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IN RE: HARVEYS LAKE BORO. INCORPORATION (No. 1) 45

IN RE: HARVEYS LAKE BORO. INCORPORATION (No. 1)

Municipal Corporations—Incorporation of borough from parts of two townships—Jurisdiction—Borough Code—Petition by majority of freeholders—Summer residents—Right to petition—Ownership of property—Benefits—Moderate tax increase—Willingness of residents to pay taxes for increased benefits—Lack of detrimental effects on remaining portions of townships

1. The Borough Code provides that the Courts of Quarter Sessions may, in their discretion, incorporate any areas within their jurisdiction, not already incorporated or a part of an incorporated municipality, as a borough, on application by a petition signed by a majority of freeholders residing within the limits of the proposed borough; and when portions of the proposed borough are in different townships the petition shall be signed by a majority of the freeholders residing in each of the separate portions.

2. Freeholders residing within the area, within the meaning of the Borough Code relating to incorporation of boroughs, includes summer residents.

3. It is the intention of the legislature that summer residents shall have the right to petition for the creation of a borough.

4. The compelling part of the requirement for eligibility to petition for the incorporation of a borough is not so much the residence of the signers as it is the ownership of property.

5. As between the two governments, —township or borough— relating to taxation, the Borough Code is updated to modern times so that the governmental officials have the ability to meet the requirements of modern day living, while the township governmental structure, as indicated by its tax authority, is still keyed to a rural type of government, which has prevented it from correcting the problems so peculiar to an area within a proposed borough.

6. The fact that a moderate tax increase will result is not alone ground for refusing the formation of a borough.

7. The Borough Code gives discretion to the Court to grant a petition to form a borough, and where testimony indicates that a benefit will result to the residents, who are willing to pay increased taxes for relief from nuisances, improved sanitary conditions, and other benefits to the community, with no detrimental effects to the remaining portions of the townships from which the borough is taken, the petition will be allowed.

Quarter Sessions of Luzerne County. No. 2305 of 1965.

Before Pinola, P. J., Brominski and Schiffman, JJ.

PINOLA, P. J. for the Court *en banc*. December 5, 1966.
We have before us the petition of certain residents of Lake Township and Lehman Township, filed on November 1, 1965,

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for the creation of a borough to be known as the Borough of Harveys Lake.

Attached to the petition is a map of Harveys Lake and the proposed borough, and a description by metes and bounds of the proposed borough.

It is intended in the creation of the borough to include Harveys Lake and the watershed which feeds water into the lake. In fixing the boundaries the petitioners have used the county line between Luzerne County and Wyoming County and township boundary lines where possible.

All signatures were obtained within ninety days of the presentation of the petition as required.

Upon presentation of the application the court directed that it be filed and that notice thereof be given by publication in one newspaper of general circulation within the county and in the Luzerne Legal Register once a week for four consecutive weeks. It fixed the 8th day of December, 1965 as the time within which any interested person might file exceptions to the petition, and it fixed the time of hearing upon the petition as December 15, 1965 at 10 A.M.

Due proofs of publication in accordance with the order of court were subsequently produced and filed.

Harveys Lake is the second largest natural lake in the state. It has a sizeable population, it has hundreds of beautiful, costly residences, three churches, many stores and restaurants, several bathing beaches and numerous places of amusement.

The main highway, which is located between the buildings and the lake, is about nine miles around. Approximately eight miles are located in Lake Township and the remaining mile, from Sunset to Warden Place, is in Lehman Township.

The area of the proposed borough consists of 5.02 square miles of land in Lake Township and 1.30 square miles of land in Lehman Township.

This proceeding was initiated under Sub-title (a) of Art. II of the Borough Code of 1927, Sections 201 et seq., as amended, modified and revised by the Act of July 10, 1947, P. L. 1621, 53 P. S., Sections 45201 et seq. That Act was repealed by Act No. 581 of 1966, (P. L. (1965) _____).

Section 103 reads, inter alia:

"The provisions of this Act, so far as they are the same as those of existing laws, are intended as a continuance of such laws and not as new enactments."

Section 201 of the previous Code provided:

“The courts of quarter sessions may incorporate any town or village or any two or more towns or villages within their jurisdiction into a borough.”

No exception was taken to the averment that the area involved in the petition constitutes a village. While it includes several areas known as Sunset, Sandy Beach, Alderson and Warden Place, the whole constitute the Village of Harveys Lake as it has been known for many years.

In any event, under the new Act, the power of the court is enlarged. New Section 201 reads:

“The courts of quarter sessions may incorporate *any area* within their jurisdiction, *not already incorporated* or a part of an incorporated municipality, as a borough. . . .”

The petition consists of a number of identical petitions bound together, having one face sheet, which sets forth therein the prayer of the petitioners, the dates upon which they signed it, the names of the circulators thereof, and the township in which the signers reside. For convenience they have designated the year round residents as such and those not year round residents as summer residents. They are subscribed by and sworn to by many persons.

Exceptions were filed by the Supervisors of Lake Township, the Supervisors of Lehman Township, certain freeholders of Lake Township, and certain freeholders of Lehman Township. All are in exactly the same language and differ only in certain figures.

The first exception questions the right of summer residents to sign the petition, and the second avers that the petition is not signed by a majority of the freeholders.

We will consider them together.

In the case of Lake Township, there are 410 freeholders residing year round in the area to be included in the proposed borough. A majority, to-wit, 246 of them have signed the petition. This is compliance with the law. In addition, of 1064 freeholders designated summer residents, 650 signed the petition. Thus the total number of freeholders residing in Lake Township eligible to sign is 1474, of whom 896 signed.

In Lehman Township, although there are only 85 properties in the area of the proposed borough, there are 170 freeholders residing therein year round, of whom 80 signed the petition. This number is just six short of a majority. In addition thereto, there are 190 freeholders designated summer residents, of whom 128 signed the petition.

Obviously, since the petition is short 6 signers in Lehman

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Township, the petitioners must depend upon the validity of the signatures of the freeholders who are designated summer residents.

Of 200 exceptants from Lake Township, 25 had previously signed the petition and, therefore, their remonstrance is invalid and the number of exceptants becomes reduced to 175.

In the case of Lehman Township, 19 persons, who had previously signed the petition for incorporation, asked leave to withdraw claiming that their signatures were obtained by misrepresentation, duress and undue influence. In a companion decision we have denied the prayer of the petition and dismissed it.

Section 202 of Art. II of the new Code is the same as Section 202 of the Act of 1947, as amended, 53 P. S., Section 45202. It reads as follows:

"The application for incorporation shall be by a petition signed by a majority of the freeholders residing within the limits of the proposed borough, when all parts of the proposed borough are in the same township and, where portions of the proposed borough are in different townships, the petition shall be signed by a majority of the freeholders residing in each of such separate portions."

To qualify as signers, the petitioners must be "freeholders residing" in the area. This provision has been in the law since the original Borough Code of 1834, P. L. 163.

This provision limiting the petitioners to freeholders residing in the area is a relic of colonial days when only freeholders were allowed to vote. In 1682 in order to vote one had to be a freeman and to own 100 acres of land. The number of acres was reduced in 1696 to 50, and the ownership of property requirement was eliminated in 1776.

It is significant that an elector or any other person domiciled in the area is not entitled to sign the petition for incorporation of the borough, yet when the borough is incorporated he does have the right to vote for the election of officials.

The exceptants contend that "residence" in this case is equivalent to "domicile" and therefore a summer resident is not qualified to sign the petition.

A "resident freeholder" is one who has the actual possession of real estate for life or longer. Wernersville Borough, 5 Berks 364; In Re Incorporation of Borough of Leiperville, 37 Del. 201.

How long must one reside in the area to be a resident freeholder?

In construing a legislative enactment the court must ascertain and give effect to the legislative intention as expressed in the language employed. *Bonasi v. Haverford Twp. Bd. of Adjustment*, 382 Pa. 307, 310.

Both by statute and decisional law the court is required to construe words and phrases according to their common and improved useage; the Act is presumed to employ words in their popular and plain everyday sense. The popular meaning of the words employed must prevail unless the statute defines them otherwise or unless the context of the statute requires another meaning. *Act of 1937, P. L. 1019, 46 P. S. 533; Harris-Walsh, Inc. v. Dickson City Borough*, 420 Pa. 259, 271.

According to Webster's International Dictionary, residence is defined as:

"1. Act or fact of abiding or dwelling in a place *for some time*; act of making one's home in a place; as, a center of fashionable residence.

"2. Act or fact of living or regularly staying at or in some place, either in, or as a qualification for, the discharge of a duty or the enjoyment of a benefit; as, to be in *residence*.

"3. The place where one actually lives or has his home; a person's dwelling place or place of habitation; an abode. A person's place of *residence* may or may not be identical with his *domicile*, though the term *residence* is ordinarily used and legally construed as merely implying the fact of actual abode without reference to the intent necessary to constitute that abode one's domicile."

Commonwealth v. Rowley, 14 D. & C. 2d 676, involved an appeal from a summary conviction under a section of the Game Law which made it unlawful to hunt wild game without obtaining a hunter's license, excepting in the case of a citizen residing within the Commonwealth and regularly engaged in cultivating the soil for general crop purposes. The defendant, a resident of Maryland, had purchased a farm in Pennsylvania to which he had moved part of his furniture. He lived on the farm with his family during the summer months and spent some week-ends there during the remainder of the year when the family lived in Maryland and where the children attended school. A large portion of the farm was in cultivation. Judge Lansberry, in setting aside the summary conviction, held that the purpose of the act was not to prevent owners who are also tillers of their farm from hunting on their own farm and woodland, for had the legislature so intended, it would more

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appropriately have required such persons to be domiciled in Pennsylvania. At page 680, he declared:

“The nice distinctions and precise use of the terms ‘domicile’ and ‘residence’ have not always been observed in either legislative enactments, judicial opinions and legal documents. However, domicile and residence are not convertible terms; domicile is a matter of intention, residence is a physical fact: . . . A. L. I. Restatement of the Law of Conflict of Laws, Section 9, particularly the Pennsylvania annotations indicating the various constructions placed on both words in various situations such as taxation statutes, divorce proceedings, attachment and insolvency proceedings and various other statutory enactments.”

In the Fiduciaries Act of 1917, P. L. 447, 457, the legislature directed that letters testamentary and of administration shall be granted only by the Register of Wills of the county within which was “the *family or principal residence* of the decedent at the time of his decease.” *Obici Estate*, 373 Pa. 567.

And in the Election Code of 1937, P. L. 1333, Section 704, the legislature spelled out what it meant by residence, saying:

“In determining the residence of a person desiring to register or vote, the following rules shall be followed so far as they may be applicable:

“(a) That place shall be considered the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning.”

In connection with annexation, the legislature has never been consistent in its treatment. In a very recent case, *Jenner Township Annexation Case*, 208 Pa. Super. 62, President Judge Ervin declared (p. 66):

“Mr. Justice Cohen in his opinion in *Palmer Township Annexation Case*, 416 Pa. 163, 204 A. 2d 760, summarized many of the statutes which have dealt with the subject. The various acts which were in force in 1950 are set forth in an excellent article in 11 *Pitts. L. R.* 446, and it was pointed out in that article, at page 460: ‘As the statutes exist on the books today, they are exceedingly complex and varied. In their placement, some laws are set out in the codes of the annexing communities, while others are in the codes of the community being annexed. But aside from their location in the statute books, the particulars of the statutes are diverse

without apparent reason. To constitute one a requisite signer of a petition for annexation, he must at times, depending upon the statute covering the particular situation, be a "freeholder," a "taxable inhabitant," a "qualified elector," or a "qualified registered voter." And the various percentages required to make the petition legal include 5%, 10%, 20%, 60%, 66 $\frac{2}{3}$ %, 80% and of course in some cases a simple majority of one or more of the categories of signers set out above.' "

We believe that if the legislature had in mind that a signer had to be domiciled in the area, it would have said so.

Our research reveals only one case in point.

In *McGrath v. Stevenson*, 194 Wash. 160, 77 P. 2d 608, a statute was involved which provided for the vacation of a road upon petition of "ten freeholders residing in the vicinity of said road." The court held that the requirement that the freeholder must "reside in the vicinity" was satisfied by summer residency. It said (p. 609):

"Each of the terms 'reside,' 'residing,' 'resident,' and 'residence' is elastic. To interpret the sense in which such a term is used, we should look to the object or purpose of the statute in which the term is employed. A man can have only one place of residence for voting purposes and certain other purposes, but there is no reason why, within the meaning of the vacation statute, Rem. Rev. Stat. Section 6503, he may not have more than one place of residence.

"The phrase 'freeholders residing in the vicinity' is not used in a strict sense as necessarily implying a permanent abode in such place, but as used in Rem. Rev. Stat. Section 6503, may be satisfied by a temporary residence in the vicinity. The principle of the law and its evident intent are that a road shall not be vacated without the advice and sanction of the requisite number of residents who have a property interest in that vicinity. A man may have a summer home, as the freeholder petitioners in the case at bar had, and also a place of permanent abode. 'Residing,' as used in the vacation statute, Rem. Rev. Stat. Section 6503, is not employed in the sense of legal residence of a person with reference to his right of suffrage and eligibility to office. Clearly, the intention of the statute is to insure the execution of a petition by ten people having an actual personal interest in the vacation of the road."

That represents sound reasoning and good judgment.

In another case, *In Re Petition for the Organization of the Township of Spread Eagle v. Township of Florence*, 116 N. W. 2d (Wisc.) 165, the petition to form a new town had to be signed by a *majority of resident freeholders* and a *majority of the electors* in the territory of the proposed town.

We repeat, if the legislature required more than mere residence, it would have said so.

Our leading case on "residence" is *Raymond v. Leishman*, 243 Pa. 64. It involved a writ of foreign attachment and the question was whether a person was residing in the Commonwealth. Justice Mestrezat declared (p. 68):

"The learned court below held that in contemplation of the act, 'residence' is synonymous with 'domicil,' and that as the defendant had his domicil in this State, the writ would not lie against him. We do not think this conclusion is sustained either by reason or by the weight of authority. 'Residence' is often used to express different meanings, according to the subject matter: *Long v. Ryan*, 71 Va. (30 Gratt.) 718. It may be said to be the dwelling place of a person and may be his permanent or temporary abode. It may mean the domicil of the person or his temporary presence in the locality. Domicil has been well defined to be the place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. It is acquired by residence with the intention of remaining in the locality. A person may have his domicil in one state and be engaged in business in another and thereby acquire a temporary residence in the latter. He retains his former domicil until he acquires another, that is, until he removes to another locality with the intention of making it his permanent abode. A man can have but one domicil for one and the same purpose at any one time, though *he may have numerous places of residence*. . . . It is, therefore, apparent and the courts have held that 'residence' is a word whose statutory meaning depends upon the context and the purpose of the statute, which may as used in one statute be fulfilled by mere business residence, and in another require domicil in the strictest and most technical sense: 34 Cyc. 1647. In ascertaining the meaning of the word 'residence' in a particular statute the legislative purpose as well as the context must be kept in view."

In the latest decision, Lesker Case, 377 Pa. 411, Justice Musmanno declared (p. 418):

“It seems impossible to restrict the terms habitation, residence and domicile to airtight, water-proof compartments. Their meanings seem bound to escape their lexicographical boundaries and mingle with the others since a person’s place of *residence* may be identical with his *domicile*, and *habitation* is always a component part of *residence* and *domicile*. However, in strict technical terminology, a *habitation* may be defined as an abode for the moment, *residence* a tarrying place for some specific purpose of business or pleasure, and *domicile* the fixed, permanent, final home to which one always intends to return. A person’s civil status is determined by his domicile. Thus, a business man may have his family home in the suburbs of a city where he lives with his wife and children. No matter where he travels nor how long he remains away, he always returns to this abode. This is his domicile. For business reasons he may have a residence in the city, even living there for many months of the year. This residence can never become the basis for voting or for candidacy for office. If travelling, he may stay at a hotel, boarding or rooming house. This would be his habitation and, regardless of expression of intention, could never become his legal domicile.”

In *Stabile Registration Case*, 348 Pa. 587, a candidate contended that Mt. Lebanon was his “summer home,” but Chief Justice Maxey pointed out that his three children resided there “all the year round” and went to school from that house. He then referred to the *Dorrance’s Estate*, 309 Pa. 151, 163 A. 303, which involved the payment of an inheritance tax of about \$18,000,000. The court held that *Dorrance*, the decedent, was a resident of Pennsylvania, although he owned a home in New Jersey which he occasionally occupied and where he had previously legally resided, and where he maintained some household servants. He had continued to receive his personal mail at a New Jersey post office, paid a poll tax in that State until his death, and he and his wife voted in that State. He maintained church affiliations in New Jersey. In his will he declared New Jersey to be the State of his domicile. The court concluded that these facts could not prevail against the fact that his family life centered in his Pennsylvania residence and sustained the tax. The New Jersey courts also taxed the *Dorrance* estate. Thus *Dorrance* had two residences and his estate paid inheritance taxes in connection with both.

In Jones' Case, 341 Pa. 329, Justice (later Chief Justice) Stern declared (p. 332):

“ ‘Reside’ and ‘residence’ are terms whose statutory meaning depends upon the context and purpose of the statute in which they occur.” (Citing Raymond v. Leishman, supra)

In Robinson v. Robinson, 362 Pa. 554, Justice Patterson said (p. 558):

“In ascertaining the meaning of the word ‘residence’ in a particular legal phrase, it is necessary that the object as well as the context be kept in view. Restatement, Conflict of Laws, section 9, comment (e); Goodrich, Conflict of laws, 2d ed., section 17, page 30. . . . ‘Domicile’ and ‘residence’ are not convertible terms. Domicile is a matter of intention; residence is a physical fact. . . . ‘A debtor may have his residence in one state while his domicile is in another, and . . . although his legal domicile is in a state, may reside or remain out of it for so long a time, and under such circumstances, as to acquire, so to speak, an actual non-residence.’ ” (Citing Raymond v. Leishman, supra, also Dorrance Estate, 309 Pa. 151).

Continuing, he said (p. 559):

“In accordance with the great weight of authority, the court held in Raymond v. Leishman, supra, that the words ‘not residing within the Commonwealth’ . . . are not the equivalent of and do not mean ‘not domiciled within the Commonwealth.’ ”

Other courts agree with our Supreme Court.

The petitioner, In the Matter of Yap, 241 N. Y. S. 2d 976, was a national of the Republic of the Philippines. He lived continuously without interruption in the State of New York for over eight years as a full time student at New York University. The court said the sole question to be decided was whether or not the petitioner was a resident of the State. It declared:

“The word ‘resident’ although commonly used, it is not easily susceptible of definition. The respondent contends, in effect, that it should be held to be synonymous with domicile. Generally, however, residence is not held to be synonymous with domicile . . . In some cases, the word ‘residing’ has been held

to be synonymous with the word 'sojourn'. . . . In most cases, residents are held to be somewhere between persons just passing through a place and persons who are permanent inhabitants thereof. In the Scoe case, (185 N.Y.S. 2d 383), a defendant who lived in the state two months while his wife was making a motion picture was held to be a resident for the purpose of serving process.

"It thus appears that a person may be a domiciliary of one place and a resident of another, and even a resident of more than one place (In Re Rothwolz's Estate, 300 N.Y.S. 56)."

In *State Farm Mutual Automobile Ins. Co. v. Hanna*, 166 So. 2d 872, (Ala. 1964), the court held that an insured who was a student at college in another town and who returned to the family home for vacations and occasional week-ends was not "residing in the same household" when his father was injured in an automobile accident while insured was home for a week-end, and that the accident was not excluded from the automobile policy which excluded coverage for injury to insured or any member of the family of insured residing in the same household as the insured. It said (p. 876):

"The word '*residing*' is an ambiguous, elastic, or relative term, and includes a very temporary, as well as a permanent, abode. *Phillips v. South Carolina Tax Comm.*, 195 S. C. 472, 12 S. E. 2d 13. It means a dwelling place for the time being, as distinguished from a mere temporary locality of existence. *Drew v. Drew*, 37 Me. 389. It indicates some intent of permanency of occupation as distinguished from boarding or lodging, but does not require the intent of permanency to the degree required in domicile. 2 *Kent's Comm.* (10th Ed.) 576. While residence is a necessary component of domicile, residence is not always domicile. One may have a legal domicile with his family, and reside actually and personally away from his family. In such event the word '*reside*' may correctly denote either the technical domicile, or the actual personal residence. The word '*reside*' is often used to express a different meaning according to the subject matter. *In re Seidel*, 204 Minn. 357, 283 N. W. 742."

In *City of St. Louis v. Temples*, 149 S. W. 2d (Mo.) 888, where a tax was levied upon an owner residing in such municipality, the court held:

"The words '*residing in such municipalities*' should

not be so limited by construction as to require the owner of a freight delivery truck to be a citizen and permanently domiciled in the city where the truck is operated. We do not think the law makers so intended. Such construction would result in an intolerable situation, and all the owner would have to do in order to evade the license fee would be to establish his domicile outside the city limits. We think it more consonant with the reason and purpose of the statute that the legislature meant the words 'residing in such municipalities,' to apply to any owner whose truck was regularly engaged in business in such municipality, and the fact that the owner, for the purpose of voting or paying taxes, or for any other reason, has established a domicile elsewhere, would not exempt the truck from the license tax. Such construction results in no hardship to any one, and gives a meaning to the statute which would not destroy its purpose, which is that every truck engaged in transporting freight is subject to a license tax in the city in which it is usually kept and operated."

The possibility of having more than one residence as suggested by the courts is rapidly becoming a reality.

The August, 1966 number of "Signature," the Diner's Club magazine, contains an article by Max Gunther entitled "The Decade of the Double-Home Owner." The introductory paragraph contains the following startling statement:

"According to National Association of Real Estate Board's research department, there are now perhaps 2 million American families who own a second home, a dwelling other than the house or apartment that is their primary residence. These families, with incomes from about \$7,500 a year and up, represent roughly 4 per cent of all households in the nation. Nearly 150,000 second homes are being sold annually, and by the end of this landmark decade, the number is expected to have risen to 200,000 a year."

And in an article on the law of Search and Seizure, 7 Villanova Law Review 407, the writer, after referring to several federal cases, concludes:

"It is apparent from these cases that one can have two residences both of which are considered dwellings even though one is unoccupied at the time of the search."

In one of the cases, *Roberson v. U. S.*, 165 F. 2d 752, the court held that a smoke house associated with a dwelling was a "house" within the meaning and protection of the fourth amendment. It then said (p. 754):

"(N)or does the constitutional provision limit its protection to a single house or home. *It is not at all unusual for a man to own two different houses, each of which is used by him at intervals as his home.* The full purpose of immunity from unreasonable search and seizure would be lost if the protection shifted from one home to another after owner moved from one house to another, either in the regular pursuit of his business or for his own convenience or pleasure."

The summer residents have as much interest in the form of government as the year round residents. Their properties are vastly more expensive than those of the year round residents. These represent large investments and certainly the residents should be entitled to have the form of government which will serve them best. They are willing to pay double their present taxes in order to obtain a form of government which will be responsive to their needs.

We are satisfied that the legislature intended summer residents to have the right to petition for the creation of a borough.

In Exception 3 the claim is made that many of the signatures were obtained by misrepresentation, duress and undue influence. No proof was offered except in connection with one signer, who signed on August 10, 1965 and who said he was "too lazy" to withdraw his name before November 1st, when the petition was filed.

In Exception 4 the objectors insist that the conditions prescribed by law have not been complied with. The only question raised was the validity of the signatures of summer residents. The petition was not challenged in any other respect.

Exception 5 reads as follows:

"That the Petition, as presented, fails to set forth or show that a *great majority* of the freeholders residing within the limits of the proposed borough desire or wish the said Village of Harveys Lake incorporated into a Borough."

There is no requirement in the law that "a great majority of the freeholders" must request the incorporation.

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Exception 6 reads as follows:

"That the creation of a Borough will create a hardship upon a great many of the freeholders residing within the proposed Borough, in that the expenses of running said Borough will be greatly increased, and the taxes unduly increased due to the multiplication of service already being furnished by the Township form of Government."

In Lake Township, the present millage is as follows: 4.1 mills.

And the millage in Lehman Township is as follows: 5 mills.

It is estimated that a tax of ten mills will furnish a modern form of borough government, that of borough manager, and that this millage will adequately supply all the needs of the borough.

Although there were 175 exceptants, only 3 officials and 1 non-official came to court from Lake Township.

Edward P. Crake, supervisor, simply stated that the increased taxation would be "a hardship on the old, aged and the retired." Not a single one of these persons, however, came to complain. He himself did not complain about the increased taxes. Perhaps the reason is that doubling the millage would only add \$15.45 to his tax bill.

Another Supervisor, Sharon E. Whitesell, testified, and he had no complaint about the higher taxes. The increase in his taxes would be \$19.60.

William F. Purcell, a grocer, (the only non-official), feared that the taxes would go beyond the estimated ten mills. He opposed the increase of taxes, yet in his case the increase would only be \$34.85.

From Lehman Township, of 81 exceptants, only 3 officials and 3 non-officials appeared at the hearing.

Robert Disque, the *Tax Collector*, testified concerning the preparation of the remonstrance. In his case the increase in taxes would be *thirty-five and one-half (35½) cents*.

Francis L. Ambrose has probably the highest assessment in the area. He values his properties at \$75,000. He was informed that his increase would be about \$200. Actually, it would only be \$169.75. He claimed that the increase would be out of proportion to the services he would receive.

Michael Godek, former Supervisor, now Secretary, complained about the increase in taxes and yet it would be only \$28.

Anthony Toluba, who owns a trailer camp, said it had a value of \$30,000. However, the assessment is \$8,900 and the increase in taxes would be \$52.85. He opposed the proposed borough because, as he put it, he did not wish to pay for the bad errors which were committed at Harveys Lake during the last thirty-five years.

John Kriel, an auto repairman, whose property is assessed at \$20,000, opposed the proposed borough because of the increase in taxes, and yet it would amount to only \$10.85.

William Samuel, a *Supervisor*, would only pay an additional \$29.35 under the new form of government.

Certainly, there is no evidence of hardship as claimed. Exception 7 reads as follows:

“That the present Township Government is legally able to carry out the wishes of the majority of the freeholders residing in the Township, as a Township of the second class now has practically all of the rights and privileges of a Borough, and is legally able to do all that the newly formed Borough could do.”

It is obvious that the borough form of government is one of more sophistication. While this should not be the determining factor, one has to admit that having a mayor and councilmen, elected either at large or by wards, brings government closer to the people than that obtainable under a situation of three supervisors who are basically roadworkers or laborers. An examination of the general corporate powers of both types of governmental structures reveals many differences in powers. The Borough Code covers sixty-four different subjects (53 P. S., Sections 46201-46265), as against fifty-three in second class townships (53 P. S., Sections 65701-65754). One of the most important aspects of governmental life is the authority of taxation. The Borough Code (53 P. S., Sections 46301 et seq.) provides that council may levy up to 25 mills for general borough purposes and in addition such additional millage as may be necessary to pay interest and sinking fund charges.

In second class townships the annual tax for general township purposes cannot exceed 9 mills.

A petition must be signed by the owners of all real estate to permit an additional levy of five mills for lighting. While two mills may be levied for fire hydrants, a tax of two mills can be levied for fire apparatus, only with “assent of the electors,” at an election.

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We conclude, therefore, that as between the two governments, relating to taxation, the Borough Code is updated to modern times so that the governmental officials have the ability to meet the requirements of modern day living, while the township governmental structure, as indicated by its tax authority, is still keyed to a rural type of government, which has prevented it from correcting the problems so peculiar to the area within the proposed borough.

A very important distinction between the two forms of government is in the right of a borough to require the building of sidewalks. The township has no such power.

Although the Supervisors testified to the many services which they are rendering and what is going to be provided by Project 70 of the Federal Government, involving \$40,000, it is significant that at their most recent meeting, held August 13, 1966, William Calkins inquired: "How much is Project 70 going to cost the township?" Supervisor Smith replied: "Not one cent or we don't want it."

Mrs. Lawrence Steltz wanted to know why Lehman Township residents did not have garbage dumping facilities, pointing out that the residents of Harveys Lake had such facilities. She was told by Chairman William Samuel that the township does not take in enough in taxes to maintain a landfill.

All this is matter of public knowledge and is evidenced by copy of the Dallas Post hereto attached.*

Here is an instance where the Harveys Lake residents must provide for themselves a service which the Supervisors could provide but refuse to do so.

What good is the power of the Supervisors to do anything if they are afraid to raise the taxes to provide for the needs of the people?

There is no merit to any of the exceptions.

Being satisfied that the petitioners have complied with all requirements, shall the prayer of the petition be granted?

Under Section 402 of the Code of 1966 (53 P. S., Section 45020),—

"The court, if it shall find, after hearing, that the conditions prescribed by this article have been complied with, may grant the prayer of the petitioners and make a decree accordingly."

*Ed. Note: See Appendix I.

The use of the permissive verb "may" clearly indicates the vesting of discretion in the Court of Quarter Sessions. Blandon Borough Incorporation Case, 182 Pa. Super. 304, 309.

In the exercise of that discretion certain decisions furnish us with guide lines.

In *Kistler v. Swarthmore*, 134 Pa. Super. 287, the court declared:

"The court should hesitate in declaring invalid the express will of the people of a municipality. There is much to be said in permitting residents to determine rules and regulations relating to their local affairs."

In *Irwin Borough Annexation Case*, 171 Pa. Super. 256, Judge Dithrich approved the statement of the lower court that "it is not the province of this Court to set aside the will of the petitioners and the Borough unless cogent reasons appear in the record."

In *Edgewood Borough*, 130 Pa. 348, 18 A. 646, the court, in a per curiam opinion, approved the decision of the lower court in which Judge Magee said (p. 353):

"The law contemplates the formation of boroughs out of villages and adjacent territory; and when the people in the village and its adjacent territory, with almost entire unanimity, ask incorporation, it would seem to be a wilful disregard of the intention of the legislature in its borough legislation, and the rights of the people thereunder, to refuse them borough privileges."

At page 352, he also said:

"The question of taxes withdrawn from the township of Braddock, we take to be the motive which animates the controversy. If the village and its adjacent territory is entitled to incorporation, this objection will not avail to defeat the grant."

And in *Pleasant Hills Borough*, 161 Pa. Super. 259, Judge Hirt declared (p. 264):

"There is no merit in appellants' remaining contention that the court erred in limiting the cross-examination of witnesses as to the adverse financial effect of the incorporation on the remaining township. Certainly the loss of more than one-half of its tax revenue is a matter of concern to the township but it will not be in worse position than it would have been if it had assumed the financial burden of providing adequately for the needs of the community here involved. In any view, the disadvantages to the township supply no good reason for denying

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the right of incorporation as a borough to residents seeking to attain an efficient local self-government suitable to their needs. The law never intended to protect a township in maintaining its boundaries intact at the expense of a town within its borders."

As Judge Carr pointed out in In Re Incorporation of the Borough of Newell, 44 Municipal L. R. 129:

"(T)he law prescribes no minimum of wealth or population to entitle the freeholders to incorporate."

In that case there were 242 properties separately owned in the proposed borough, 124 were owned by residents who signed the petition. Of the 118 owners who did not sign, 81 were non-residents.

In another case the court created a borough where there were only forty-five houses within the limits of the proposed borough. In Re: Petition of the Borough of Churchill, 111 Pa. Super. 380.

And, in Brookhaven Borough Incorporation, 54 D. & C. 546, there were only 150 separate properties in the borough.

The testimony is very interesting.

Frank Burnside, President of Fowler, Dick & Walker, the largest department store in northeastern Pennsylvania, stated (N. T. 23):

"Based on my personal experience and residency in this area for some 25 years, and in the light of what I have learned in this last year and one-half of study of this matter, I am completely convinced that this watershed area is a homogeneous geographical governmental area which has interests and problems quite separate from that of the contiguous township areas."

Since Harveys Lake is what one would consider a resort area, the problems, by necessity, are distinct from the problems of government of rural oriented areas.

For many years the Harveys Lake Protective Association composed of property owners subsidized the township police salaries.

It is estimated that during the period of thirty years the residents of the lake purchased equipment and services amounting to upwards of \$150,000 because the townships were unable to provide such equipment and services.

They bought fire trucks, ambulances and cruiser cars. They have a landfill for garbage disposal which the townships have failed to furnish for their residents. They have carried

on many of their own projects and only recently spent \$2500 for a survey to determine the feasibility of sanitation and a sanitary sewer.

The problem of pollution of the lake is a serious one. In 1964 the State Department of Health closed the lake to bathing and declared that the problem of pollution is distinctly a local one.

They are vitally concerned in the failure of the townships to regulate junk yards so that five unsightly of such yards have been established and the residents have occasion to worry because the townships have permitted nine buildings housing human beings to be built over the lake.

In one area of Lake Township there are 3.8 miles of road which will be in the proposed borough. On this road there are 129 homes with a market value of \$600,000, and yet nothing is being done to improve the road.

The highway around the lake is only thirty feet wide and the State Highway Department will not help in its maintenance or reconstruction because it is not fifty feet wide. A borough government could re-establish the lines.

In short, the residents of the lake area have many problems which are not common to the residents of the rural areas and they are willing to pay double the present taxes to get relief from nuisances and the improvement in sanitary conditions.

The police of Lake Township and Lehman Township have so much territory to cover that they cannot patrol the lake area as fully as required. During the summer and especially on week-ends, the traffic is bumper to bumper.

In the winter fishermen build huts on the ice and leave them with a lot of garbage, tin cans, etc., and no effort is being made by the police to compel cleaning up.

When industries are sought for Wyoming Valley area, one question always asked is — what is there for recreation entertainment. The committee of 100 of the Industrial Fund names golf courses, and invariably points to Harveys Lake primarily as a wonderful resort area.

There is a great need for a public dock and yet the supervisors of the townships have made no effort to provide one.

Raymond Carmon of the Pennsylvania Economy League, a resident of nearby Dallas Township, made an investigation of the application and the necessity therefor. He testified that his League normally opposed fragmentation of local government, but after looking into the situation at Harveys Lake, it concluded to approve the application. It learned of the contributions of the lake citizens for many years and

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made on the spot checks regarding some of the problems, including drainage and streets. It felt "that the community of interest that we saw and that the statistics revealed, would warrant the creation of a new governing body to handle those problems in that particular area."

Howard Kennedy, Vice President of the Miners National Bank of Wilkes-Barre, the largest bank in Luzerne County, stated (N. T. 157):

"In 1960 when I moved to the Village of Harveys Lake for summer residence, I found what I thought was a very delightful place to live. I found a village composing about seventeen hundred homes, three churches, restaurants, taverns, service stations, grocery stores, bathing beaches, amusement parks, an outdoor movie theater, a fire house, a post office, a boat club, and I noticed that there were schools within the area. It seemed to be an ideal community in which to live. Subsequently, I found that as ideal as that was, that various things were sadly lacking. Having spent most of my life in a municipality I was used to services such as paid police protection, fire protection, street lighting, maintenance, street cleaning, rubble collection and disposal. All of these things seemed to be lacking. At one of the meetings of the Protective Association I raised the question, 'What happens to our tax money as to why none of these services are bestowed upon the residents of our area.' I found in my own examination that about three quarters of the tax money collected from the residents of our area was used in other parts of the township; that over all, the residents of our area paid about three quarters of the taxes of Lake Township. I didn't check the Lehman area because I lived in the area of Lake Township. It appeared to me that although good services were being rendered by the township supervisors to the south district and the lower district, the north district was (treated) like a tail on the appendix. . . ."

Mr. Burnside lived at the lake as a summer resident for fifteen years and lately he has lived there for another fifteen years as a permanent resident.

He complained of the dual township supervision with the majority of interests in this supervision being disposed heavily in the direction of the rural portions of the townships as opposed to the resort portion. In ten years there has never been a joint meeting of the supervisors of Lake Township and Lehman Township. Many organizations have been created

to control problems which are special to the area and which were not being properly handled by governmental authorities.

The various organizations jointly are providing the funds for legal and other services for the incorporation of the borough.

According to him, the traffic problem in summer is acute and it is aggravated by the fact that two of the most intense concentrations of traffic occur where the two township lines abut at the entrance to the lake in the Sunset area and at the chapel area commonly known as Warden Place. Because of jurisdictional problems, it is difficult to get these traffic problems, particularly in these two areas, regulated and policed adequately. There is a measure of difficulty with problems relative to boating—high speed boating and large transient boats.

Mr. Burnside is so concerned about the existing problems that though the hearings were held during the busiest season of his store, the Christmas season, he attended every court session.

Mr. Thomas P. Garrity, a prominent realtor, who has lived at the lake all his life, pointed out that the police protection is entirely inadequate and told how for many years the Harveys Lake Protective Association had to contribute to the salaries of policemen in both townships in order that they could have a semblance of police protection.

In his opinion, 85% of the funds to provide services which were not available under supervisors came from summer residents as distinguished from year round residents. The residents themselves bought two thousand feet of fire hose in order to make the fire truck useful. Previously there was no contact between the pumper and any fire.

At the hearing, it developed that the population of Lake Township, according to the 1960 census, is 1895, out of which 1300 live in the proposed borough area.

The population of Lehman Township is 2318, of whom 350 live in the proposed borough area.

There are 257 properties owned and occupied by year round residents in Lake Township, and 85 in Lehman Township. In addition, there are 647 properties owned and occupied by summer residents in Lake Township and 126 in Lehman Township. The total number of properties within the proposed borough area in Lake Township is 1754 and in Lehman Township, 418.

In Lake Township, the total assessed valuation for 1965 was \$5,164,000.

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In the borough area, the assessed valuation of the properties of year round resident freeholders is \$1,119,940.

The assessed valuation of the properties of summer residents is \$1,621,570, and the assessed valuation of the properties of non-residents is \$1,503,110, making a total of \$4,244,620.

In Lehman Township, the total assessed valuation for 1965 was \$4,442,050.

In the borough area, the assessed valuation of the 85 properties owned by year round freeholders is \$339,760.

The assessed valuation of the properties owned by summer residents is \$269,180, and those of non-residents is \$374,100, making a total of \$983,040.

The total assessed valuation of all properties within the proposed area is \$5,227,660.

The area of Lake Township is 28.56 square miles, of which 5.02 square miles will be in the proposed borough.

The area of Lehman Township is 23.07 square miles, and only 1.3 square miles will be in the proposed borough.

Lake Township has eligible for fuel grant, 31.03 miles of roads, of which only 2.67 miles will be in the proposed borough. So that the loss in the liquid fuels grant will be minimal.

Lehman Township has 35.61 miles of eligible roads and it will lose only .64 of a mile, so that it will continue to receive practically all of the liquid fuels grant, amounting to approximately \$15,000.

If the incorporation is granted, there will be only 22 of the 73 municipalities in Luzerne County having a higher assessed valuation, four third class cities, 9 boroughs, and 9 townships.

There would be 10 townships having a lower valuation than the remaining portion of Lake Township.

And, there will be 12 boroughs with a smaller population than the estimated 1650 persons in the proposed borough.

Of the 33 boroughs in Luzerne County, 21 have a higher tax rate than the projected 10 mills required for the proposed Harveys Lake Borough, 3 have the same millage, and 9 have lower rates.

Of the 12 boroughs with smaller population than that of the proposed Harveys Lake Borough, 7 have tax rates above the projected 10 mills and 5 have lower rates.

If the incorporation is granted, Lehman Township, whose general levy produces \$20,000 in taxes, will lose only \$3,000 from the area of the proposed borough, and about one-half of \$2,000 from the liquor licenses. The fuel grant of about \$15,000 will have very little reduction. So that the incorporation will have no detrimental effect upon it.

The exceptants offered no testimony as to the effect of the incorporation upon the remaining part of Lake Township. So we assume that they can get along.

The proposed borough is essentially and principally a summer colony. The statistics revealed by the tables hereto attached abundantly establish that fact.

While the statistics as they relate to the portion of the proposed borough which now comprises a part of Lake Township are slightly more striking than those relating to the portion which now comprises a part of Lehman Township, the latter are not any less substantial to justify any distinction in resolving the question as it relates to each portion.

Table I* reveals that of all the freeholders (all year and summer) residing within Lake Township over 72% are summer residents and 28% are all year residents. As to Lehman Township, over 53% are summer residents and 47% are all year residents.

Table II reveals that of all taxable properties in Lake Township, numbering 904, owned by resident freeholders (all year and summer) 71½% are owned by summer residents as against 28.4% of all year residents. As to Lehman Township, of all taxable properties, 211 in number, owned by resident freeholders (all year and summer) 60% are owned by summer residents as against 40% by all year residents. That table also indicates that of all the taxable properties of Lake Township intended to be included in the proposed borough (1754) and not classified as to the residency or non-residency of the owners, about 37% are owned by summer resident freeholders as against 14.6% by all year resident freeholders. In Lehman Township of the total of taxable properties (418) without classification as to the

*Ed. Note: For Tables I, II, III, IV see Appendix II

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residency or non-residency of the owners, 30% are owned by summer resident freeholders as against 20% by all year resident freeholders.

Table III reveals that of the total assessed valuation of properties in Lake Township owned by all year and summer resident freeholders, the relative assessed valuation of properties owned by summer resident freeholders is 60% as against 40% by all year resident freeholders. In Lehman Township, the ratio is about 44% by summer resident freeholders and 55% by all year resident freeholders. That table also shows that of the total assessed valuation of all properties in Lake Township intended to be included in the proposed borough and without classification as to the residency or non-residency of the owners, 38% of that total assessed valuation relates to properties owned by summer resident freeholders as against 26% by all year resident freeholders. As to Lehman Township, the ratio is 27.4% by summer resident freeholders as against 34.5% by all year resident freeholders.

Table IV shows that the total number of resident freeholders, both all year and summer, to be counted in this case is 1474 as to Lake Township and 360 as to Lehman Township. The total number of petitioners, both all year and summer, is 61+% of all the resident freeholders, all year and summer, eligible to be counted as to Lake Township and 57.7% as to Lehman Township. The number of petitioners identified as all year resident freeholders is 60.8% of the total number identified as all year resident freeholders of Lake Township and 47% as to Lehman Township. The number of petitioners identified as summer resident freeholders is 61+% of the total number identified as summer resident freeholders of Lake Township and 67% as to Lehman Township.

It appears, therefore, that as to Lake Township, the petitioners clearly constitute more than a majority of all the resident freeholders without regard to whether summer resident freeholders are or are not to be counted in any determination that the petition was signed by "a majority of the freeholders residing within the limits of" the portion of Lake Township sought to be incorporated within the proposed borough. As to Lehman Township, however, it is evident that although the petitioners constitute a clear majority (67%) of the total (360) of all year and summer resident freeholders, if both categories are to be considered, the 80 all year round petitioners do not constitute a majority of the all year resident freeholders.

However, as we have demonstrated above, the compelling part of the requirement is not so much the residence of the signer as the ownership of property. This is emphasized by the learned Judge Endlich, who in Wernersville Borough, 5 Berks C.L.J. 364, declared (p. 366):

“The enactment involved here has for its object the establishment of a judicial procedure for the conversion into distinct municipalities, with adequate powers of government and regulation, of certain settlements already built up, or partially so and in process of being further developed but lacking those corporate and police powers needful to the present and future well-being and comfort of its inhabitants. On the one hand it is self-evident that the brunt of the burdens involved in effecting all that may be needful or appear desirable for these purposes in the way of public institutions and improvements must, in the form of taxation, municipal assessments, construction and repair of sidewalks, restrictive building regulations, and the like, be borne by the owners of real estate situate within the proposed borough. On the other hand, it is equally manifest not only that the conveniences, etc., resulting from all that these burdens are capable of securing will be most largely and directly enjoyed by the owners of real estate who are also residents of the borough, but also that it is they who are most immediately and seriously hampered by the absence of such conveniences, etc. To persons of this class, therefore, rather than to non-resident owners or to resident non-owners, the statute accords a decisive voice in the inauguration of proceedings for incorporation . . . contemplating of course that in the progress of those proceedings the interests of all other less ultimately concerned will be duly considered.”

We are satisfied that all the petitioners are qualified to sign the petition.

Based upon the foregoing, we enter the following

D E C R E E

Now, December 5th, 1966, at 10 A.M., all exceptions are dismissed.

After full investigation of the petition to incorporate the Borough of Harveys Lake, and due consideration of all the testimony, the court finds that the conditions prescribed by

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law have been complied with and believes that the petitioners are entitled to the grant of the prayer of their petition.

Therefore, it is hereby ordered and declared that the Village of Harveys Lake be incorporated as a Borough; that the corporate name shall be "The Borough of Harveys Lake"; and that the boundaries of the said Borough of Harveys Lake shall be as follows:

Description Omitted

William A. Valentine, Lewis R. Crisman, for Exceptants.

Maurice S. Cantor, Gifford S. Cappellini, Edward Hosey, Joseph V. Kasper, for Petitioners.

Appendix I

CITIZENS SEEK DUMPING FACILITIES IN LEHMAN;
SOME OPPOSE PROJECT 70

Valentine Urges Action Be Taken

Residents seeking dump facilities in Lehman Township appeared before the Supervisor Board of that municipality on Saturday morning.

Mrs. Lawrence Steltz who resides in an outlying area related the hardship involved. She asked how Harveys Lake could afford one.

Chairman William Samuel replied that the township does not take in enough taxes to maintain a landfill and said the previous effort to supply such a site with Hoover and Milbrodt operating it had resulted in failure with the firm realizing only \$18 per week, far below the required expenditures needed for maintenance.

Mr. Samuel continued that it costs \$14,000 a year to operate such a project as required by state specifications. He said Pringle dump was available and not too distant.

Solicitor William Valentine said the matter is on a grassroots level and that public officials will have to buckle down and stop playing politics or everyone will have a dump in their backyard with resultant disease.

Joint Meeting

Supervisor Alan Major asked, "What is your solution?" Valentine replied, "The state is preaching health but there is no teeth in it. A joint meeting of the townships Back of the Mountain should be called and certainly nine townships could pay for a bulldozer."

Major said the other townships had been contacted but no action resulted. Samuels said, "It sounds like we are doing nothing but we are working on it. We have 37 miles of road to maintain and we feel we are doing a good job."

Supervisor Clinton Smith moved that the secretary contact the other townships again and see if a program could be worked out. He said if any citizens had constructive ideas the board would be glad to hear them. Alan Major suggested putting the issue on the ballot but Atty. Valentine replied that he wasn't sure this could be done.

How Much Will It Cost?

William Calkins inquired, "How much is Project 70 going to cost the township?" Supervisor Smith replied, "Not one cent or we don't want it. Maintenance will be up to those operating the businesses there and we will have guaranteed assurance from these people before we proceed."

Visitors asked, "Why don't they develop the land themselves, why another beach?"

Smith said, "It is really a real estate transaction. They will sell it back to the township and funds received will be used to develop it into a recreational and business area."

Al Feist remarked the place had been the same for 20 years. Others suggested a beautiful park site would be more in the interest of taxpayers.

An Oak Hill woman said the township didn't need another beach and the water wasn't fit to swim in anyway.

Mr. Kutsky said he had no children to educate, that he was willing to pay taxes and he was in favor of the beach and asked that another extension be sought on Project 70.

Improve Area

Mr. Willoughby said the project would improve evaluations in that area. He was asked how much had been raised toward the improvement and he answered, "\$500."

Supervisor Smith was asked how he felt about Project 70 and he replied that as long as it did not cost the township one penny, he would go along on it, but if there was any obligation to the township he would be opposed. He said public safety was more urgent than a beach and he was in favor of better roads and equipment. (Dallas Post, Aug. 18, 1966.)

Appendix II

Table I

Number of all year and summer resident freeholders and comparative ratios

	Lake Twp.	Lehman Twp.
All year residents	410	170
Summer residents	1064	190
Total, all year and summer	1474	360
Percentage of total, all year	28-%	47%
Percentage of total, summer	72+%	53%

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Table II

Number of properties of all year and summer resident freeholders; of all properties within proposed borough and comparative ratios

	Lake Twp.	Lehman Twp.
All year properties	257	85
Summer properties	647	126
Total, all year and summer	904	211
Percentage of total, all year	28.4-%	40+-%
Percentage of total, summer	71.5+-%	60-%
Total properties within proposed borough	1754	418
Percentage of total, all year	14.6-%	20%
Percentage of total, summer	37-%	30%

Table III

Assessed valuations of properties of all year and summer resident freeholders; of all properties within proposed borough, and comparative ratios

	Lake Twp.	Lehman Twp.
All year properties	\$1,119,940	339,760
Summer properties	\$1,621,570	269,180
Total, all year and summer	\$2,741,510	608,940
Percentage of total, all year	40+-%	55+-%
Percentage of total, summer	60-%	44-%
Total valuation of all properties within proposed borough	\$4,244,620	983,040
Percentage of total, all year	26+-%	34.5%
Percentage of total, summer	38+-%	27.4%

Table IV

Number of all year and summer resident freeholders; number of petitioners and comparative ratios

	Lake Twp.	Lehman Twp.
All year residents	410	170
Petitioners, all year	250	80
Percentage petitioners, all year	60.8%	47%
Summer residents	1064	190
Petitioners	650	128
Percentage petitioners, summer	61+-%	67+-%
Total, all year and summer residents	1474	360
Petitioners, all year and summer	900	208
Percentage petitioners of total	61+-%	57.7%

IN RE: HARVEYS LAKE BORO. INCORPORATION (No. 2)

Municipal Corporations—Petition for incorporation of a borough—Fulfillment of purpose of petition—Withdrawal after jurisdiction of court attaches

1. Any person has a right to sign or refrain from signing a petition for the incorporation of a borough and may withdraw his signature after signing but before the petition has fulfilled its purpose, but once it has fulfilled its purpose (in this case the attachment of jurisdiction of a court) a party cannot withdraw his signature without just cause.

Quarter Sessions of Luzerne County. No. 2305 of 1965.

Before Pinola, P. J., Brominski and Schiffman, JJ.

PINOLA, P. J. for the Court *en banc*. December 5, 1966. On November 1, 1965 a petition signed by many residents was presented to the court to the above number, asking the creation of the Borough of Harveys Lake.

On December 4, 1965 nineteen residents of Lehman Township, who had signed it, filed a petition seeking permission to withdraw their names.

They allege that the signatures were obtained by misrepresentation, duress and undue influence, and that the signers were misled as to the true purpose of the petition.

On December 15th an answer was filed on behalf of the original petitioners denying these allegations.

At the hearing, only one of the nineteen, Albert Schweitzer, appeared to testify. He had signed it on August 10, 1965, more than two and one-half months before the date when the petition was presented to the court. He did not say that the solicitor told him that the petition was to place the question of the creation of the borough upon the ballot, but that he himself assumed that was the purpose. He said he signed the paper because Schreiner, the solicitor, was his friend. On November 27, 1965, he joined eighteen others in the present petition to withdraw their names.

When asked why he had not requested that his signature

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be withdrawn during the two and one-half months prior to its presentation, he replied,— “I guess I was just too lazy.”

Counsel for the petitioners for the creation of the borough moved to dismiss the petition to withdraw.

The requirement that the petition be signed by a majority of the freeholders residing within the limits of the proposed borough is jurisdictional and upon the filing of such petition, otherwise complying with the provisions of the Code, the court has jurisdiction to proceed with the matter. Any person has a right to sign or refrain from signing a petition and might withdraw his signature after signing but before the petition has fulfilled its purpose. But after the petition has fulfilled its purpose, in this case the attachment of jurisdiction by the court, a party cannot withdraw his signature without just cause. Incorporation of Flemington Borough, 168 Pa. 628, 634.

As the court pointed out in Borough of Quakertown, 3 Grant 203,—

“The second thought may have been better than the first, but it came too late.”

Judge Porter in the Incorporation of the Borough of Old Forge, 12 Pa. Super. 359, 362, made it clear,—

“Petitioners cannot thus play fast and loose with the court. . . .”

We agree with Judge Sheely that,—

“If this were not true, all proceedings would depend upon the whim of a few persons signing the original petition.” Borough of Bonneauville Incorporation, 26 D. & C. 2d 183, 190.

Under the circumstances, we enter the following

O R D E R

The petition of certain residents of Lehman Township to withdraw their names from the petition to create the borough is dismissed.

William A. Valentine, for petitioners.

Maurice S. Cantor, Gifford S. Cappellini, Edward Hosey, Joseph V.

Kasper, for proponents of the Borough of Harveys Lake.