 709.02(A). Plainly, this statutory language means the owners permitted to file a particular petition are those who, as a group, own property lying within the same contiguous-to-the-village territory proposed for annexation.

{¶48} This plain interpretation is further supported when the first sentence in R.C. 709.02 is read in the context of the whole statute (and in the context of the statutes incorporated by reference therein). *See* R.C. 709.02(A), citing R.C. 709.02 to 709.11. *See also State v. Wilson*, 77 Ohio St.3d 334, 336, 673 N.E.2d 1347, 1350 (1997) (read statutory terms in context and "look to the four corners of the enactment to determine the intent of the enacting body"). The statute requires the petition to disclose "an accurate legal description of the perimeter * * * of the territory proposed for annexation." R.C. 709.02 (C)(2) (and a map or plat of that territory). The petition must be signed by "a majority of owners of real estate in the territory proposed for annexation." R.C. 709.02(C)(1). And, it shall be accompanied by "a list of all tracts, lots, or parcels in the territory proposed for annexation" with each owner listed as well. R.C. 709.02(D). Appellants' submission mixed the majorities (and the listed owners). A second territory would fall outside the statutorily required perimeter description of the first territory (or vice versa).

{¶49} Appellants alternatively state the Fifth District's position should only be applied if there is an issue with the majority requirement being met as to one of the various territories proposed to be annexed in a single petition. Although Appellants blended the signatures for the majority and the lists of tracts in the territories, they say the majority requirement was met on each territory separately as well as when combined (an issue raised in Appellants' second assignment of error). In any event, the application of a single-perimeter contiguity requirement should not be dependent on the conclusion reached on the merits of other required annexation factors. Otherwise, the rule applicable at the time of filing the petition could change after the majorities are argued and counted or after the conditions are heard and evaluated. The other required conditions may entail

wholly different considerations as to the territory in each separate perimeter. As a further example, the petitioners in this case relied on two parcels to determine the factors while relying on a services ordinance only relating to one parcel, as discussed next.

{¶50} We uphold the trial court's specific finding on a lack of contiguity amongst the two territories in the same petition as well as the board's general finding on a lack of contiguity.

Services Ordinance

{¶51} In order to grant annexation, the board must additionally find the following condition was met: "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." R.C. 709.033(A)(3). Pursuant to R.C. 709.03, after the municipal corporation receives notice of the board's hearing date, "the legislative authority of the municipal corporation shall adopt, by ordinance or resolution, a statement indicating what services the municipal corporation will provide, and an approximate date by which it will provide them, to the territory proposed for annexation, upon annexation." R.C. 709.03(D). This services ordinance "shall be filed with the board of county commissioners at least twenty days before the date of the hearing." *Id.* "The municipal corporation is entitled in its sole discretion to provide to the territory proposed for annexation, upon annexation, services in addition to the services described in the ordinance or resolution it adopts under this division." *Id.*

{¶52} The board unanimously found the village did not comply with R.C. 709.03(D). The trial court agreed, reasoning the services ordinance adopted by the village on June 9, 2021 only related to parcel 1 and thus a services ordinance was not adopted indicating the services to be provided to the territory proposed for annexation.

{¶53} Appellants argue this issue was a scrivener's error or a mere procedural requirement, claiming their petition substantially complied with R.C. 709.02(C)(2) (accurate legal description of perimeter and map). They rely on the following provision: "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." R.C. 709.015.

{¶54} We note this statute does not say the requirements in the listed sections are all procedural. The board allowed the curing of minor discrepancies in the perimeters listed and allowed an amended petition to be filed after the original petition listed only the acreage of parcel 1 and only provided the legal description for parcel 1. The omission here involves the *services ordinance*, which must be enacted by the village, not amended by a landowner's petition.

{¶55} Rejecting Appellants' argument about a scrivener's error by the village in the services ordinance, the trial court pointed out the reference to 693.831 acres occurred three times (in the caption, the first clause, and section 1). Additionally, the services ordinance said, "upon annexation, the parcel proposed for annexation will have uniform access to Village services." The word "parcel" was singular, notwithstanding the agent's terminology of parcel 1 and parcel 2 in the map attached to the petition for annexation previously filed with the board. Under the circumstances presented in this case, the language of the services ordinance limited its coverage to parcel 1.

{¶56} Contrary to Appellant's argument, the use of "+/-" after 693.831 does not cure the limiting language under the situation existing here, where one parcel was in fact 693.831 acres and a second (non-contiguous) parcel was 36.915 acres. In addition, the phrase "plus or minus" is generally considered synonymous with "more or less" or "approximately." *See, e.g.,* www.merriamwebster.com/thesaurus (searching approximately). The acreage of 730.746 would not reasonably be considered "approximately 693.831 acres."

{¶57} Notably, the services ordinance said it was incorporating a description of the property to be annexed, purportedly attached as Exhibit A. The stipulated addition to the record filed in the common pleas court added the services ordinance without an attached exhibit. As mentioned in the Statement of the Case, the original annexation petition also referred only to 693.831 acres and incorporated Exhibit A. This Exhibit A was the legal description *for only parcel 1*. The petition contained an Exhibit B, which was a two-page map showing both parcels, whereas the services ordinance did not refer

to Exhibit B or a map. The annexation petition was amended to change the title and body of the territory to 730.746 acres and to add the legal description for parcel 2.

{¶58} However, the services ordinance was never amended by the village. As Appellee urges, the village speaks through its official actions, such as resolutions and ordinances, citing *Billington v. Cotner*, 25 Ohio St.2d 140, 150, 267 N.E.2d 410 (1971) (parol evidence could not be submitted to supply missing terms in a municipal resolution). As discussed further infra, argument and testimony cannot alter a services ordinance enacted by a village. Accordingly, it was not a legal error or an abuse of discretion to find the services ordinance requirement was not met.

Divided Road

{¶59} Before granting an annexation petition, the board must find (by a preponderance of the substantial, reliable, and probative evidence on the whole record):

> 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.

R.C. 709.033(A)(6).

{¶60} The board quoted this requirement (along with the definition of street or highway) and unanimously found the petition failed to satisfy this condition. The trial court agreed, pointing out the statement in the services ordinance on the village's willingness to assume responsibility only related to parcel 1 and testimony does not modify a services ordinance.

{¶61} Appellants' brief in the trial court argued the only potential road issue in parcel 2 would be additional portions of Cemetery Road but asserted this road was irrelevant as it was already maintained by the village (notwithstanding its intermittent path); this was not discussed at the hearing before the board. Instead, Appellants focused on Leffler Road in parcel 1, which the map shows as running through and extending out of parcel 1. At the board hearing, the agent for the petitioners (who was also counsel for the village) stated:

> Leffler Road extends kind of through the northern part of this territory and actually extends outside of it to an adjoining roadway. Well, what the village council included as part of their ordinance was that in fact any road that is either split in any fashion will be assumed by the village, and also any road that is segmented in any fashion *the full length* would be assumed. Which means the segment of Leffler that goes outside of the territory the village is willing to assume it as its responsibility also. And that's a requirement under the code to avoid any maintenance conflicts or issues going forward.

(Emphasis added.) (Tr. 27).

{¶62} The petitioners' agent asked the village administrator, "Did I accurately state to the members of the board that if this annexation is approved the entirety of Leffler Road would be assumed by the city for maintenance and repair?" The village administrator answered in the affirmative. (Tr. 37). The petitioners did not argue the segmentation of Leffler (or the division of Cemetery Road) would not cause a road maintenance issue but went directly to the second half of R.C. 709.033(A)(6) applicable when there is a road maintenance problem from the division or segmentation of a road.

{¶63} As the trial court also mentioned, the services ordinance did not cover parcel 2 (as discussed in the prior section). The services ordinance said, "In the event any street or highway will be divided or segmented by the boundary line between North Township and the Village of Scio as to create a road maintenance problem, the Village agrees to assume the maintenance of the full width of such street or highway adjacent to the territory."

{¶64} The use of the term "width" in the services ordinance when discussing road maintenance suggests a concern with a road split down the center by annexation, as opposed to a road segmented into a short length falling outside the territory proposed for annexation. This could be seen as limiting language rather than a commitment to cover the entire length of a road including the portion extending beyond the proposed territory (as suggested in the county engineer's testimony).

{¶65} Moreover, without naming a street, the services ordinance did not acknowledge there was segmentation or that such segmentation would create a road maintenance issue (leaving open the possibility of a future dispute on whether

segmentation actually created a road maintenance issue). Testimony by a village administrator is not an agreement and cannot change a services ordinance. See *Tuscarawas Twp.*, 5th Dist. No. 2008CA00188 at ¶ 68-74 (testimony cannot cure a defect in the services ordinance on divided or segmented roads, finding the issue was more than a procedural one). The board and trial court could reasonably conclude R.C. 709.033(A)(6) was not satisfied.

{¶66} For the foregoing reasons, the first assignment of error is overruled.

ASSIGNMENT OF ERROR TWO

{¶67} Appellant's second assignment of error alleges:

"THE TRIAL COURT ERRED WHEN IT ADOPTED THE APPELLEE'S CROSS-ASSIGNMENTS OF ERROR, WHEREIN THE COURT SUBSTITUTED ITS JUDGMENT FOR FACTUAL FINDINGS MADE BY THE BOARD, WHICH IS ERRONEOUS AND PREJUDICAL AS A MATTER OF LAW."

{¶68} In this assignment of error, Appellants argue the trial court erred in modifying the board's decision and providing additional grounds for denying annexation as requested in a cross-appeal by Appellee Utica East Ohio Midstream, LLC. In that cross-appeal before the trial court, Appellee set forth the following arguments in three cross-assignments of error: the petition lacked a majority of owners because the utility properties used as substations were not statutorily excluded from the definition of owner; the territory to be annexed was unreasonably large; and the general good of the territory would not be served by annexation with the benefits failing to outweigh the detriments. The trial court agreed with all three arguments and modified the board's decision accordingly.

Majority of Statutorily Defined Owners

{¶69} Appellants say parcel 1 consists of the following five owners entitled to vote on annexation: Utica East, Scio Pottery, Robert Hendricks, James Barrett, and Kathleen Barrett. As the last three signed the annexation petition, Appellants say this parcel had the signature of a majority of owners. Appellants say parcel 2 consists of lots owned by only one statutorily defined owner, the Spiker Trust. Adding these owners from both parcels together, Appellants' petition reported to the board that four out of six owners signed the petition (with only Utica East and Scio Pottery refusing to sign). Other lots

within the territory to be annexed were owned by the county commissioners, a railroad commission, and electric utility companies.

{¶70} The dispute is over the status of AEP Ohio Transmission Co. and Ohio Power, landowners Appellants listed as being excluded from the statutory definition of owner. Objecting to this exclusion, Appellee provided evidence at the hearing to show these electric utilities owned the lots in fee simple and used the lots for substations. From this, they concluded the utilities fell within the statutory definition of owner.

{¶71} AEP purchased the lot in parcel 1 from Utica East in a deed recorded December 20, 2012. Ohio Power purchased the lot in parcel 2 from Tomas Spiker in a deed recorded October 17, 2013. Neither deed specified the use of the property. The petitioners had the burden at the hearing and did not dispute the photographic evidence showing the lots were used for substation purposes.

{¶72} In the hearing brief submitted to the board, the petitioners' agent said a utility is never an owner under the statute. Although the board denied annexation, the board found the number of signatures on the petition constituted a majority of the owners of real estate in the territory, which is an annexation requirement under R.C. 709.02(C)(1) and R.C. 709.033(A)(2). Sustaining the first cross-assignment of error of Utica East, the trial court found the two utility companies qualified as owners and thus a majority of owners did not sign the petition.

{¶73} Appellants maintain they met the majority requirement whether counting the owners in each parcel separately (3/5 and 1/1) or adding them together (4/6) because the electric utilities are excluded as owners. In contrast, Appellee says the two utilities count as owners when applying the statutory definition to this case and thus the majority requirement was not met whether the parcels are counted separately (3/6 and 1/2) or together (4/8). The interpretation and application of the following statutory provision is key:

> "owner" or "owners" means any adult individual who is legally competent, the state or any political subdivision as defined in section 5713.081 of the Revised Code, and any firm, trustee, or private corporation, any of which is seized of a freehold estate in land; *except that* easements and any railroad,

> *utility*, street, and highway *rights-of-way held in fee*, by easement, or by dedication and acceptance *are not included within those meanings* * * *.

(Emphasis added.) R.C. 709.02(E) (with exceptions if a signer became an owner with the primary purpose to affect the number of owners and "the state and any political subdivision shall not be considered an owner and shall not be included in determining the number of owners needed to sign a petition unless an authorized agent of the state or the political subdivision signs the petition").

{¶74} First, Appellants argue the term "rights-of-way" in R.C. 709.02(E) only applies to the word "highway." They claim the word "utility" should be read as standing alone in the exceptions list (just as the word "easements" is not modified by "rights-of-way"). However, this argument defies ordinary principles of grammar and reading. The trial court properly held this argument was legally incorrect. Plainly, the term "rights-of-way" modifies railroad, utility, street, and highway. *State ex rel. National Lime & Stone Co. v. Marion Cty. Bd. of Commrs.*, 152 Ohio St.3d 393, 2017-Ohio-8348, 97 N.E.3d 404, ¶ 24 (stating the statutory intent was "to exclude the holders of railroad, utility, street, and highway rights-of-way" and rearranging R.C. 709.02(E) to explain it applies to "railroad right-of-way held in fee"); *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 112 Ohio St.3d 262, 2006-Ohio-6411, 858 N.E.2d 1193, ¶ 41 (stating this "clause also refers to railroad and utility rights of way").

{¶75} Alternatively, Appellants argue the lot owned by AEP in parcel 1 and the lot owned by Ohio Power in parcel 2 are "utility * * * rights-of-way held in fee" and thus are not included in R.C. 709.02(E)'s definition of owner for purposes of obtaining signatures for a majority. They contend the utility parcels were used for the purpose of a right-of-way, stating a substation is an appurtenance to a transmission line and there should be no distinction between these two aspects of an electric utility. Appellee responds the lots (owned in fee simple) on which an electric utility operates a permanent substation are being used for more than right-of-way purposes.

{¶76} Both sides rely on the holding in *National Lime* where the Supreme Court applied the definition of owner in R.C. 709.02(E) and considered whether, under the circumstances presented in that case, a railroad's property interest in the territory proposed for annexation constituted "a railroad right-of-way held in fee." *National Lime*,

152 Ohio St.3d 393 at ¶ 1-2, 11 (an expedited annexation where all owners must sign, using same definition of owner). The deeds to the railroad granted a fee simple interest in two parcels of land, and the board denied annexation upon finding the railroad was an owner. *Id.* at ¶ 5-8.

{¶77} The Supreme Court pointed out it previously found R.C. 709.02(E)'s use of the term "rights-of-way" to be ambiguous because the term can refer to "the land itself or the right to use the land." *Id.* at ¶ 15, citing *Butler Twp.*, 112 Ohio St.3d 262 at ¶ 25 and *Joy v. St. Louis*, 138 U.S. 1, 44, 11 S.Ct. 243, 34 L.Ed. 843 (1891) (the term can mean a party's "right of passage over any tract" or "that strip of land which railroad companies take upon which to construct their road-bed"). The Court cited the following examples of additional definitions: "the area over which a right-of-way exists"; "the strip of land devoted to or over which is built a public road"; "the land occupied by a railroad for its tracks"; and "*the land used by a public utility (as for an electric power transmission line* * * *)." (Emphasis added.) *Id.* at ¶ 22, quoting *Webster's Third New International Dictionary* 1956 (2002). It was then noted the railroad industry defines "right-of-way" as "[p]roperty owned by a railroad over which tracks have been laid" (strictly meaning "rights necessary for the roadbed and its accessories" or loosely meaning "property owned and/or operated over by a railroad.") *Id.* (quoting a railroad dictionary on www.csx.com).

{¶78} The owner desiring annexation essentially argued "the strip of land upon which a railroad company constructs its roadbed is necessarily a right-of-way, whether owned in fee, taken by easement, or by dedication and acceptance," and the Court opined this interpretation "gives effect to each of the words in the statute and conforms to the technical or particular meaning of the term 'right-of-way' as it is used in the railroad industry." *National Lime*, 152 Ohio St.3d 393 at ¶ 22. R.C. 709.02(E) uses "rights-of-way" or "utility * * * rights-of-way held in fee * * *" in order to "describe the way in which a piece of property is used" (rather than referring to how the property is held) because the term is "followed by a list of ways in which the property may be held, that is, in fee, by easement, or by dedication and acceptance." *Id.* at ¶ 24. The statute excludes as owners "the holders of railroad, utility, street, and highway rights-of-way—whether the holder possesses the right to pass over the lands of another or owns the land under the right of passage in fee * * *." *Id.*

{¶79} The Court then applied its holding to the following two pieces of property owned in fee simple by the railroad (which were within the single territory proposed for annexation): (1) a strip of property containing the railroad bed and tracks and (2) an adjacent piece of property obtained through a deed saying the railroad was to construct a spur of track, stock pens, a scale, and a shelter for freight and passengers (which the Supreme Court characterized as accessories to the property containing the railroad tracks). *Id.* at ¶ 5-6, 25. The Court concluded both parcels were "railroad rights-of-way held in fee" so that the railroad was excluded from the statutory definition of owner. *Id.* at ¶ 25.[2]

{¶80} Still, the Court said the "plain language" of R.C. 709.02(E) only excepts "*some* railroad interests held in fee – specifically rights-of-way in fee – from the statutory definition" of owner. (Emphasis original). *Id.* at ¶ 17. Most notably, the *National Lime* Court observed the holding "leaves open the possibility that a railroad's consent may still be a condition for annexation *if it owns real property* in a territory proposed for annexation *that is used for purposes other than as a right-of-way*." (Emphasis added). *Id.* at ¶ 25.

{¶81} In determining whether the substation lots are "utility * * * rights-of-way held in fee" and thus excluded from the definition of owner, we must consider whether these lots were used for purposes other than as rights-of-way. We initially point out the fact that AEP and Ohio Power acquired their lots through a deed granting them a fee simple is not dispositive due to the statutory language excluding a utility right-of-way "held in fee" (in addition to those held "by easement" or held "by dedication and acceptance"). *See id.* at ¶ 24.

{¶82} Electric utility property (whether held in fee or by easement) which is used *solely for transmission lines* would seem akin to the property at issue in *National Lime* held in fee simple by the railroad with railroad tracks passing through. Appellee argues the lots used by the utility as substations are for a purpose other than to pass through the land. In contrast, Appellants contend the utility parcels were used for the purpose of a right-of-way because a substation is appurtenant to a transmission line and there should be no distinction between these two aspects of an electric utility (just as the Supreme

[2] Three justices dissented based on their opinion the railroad qualified as an owner of the second property (with one of those justices believing the railroad qualified as an owner of both lots).

Court found the second property an accessory to the railroad track property). Essentially, the question is whether the Ohio Supreme Court would equate an electric utility's substation property to the second property in *National Lime*.

{¶83} Appellants place emphasis on the following quote from a case unrelated to annexation: "American Transmission planned to build a new substation. A substation is a point on the power grid where electricity, having been stepped up in voltage for more efficient, long-distance transmission, is stepped down for distribution on smaller lines. The needed substation would require a new transmission line, which in turn required a new right-of-way." *In re Application of American Transmission Sys., Inc.*, 125 Ohio St.3d 333, 2010-Ohio-1841, 928 N.E.2d 427, ¶ 5. This was background information in an appeal of the Power Siting Board's decision approving the electric utility's proposed route for a new transmission line; the reviewed arguments involved the delegation of the board's authority and the adequacy of time to prepare for the hearing. Still, it constitutes an explanation of the purpose of a substation.

{¶84} Appellants also quote the following: "A substation that reduces the voltage in a public utility facility so that it may be used for local distribution is an appurtenance connected to, used in direct connection with, or necessary for the operation or safety of such line within the meaning of R.C. 4905.65(A)(2)." *Cleveland Elec. Illum. Co. v. Village of Mayfield*, 53 Ohio App.2d 37, 371 N.E.2d 567 (8th Dist.1977), paragraph 4 of the syllabus (where a utility was constructing a transmission line with a series of substations along the route, part of the line plus a substation were being built in a village, the utility purchased the lot for the substation after obtaining a zoning variance from the village, and the village then enacted new ordinances interfering with the construction). The Eighth District was applying a statute defining a "public utility facility" as "any electric line having a voltage of twenty-two thousand or more volts used or to be used by an electric light company and supporting structures, fixtures, and appurtenances connected to, used in direct connection with, or necessary for the operation or safety of such electric lines." R.C. 4905.65(A)(2).

{¶85} As Appellants point out, the use of the utility substation property here assists in moving power along the transmission lines and shares a purpose with transmission lines. The second lot in *National Lime* did not contain the tracks used to pass over land

but involved a deed saying the railroad would construct a spur of track, stock pens, a scale, and even a shelter for passengers and freight. *National Lime*, 152 Ohio St.3d 393 at ¶ 5, 25. The deed also mentioned a future permanent station. *Id.* at ¶ 37 (Kennedy, J., concurring in part and dissenting in part). The Supreme Court characterized the uses mentioned in the deed as "accessories" to the adjacent strip of land used for the railroad "road-bed" and tracks and concluded the railroad did not qualify as an owner even for this lot. *Id.* at ¶ 23-25. It should be noted the Court relied on what the deed said the railroad would be doing with the land and not what the railroad was in fact doing with the land, and here the deeds had no similar statements.

{¶86} Nevertheless, because the Supreme Court in *National Lime* considered the second lot as property being used for right-of-way purposes and concluded the fee simple railroad property owner was excluded as a statutory owner under R.C. 709.02(E), we are constrained to conclude the Supreme Court would similarly hold an electric substation lot was being used for right-of-way purposes under the theory that a substation is an accessory to transmission lines. Being the connection and conversion point between two types of transmission lines is supportive of a conclusion the property is used as part of the traditional right-of-way for the passage of electricity or inherently supportive of the transmission line right-of-way in the same manner as the second property in *National Lime*. We therefore conclude the trial court legally erred in modifying the board's decision to add this statutory condition as an additional reason for denying annexation. Nevertheless, this would not reverse the denial of annexation, as annexation must be denied unless all of the findings are made in the petitioners' favor.

{¶87} Lastly, in responding to Appellants' argument on the majority of owners condition, Appellee presents an alternative argument that the condition also requires the owners of the majority of *acreage* to have signed. The trial court did not adopt Appellee's argument on the majority of acreage, instead finding a lack of majority *in numerical owners*. Appellants point out there is no authority equating the majority of land acreage with the numerical majority of owners in R.C. 709.02(C)(1) or 709.033(A)(2). The statutory language "a majority of the owners of real estate" is not equivalent to "the owners of the majority of the real estate acreage."

{¶88} The cases cited by Appellee support the conclusion that references to the owners of the majority of the acreage are unrelated to the condition on the signature of "a majority of the owners of real estate in that territory." *See Kunkel v. Champaign Cty. Bd. of Commrs.,* 177 Ohio App.3d 718, 2008-Ohio-4017, 895 N.E.2d 905, ¶ 51, 54 (2d Dist.) (*in addressing the general good condition*, the appellate court pointed to the trial court's observation that the petitioners who constituted a numerical majority also owned 80 percent of the territory proposed for annexation), citing *Hottle v. Barney*, 2d Dist. Montgomery No. 15126 (Nov. 22, 1995) (after finding the numerical majority signed the petition, *when analyzing the general good condition*, the court said, "the intentions and desires of the remaining owners, including Hottle, who owned most of the territory, were reasonably entitled to great weight in the consideration of the benefits and detriments to the totality of the territory"). Accordingly, Appellee's argument involving the owner of the majority of acreage is best addressed when considering the exercise of discretion under the general good condition, which is discussed in the last section.

Unreasonably Large Territory to be Annexed

{¶89} A board of county commissioners cannot grant annexation unless it finds, based upon a preponderance of the substantial, reliable, and probative evidence on the whole record: "The territory proposed to be annexed is not unreasonably large." R.C. 709.033(A)(4). The board's resolution found this condition was satisfied. However, the trial court modified the resolution and found the territory was unreasonably large.

{¶90} The parties agree the following factors are relevant to the determination of whether the territory to be annexed is unreasonably large: the geographic character, shape, and size of the territory proposed for annexation when compared to the village and when compared to the remaining township land after annexation; the village's ability to provide necessary services to additional territory; and the effect on the remaining township if annexation permitted (such as a large decrease in the township's property tax base). *In re Annexation of 1,544.61 Acres in Northampton Twp. to City of Akron*, 14 Ohio App.3d 231, 233, 470 N.E.2d 486 (9th Dist.1984) (upholding a finding on the proposed territory being unreasonably large).

{¶91} First, Appellants emphasize the annexation would only decrease the township territory by 5%, claiming this reduction was considered reasonable in other

cases. *See Golonka v. Bethel Twp. Bd. of Trustees*, 2d Dist. Miami No. 2000-CA-33 (Dec. 8, 2000) (citing cases). However, Appellants ignore the relative size increase to the village. In the same sentence, the Second District pointed out the annexation would only increase the size of the city by 5.1%. *Id.* Here, the trial court pointed out the village contained 358 acres but sought to annex 730.46 acres, "a one-time 200% increase in size" for the village. The court cited a case where the Sixth District reversed a board's finding and concluded the territory was unreasonably large where it would increase the size of a village by 12-14%, considering the character of the land and services. *In re Appeal of Annexation of 65.48 acres in Springfield Twp.*, 6th Dist. Lucas No. L-96-301 (June 20, 1997). The increase proposed here was massive, making this consideration a weighty one in the context of the condition evaluating whether the proposed annexation was unreasonably large.[3]

{¶92} Regarding the odd shapes, corridors, and village connection points, we refer to the descriptions in our Statement of the Case and Contiguity sections supra. The trial court also noted the majority of the acreage (owned by Appellee) was highly industrialized and could not be used for growth or development by the village. *See, e.g., City of Dayton v. McPherson*, 29 Ohio Misc. 190, 220, 280 N.E.2d 110 (C.P.1970) ("the airport land and facilities developed to serve the highly specialized requirements of air passenger and freight transportation, together with related uses, now efficiently operated and adequately supplied with all necessary governmental services, was not susceptible to growth and development by Vandalia for residential, commercial and industrial purposes, or any municipal purpose other than an airport").

{¶93} Second, Appellants say the village presented evidence showing it has the ability to provide necessary services. They suggest snow removal would be part of road maintenance discussed in the services ordinance. They note fire services would remain the same and additional coverage by the sheriff's department would be provided (a village levy pays for 32 additional hours of coverage per week). Appellee notes these services were not mentioned in the services ordinance.

[3] We note a landowner petition proceeding to a decision under R.C. 709.023(E), although unanimously signed by all owners in the territory proposed for annexation, cannot exceed five hundred acres (no matter how large the city may be).

{¶94} Additionally, the mention of water and sewer in the services ordinance merely said the village currently provides water and sewer in the territory to be annexed and these services would continue without an extraterritorial surcharge. Testimony indicated services would be extended; e.g., the village administrator said the Barretts did not have sewer service, but would after the annexation. Nevertheless, the services ordinance did not say the village would provide new water or sewer services to the portions of the territory lacking these services.

{¶95} The trial court believed the vast increase in size made the village's ability to provide services questionable. As the court pointed out, some areas within the village did not even receive sewer services, and evidence was produced showing the village experienced issues with sewage (which resulted in public health and environmental violations). We also make note of the suggestions that a portion of Appellee's property with a new septic system would have to be converted to sewer after annexation, even though this separate portion was required to use septic less than ten years earlier when Appellee constructed lines from the main plant to the county's sewer. The trial court noted Appellee paid to obtain water and sewer lines in order to receive these services from the county (after the village refused to permit a line extension).

{¶96} Third, the township was concerned the village would "conform its boundaries" in the future, which would deprive the township of its largest property taxpayer. Testimony on a lack of plans to conform the boundaries after annexation was not reassuring, especially where the village's witness did not even know there was such a legal process; nor would such testimony bind a village council, as discussed in the Services Ordinance section supra, citing *Billington*, 25 Ohio St.2d at 150.

{¶97} The township did not participate in the appeal to the trial court, generally informing the court the issues "related to it have been resolved" and the township "takes no position on any remaining issues" in the appeal. In Appellants' brief response to the cross-assignments filed in the trial court, the village said an agreement was reached with the township to refrain from seeking to conform the borders or to reimburse the township for any loss if the boundaries were altered. However, this statement in a brief did not constitute evidence. In addition, this was not the state of affairs existing at the time of the board hearing, and the agreement was not subsequently placed in evidence. Moreover,

the township's objection is merely one consideration in evaluating whether the territory to be annexed is unreasonably large.

{¶98} Appellants argue the trial court improperly substituted its judgment for that of the board. However, the trial court's "hearing of the appeal * * * shall proceed as in the trial of a civil action" with the trial court "confined to the transcript" (unless certain circumstances are alleged). R.C. 2506.02(A). The trial court properly "weighs the evidence to determine whether a preponderance of reliable, probative, and substantial evidence supports the administrative decision, and if it does, the court may not substitute its judgment for that of the board. * * * If it does not, the court may reverse, vacate, or modify the administrative decision." *Independence v. Office of the Cuyahoga Cty. Executive*, 142 Ohio St.3d 125, 2014-Ohio-4650, 28 N.E.3d 1182, ¶ 13.

{¶99} Consequently, the trial court had the discretionary authority to weigh the various pertinent considerations in determining whether the board's not-unreasonably-large finding was supported by the preponderance of the evidence under the circumstances of the case. *See generally Henley*, 90 Ohio St.3d at 147 (the common pleas court has "extensive power to weigh" the evidence); *In re Petition to Annex 320 Acres*, 64 Ohio St.3d at 594, fn.6 ("a virtual de novo examination of the record is conducted by the [trial] court pursuant to R.C. 2506.04"). In doing so, the trial court could properly conclude the board's finding on this mandatory factor was "unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record" and "modify the order * * * consistent with the findings or opinion of the court." R.C. 2506.04. The trial court modified the resolution consistent with its finding that the territory proposed to be annexed was unreasonably large. Our review is more limited, and there is not a legal error or abuse of discretion by the trial court to warrant eliminating the additional finding against annexation.

General Good of Territory to be Annexed & Benefits v. Detriments

{¶100} Finally, a board of county commissioners cannot grant annexation unless it finds, based upon a preponderance of the substantial, reliable, and probative evidence on the whole record: "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." R.C. 709.033(A)(5).

{¶101} "Surrounding area" is defined as "the territory within the unincorporated area of any township located one-half mile or less from any of the territory proposed to be annexed." *Id.* For purposes of applying case law on the general good condition, it should be pointed out an amendment effective March 27, 2002 added the clause "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" and added the definition of surrounding area. *See* 2001 S 5.

{¶102} The board found the conditions in division (A)(5) satisfied. However, the trial court modified the board's resolution to find these conditions were not satisfied.

{¶103} As mentioned in the prior section, the trial court questioned the village's ability to provide sufficient road maintenance and snow removal services considering the large size increase. Discounting Appellants' emphasis on a 10% reduction in water and sewer costs for those in the proposed territory who already have these services with an out-of-village surcharge, the trial court pointed out the owners would face an increase in taxes after annexation. Although income tax is an unavoidable consequence of annexation law that should not be considered, the trial court was merely noting the 10% fee reduction was not the money-saver to owners touted by the village. Appellee already paid to obtain water and sewer lines years ago in order to receive these services from the county after the village refused to permit a line extension.

{¶104} The existing services can be compared to predicted new services in determining the general good (and now in determining whether benefits outweigh the detriments). *In re Annexation of 343.2255 Acres from Symmes Twp.*, 106 Ohio App.3d 512, 515, 666 N.E.2d 593 (12th Dist.1995) (a finding of "adequate" services from the village will not require a finding of general good). *See also Baycliffs Corp. v. Marblehead*, 138 Ohio App.3d 719, 731, 742 N.E.2d 209 (6th Dist.2000). *Compare Smith v. Granville Twp. Bd. of Trustees*, 81 Ohio St.3d 608, 693 N.E.2d 219 (1998) (where all property owners in the territory agreed to the annexation in a case prior to statutory amendments). Although it has been stated the question is not what is best for the territory, the fact that

the village is able to provide services does not equate with general good to the territory or with a finding that the benefits to the territory outweigh the detriments.

{¶105} Contrary to Appellants' argument on a lack of zoning regulations in the village being a benefit to the territory to be annexed, the presence of zoning regulations in the township in combination with a lack of zoning regulations in the annexing village can be considered a detriment or a negative factor in considering the general good of the territory proposed for annexation. *See In re Appeal of Annexation of 65.48 Acres*, 6th Dist. No. L-96-301 ("zoning and planning services offered by Springfield Township are more comprehensive, experienced and developed than that of the Village of Holland").

{¶106} The trial court additionally referenced the rights and preferences of property owners. One premise underlying the annexation law is for property owners to have some freedom to choose the governmental location of their property. *McGee*, 39 Ohio St.3d at 286. Therefore, owners of property who do not desire to have their property included in the territory to be annexed are generally considered to be adversely affected by the annexation. *Id.* Appellee urges where the owner of the majority of the land area not only failed to sign the petition but also actively opposes annexation, the spirit of the annexation law would be negatively affected by granting annexation.

{¶107} Active opposition by a property owner in the territory is a relevant consideration when considering R.C. 709.033(A)(5). *See In re Annexation of 343.2255 Acres*, 106 Ohio App.3d at 515, citing *In re Annexation of 131.983 Acres*, 3d Dist. Miami No. 94-CA015 (July 7, 1995) (property owner opposed annexation and offered conflicting evidence on the provision of services). Moreover, although one owner's desires do not take precedence over the general good of the territory, the position of the owner of the majority of the acreage should not be discounted. *Kunkel,* 177 Ohio App.3d 718 at ¶ 51, 54 (pointing out the petitioners constituting the numerical majority also owned approximately 80 percent of the total area proposed for annexation), citing *Hottle*, 2d Dist. No. 15126 (the desires of the non-signing owners were entitled to great weight, especially where an owner of more than half of the territory did not want his property annexed and was satisfied with the public services supplied by the township).

{¶108} Here, Appellee owns approximately 600 of the 730.746 acres (over 80%) of the territory to be annexed (and an even higher percentage when only considering

parcel 1). Also, Scio Pottery did not sign the petition and appeared at the hearing to object to annexation (and express concerns about future annexation of its main property holdings). Moreover, it is pertinent to recognize that a married couple who owned lots (joint and survivor) totaling a mere 1.17 acres, were the sole reason a numerical majority could be reached (after excluding the substation properties), as the parties did not dispute that these married owners were each entitled to provide a qualifying signature. Their property was contiguous to the village while the vast property of Appellee was further away and proposed to be reached via an annexation strip utilizing a county bike trail and railroad properties.

{¶109} As in the prior section, Appellants argue the trial court improperly substituted its judgment for the board. However, the trial court had the discretionary authority to weigh the various pertinent considerations in determining whether the board's decision (on the general good and the benefits outweighing the detriments) was supported by the preponderance of the evidence. *See generally Independence,* 142 Ohio St.3d 125 at ¶ 13*; Henley*, 90 Ohio St.3d at 147 (the common pleas court possesses "extensive power to weigh" the evidence); *In re Petition to Annex 320 Acres*, 64 Ohio St.3d at 594, fn.6. In doing so, the trial court could properly conclude the board's finding on this factor was "unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record" and "modify the order * * * consistent with the findings or opinion of the court." R.C. 2506.04. Our review is more limited, and there was no legal error or abuse of discretion by the trial court in adding this finding against annexation.

CONCLUSION

{¶110} Appellants' first assignment of error is overruled. The board's decision contained sufficient findings of fact, and there was no error by the board or the trial court in finding the statutory requirements on contiguity, the services ordinance, and divided or segmented roads were not met.

{¶111} As to the second assignment of error, the trial court did not err in modifying the board's resolution by adding the following supplemental reasons to deny annexation: the territory to be annexed was unreasonably large and the general good of the territory would not be served by annexation with the benefits to the territory failing to outweigh the

detriments. We agree with Appellants' argument that the court legally erred in additionally finding insufficient signatures on the petition; we conclude the electric utilities did not qualify as statutory owners. However, the issue is moot as to the judgment because the other reasons for denial of annexation stand.

{¶112} For the foregoing reasons, the denial of annexation is affirmed.

Waite, J., concurs.

D'Apolito, P. J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Harrison County, Ohio, is affirmed. Costs to be taxed against the Appellants.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.