[Cite as *Smith Evergreen Nursery, Inc. v. Magnolia* , 2009-Ohio-6560.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

SMITH EVERGREEN NURSERY, INC.

Petitioner-Appellee

-vs-

VILLAGE OF MAGNOLIA, OHIO, et al.

Respondent-Appellant

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 2009 CA 00003

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 2007 CV 03665
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 7, 2009

APPEARANCES:

For Petitioner-Appellee

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Wise, J.

{¶1} Appellant Village of Magnolia appeals the decision of the Court of Common Pleas, Stark County, which granted the application of Appellee Smith Evergreen Nursery, Inc. for the detachment of 62 acres of land from said village. The relevant facts leading to this appeal are as follows.

{¶2} Appellee is the owner of 103 acres of land, presently consisting largely of a tree farm, in the northeast part of the Village of Magnolia.[1] It is undisputed that the Smith property was annexed to the village in 1958. It has been zoned as "R-1 Single Family District" since the passage of the village's zoning ordinances.

{¶3} On May 23, 2007, appellee, seeking to use its land for a surface mining and sand/gravel operation, filed an application for a zoning amendment with the village zoning authority. The application came on for a final vote before the Village Council on July 11, 2007, at which time the proposed ordinance to approve appellee's application was unanimously rejected by the council.

{¶4} On September 7, 2007, appellee filed a petition pursuant to R.C. 709.41 in the Stark County Court of Common Pleas, seeking a detachment of 62 of the 103 acres in the parcel from the Village of Magnolia into Sandy Township, Stark County.[2]

{¶5} A common pleas magistrate heard the matter, and on November 5, 2008, issued an eight-page decision, with findings of fact and conclusions of law, setting forth that appellee had satisfied the requirements of R.C. 709.42 for the detachment from the

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[1] Magnolia, which was incorporated in 1834, covers a border area of Stark County and Carroll County. The 103-acre parcel at issue is situated entirely in Stark County.

[2] Sandy Township does not currently have zoning restrictions in place.

village of the 62-acre parcel in question, thus ruling in favor of appellee. In particular, the magistrate concluded as follows:

{¶6} "6. With regard to the second element, as set forth above, i.e., that because the lands are in the municipal corporation the owner of the farm land is taxed and will continue to be taxed thereon for municipal purposes in excess of the benefits conferred on the landowner, the Court finds that the Smith property is taxed in substantial excess of the benefits conferred by reason of such land being in Magnolia.

{¶7} "7. Specifically, the Court finds that the Smith property does not enjoy any municipal benefits as a result of being in Magnolia and suffers a detriment by virtue of restrictive zoning not compatible with the character of the Smith property. Police and fire protection is not a benefit conferred upon the Smith property by virtue of being located in Magnolia, as the same services are similarly provided in Sandy Township, Stark County, Ohio.

{¶8} "8. Further, the Smith property has never been used for residential purposes and is prevented from being developed into residential uses because of both unreclaimed mine spoils and sewage treatment plant capacity limitations. (Testimony of Mayor Robert Leach, Jim Demuth and Frank Bair)." Decision at 6.

{¶9} Appellant filed an objection to the magistrate's decision on November 19, 2008.

{¶10} On December 17, 2008, the trial court issued a judgment entry effectively overruling appellant's objection and adopting the magistrate's decision.

{¶11} On January 8, 2009, appellant filed a notice of appeal. It herein raises the following sole Assignment of Error:

{¶12} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT [THE] SMITH PROPERTY WAS TAXED IN SUBSTANTIAL EXCESS OF THE BENEFITS CONFERRED BY MAGNOLIA."

I.

{¶13} In its sole Assignment of Error, Appellant Village of Magnolia contends the trial court erred in holding, under R.C. 709.42, that appellee's property was taxed in substantial excess of the benefits conferred by appellant. We disagree.

{¶14} As an initial matter, we are compelled to address appellee's responsive procedural argument that appellant waived its present assigned error by failing to comply with Civ.R. 53(D)(3)(b)(iv), which states as follows: "Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)." See, also, *North v. Murphy* (March 9, 2001), Tuscarawas App.No.2000AP050044. A review of the trial court file reveals that appellant's objection to the magistrate's decision, filed November 19, 2008, specifically challenges, inter alia, the magistrate's conclusion that appellee is taxed in substantial excess of the benefits conferred on it by the village. As such, we find the issues before us were properly preserved for appeal.

{¶15} We turn to the statute at issue in this appeal, R.C. 709.42, which states in pertinent part as follows:

{¶16} "If, upon the hearing of a cause of action as provided by section 709.41 of the Revised Code, the court of common pleas finds that the lands are farm lands, and are not

within the original limits of the municipal corporation, that by reason of the same being or remaining within the municipal corporation the owner thereof is taxed and will continue to be taxed thereon for municipal purposes in substantial excess of the benefits conferred by reason of such lands being within the municipal corporation, and that said lands may be detached without materially affecting the best interests or good government of such municipal corporation or of the territory therein adjacent to that sought to be detached; then an order and decree may be made by the court, and entered on the record, that the lands be detached from the municipal corporation and be attached to the most convenient adjacent township in the same county. Thereafter the lands shall not be a part of the municipal corporation but shall be a part of the township to which they have been so attached. ***."

{¶17} The detachment or "de-annexation" scenario presented in the case sub judice appears to be a case of first impression in this Court; appellant's and appellee's briefs both nonetheless provide cogent arguments despite the lack of prior appellate scrutiny of the issues presented. Indeed, our research indicates that R.C. 709.42, enacted in 1953, is mentioned just two times in Ohio case law – in 1960 and 1988 – and neither case provides significant guidance in this appeal, although there are several additional cases applying the pre-1953 General Code provision. However, we note that Ohio's broader body of annexation statutes has been significantly revised in recent years, reflecting a trend favoring the annexing of township lands to municipalities. Appellant emphasizes this legislative trend as part of its public policy argument in its present brief.

{¶18} Thus, before we address the specific assigned error before us, we must face the question of whether R.C. 709.42 is to be read in isolation or in conjunction with Ohio's annexation statutes. We presume the General Assembly was aware of the detachment statutes at the times it redrafted or modified the annexation statutes; however, the General Assembly has not chosen to make changes to R.C. 709.42 since its enactment. Therefore, we give no preference, when analyzing R.C 709.42, to the general trend in Ohio favoring annexation of land into municipalities. We invite the General Assembly and the Ohio Supreme Court to consider the issue.

{¶19} Appellee in the case sub judice was required to establish four requirements for detachment from the village to the township:

{¶20} 1. The land is unplatted farm land not within the original limits of the municipal corporation.

{¶21} 2. That by reason of the same being or remaining within the municipal corporation the owner thereof is taxed and will continue to be taxed thereon for municipal purposes "in substantial excess of the benefits conferred" by reason of such lands being within the municipal corporation.

{¶22} 3. That said lands may be detached without materially affecting the best interests or good government of such municipal corporation or of the territory therein adjacent to that sought to be detached.

{¶23} 4. The detachment action is brought more than five (5) years after the land was annexed to the municipal corporation.[3]

[3] The fourth requirement is actually found in R.C. 709.41.

{¶24} Appellant focuses its arguments on the above second requirement, i.e., the question of whether appellee is being taxed in substantial excess of the benefits conferred by the village. The General Assembly has not set forth in the statute whether the "substantial excess" question requires a comparative cost analysis of services provided to the landowner by the municipality versus those provided by the township, as opposed to a simpler evaluation of whether the current tax burden on the landowner for his or her municipal services is substantially excessive per se. The parties herein do not dispute that appellee pays real estate taxes for municipal purposes of $211.44 annually for the entire 103-acre parcel. Magistrate's Decision at 4. Appellant proposes that since we are looking at the taxes on the 62-acre detachment parcel, this would equate to approximately 60 percent of $211.44, or about $125.00. The trial court found that Appellant Magnolia has a public water facility, but appellee's property is not connected to same. Magistrate's Decision at 4. The court further found that appellant has a police department, but said department also provides services for Sandy Township. Id. In addition, although appellant has a volunteer fire department, the Magnolia Fire Chief did not recall any instance of appellee's property utilizing fire protection services in the prior twenty-one years. Id. Furthermore, Sandy Township has its own fire department. Id.

{¶25} Appellant emphasizes that the Magnolia Fire Department, due to geographical proximity, has a faster response time than the Sandy Fire Department. Appellant further notes that its police department has the authority to enforce village ordinances inside the village, but not in the township. In particular, there is a prohibition against the discharge of firearms within the village; appellant indicates that there have been previous police calls to appellee's property to check on hunting/firearm

discharges.[4] Overall, appellant urges that the trial court has ignored the "tremendous benefit to those living in municipalities," including home rule powers. Appellant's Brief at 7.

{¶26} We earlier set forth our question concerning the proper application of the "substantial excess" factor. The trial court in the case sub judice, in its commendable analysis, applied a comparative approach, i.e., an assessment of present municipal services vis-à-vis township services after detachment. We hold a trial court could also properly address the issue by fundamentally considering whether or not the landowner, in praesenti, is paying a substantially excessive amount for the services provided by the municipality. "Substantial" is defined as "considerable in importance, value, degree, amount, or extent." See *Phillips v. Haidet* (1997), 119 Ohio App.3d 322, 327, citing American Heritage Dictionary (2 Ed.1985) 1213. As an appellate court, we are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base his or her judgment. *Peterson v. Peterson,* Muskingum App.No. CT2003-0049, 2004-Ohio-4714, ¶ 10, citing *Cross Truck v. Jeffries* (Feb. 10, 1982), Stark App. No. CA-5758. Although we might have decided differently at the trial court level on the question of whether $125.00 in annual taxes for fire, police, and other municipal services equates to appellee being taxed in substantial excess of the benefits conferred by Appellant Magnolia, upon review of the record in the case sub judice, we find competent, credible evidence existed to support the trial court's conclusion on this issue.

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[4] See, respectively, Tr. at 88-89, 100-101, 55-66.

{¶27} Finally, appellant raises a brief challenge as to the third criterion under R.C. 709.42, i.e., whether or not the detachment would materially affect the best interests or good government of the municipality or adjacent land. Although not explored at length in the parties' appellate briefs, it is particularly noteworthy in this instance that appellee's farm land will apparently not be used for agricultural purposes subsequent to detachment, based on appellee's announced intention to use the tract at issue for a sand/gravel operation. Without commenting further in the present appeal, we note the statute does not specifically address prospective uses of detached land. Nonetheless, we again are not inclined to substitute our judgment for that of the trial court regarding the third factor under R.C. 709.42.

{¶28} Accordingly, upon review, we find no basis for reversal as a matter of law of the trial court's grant of detachment under R.C. 709.42 in favor of appellee.

{¶29} Appellant's sole Assignment of Error is overruled.

{¶30} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby affirmed.

By: Wise, J.

Hoffman, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ WILLIAM B. HOFFMAN_____

/S/ PATRICIA A. DELANEY_____

JUDGES

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Hoffman, P.J., concurring

{¶31} I concur in the majority's analysis and disposition of Appellant's sole assignment of error.

{¶32} I write separately only to address Appellant's argument that because the law favors annexation, the converse is also true; i.e., the law disfavors detachment. I suggest the reason the law favors annexation is premised upon the wish(es) of the sole or a majority of the owners of the property seeking annexation. If that is indeed the legislature's motive, the wish of a sole property owner to detach ought to be favored, provided all the other criteria of R.C. 709.42 are met. Nevertheless, I join the majority's decision not to give preference either way in determining this appeal.

/S/ WILLIAM B. HOFFMAN_____
HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

SMITH EVERGREEN NURSERY, INC.	:	
Petitioner-Appellee	:	
-vs-	:	JUDGMENT ENTRY
VILLAGE OF MAGNOLIA, OHIO, et al.	:	
Respondent-Appellant	:	Case No. 2009 CA 00003

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to appellant.

/S/ JOHN W. WISE_____

/S/ WILLIAM B. HOFFMAN_____

/S/ PATRICIA A. DELANEY_____

JUDGES