

In the
Supreme Court of Ohio

NEW 52 PROJECT, INC.,	:	Case No. 2008-0574
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	On Appeal from the
	:	Franklin County
	:	Court of Appeals,
GORDON PROCTOR, DIRECTOR, OHIO	:	Tenth Appellate District
DEPARTMENT OF TRANSPORTATION,	:	
	:	Court of Appeals Case
Defendant-Appellant.	:	No. 07-APE-06-0487
	:	

**MERIT BRIEF OF DEFENDANT-APPELLANT
DIRECTOR, OHIO DEPARTMENT OF TRANSPORTATION**

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INTRODUCTION

The General Assembly entrusted to the Ohio Department of Transportation (“ODOT”) and its Director the “general supervision of all roads comprising the state highway system.” R.C. 5501.31. As part of that duty, the Director oversees the acquisition and maintenance of thousands of miles of roads owned in fee simple or held by easement. ODOT’s maintenance of its easements is critical, because much of the State’s highway system was built on perpetual easements, with the underlying title still held as a “servient estate” by private landowners. The Assembly also granted ODOT’s Director the discretionary power to abandon or vacate state highway property, whether held in fee simple or by easement. R.C. 5511.01 and R.C. 5511.07. The issue in this case is whether that statutory process is the exclusive mechanism for ODOT to relinquish an easement, or whether instead a property owner can sue ODOT in court under a common-law theory that ODOT abandoned property by allegedly not using it for twenty-one years. The Court should hold, as it already has in regard to easements held for county and township roads, that no common-law cause of action exists to quiet title by declaring a state highway easement abandoned, as the statutory process is the exclusive method to lift a highway easement.

First, the statutes themselves show that the statutory method is exclusive, for the scheme contains several elements that would be lost in a common-law court case, thus undermining the Assembly’s intent. For example, the statutes ensure that the public’s interest in its roads is protected by requiring notice and public involvement and otherwise specifying what the Director must do to abandon or vacate of any part of the state highway system. Further, by requiring the Director actively to decide to relinquish highway property, the statutory scheme guarantees that ODOT cannot inadvertently lose its rights. The statutes also give the Director options other than returning full control of the land to the property owner. He may, for example, entrust the land to

the Director of Natural Resources to be used for recreational purposes. R.C. 5511.07; R.C. 1519.02; R.C. 1519.03. A court adjudication of abandonment, in a quiet title action or under any other common law theory, is inconsistent with this scheme.

Second, the Court has already decided that an analogous statute regarding county and townships roads provides an exclusive mechanism—that is, that no common-law abandonment action exists outside the statute—and that precedent applies with equal or greater force here, where state highways are involved. See *Bigler v. Township of York* (1993), 66 Ohio St. 3d 98. In *Bigler*, the Court held that a common pleas court lacked jurisdiction to quiet title to a township road because R.C. 5553.042 provided the exclusive mechanism for vacating the road. That statute grants a board of county commissioners discretion to vacate an unused township road if the commissioners find that vacating the easement is appropriate. *Id.* at 100. The Court reasoned that the statute’s grant of administrative discretion to the county commissioners was inconsistent with a common-law court action. *Id.* at 100. The same is true, or even more so, for state highways. If the need for administrative discretion means that a county or township cannot lose its rights to a roadway in a quiet title action, then surely ODOT, which has no lesser need for administrative discretion, should not lose its rights to a state highway in a quiet title action either.

For these and other reasons, the appeals court below was wrong to hold that a common pleas court could hear a quiet title action brought by Plaintiff-Appellee New 52 Project, Inc. See *New 52 Project, Inc. v. Gordon Proctor, Director of the Ohio Department of Transportation* (10th Dist.), 2008 Ohio App. Lexis 395, 2008-Ohio-465, ¶¶ 23-24 (“App. Op.,” attached as Ex. 3, A-5). Consequently, the Court should reverse the appeals court’s decision.

STATEMENT OF FACTS

A. New 52 alleged that ODOT abandoned a perpetual easement.

In 1959, the state highway department acquired a perpetual highway easement over land that New 52 now claims to own. App. Op. at ¶ 5. In 2006, New 52 sued ODOT in the Franklin County Court of Common Pleas, seeking a declaration that ODOT had abandoned this easement or that the easement was extinguished by operation of law. App. Op. at ¶¶ 6-7.

To support its claim, New 52 alleged that the easement had once been used as the main route of U.S. 52 but that, beginning in 1984 or 1985, “the highway was rerouted so it did not traverse the easement at issue.” App. Op. at ¶ 6 (quoting Complaint at ¶ 5). New 52 further alleged that since then “the easement held by defendant or a major portion thereof has ceased to be used as an exit or for any other highway purposes for a period exceeding the statutory period of twenty-one years.” App. Op. at ¶ 6 (quoting Complaint at ¶ 6). ODOT disagrees with these claims as a matter of fact, but that disagreement is not at issue here.¹

B. The common pleas court dismissed the case, but the appeals court reversed.

ODOT moved to dismiss, arguing that the complaint failed to state a claim. ODOT urged that adverse possession does not lie against the State and that a state highway easement cannot be abandoned through nonuse, but only through the procedures set forth in R.C. 5511.01. App. Op. at ¶ 8. In response, New 52 contended that abandonment through nonuse had occurred and that R.C. 5511.01 did not apply because the land, by virtue of nonuse, was no longer a highway. App. Op. at ¶ 9.

¹ The issue before this Court is whether a cause of action exists, and thus whether the trial court properly dismissed New 52’s case for failure to state a claim. Thus, New 52’s allegations are taken as true at this stage. If the Court rules for ODOT, the case is over, but if it rules in favor of New 52, it will need to remand the case. On remand, the parties would then litigate whether an abandonment actually occurred; ODOT’s position is that it has continued to use the land at issue for various support functions, including drainage facilities.

The trial court dismissed the complaint, reasoning that New 52 had no common-law cause of action because R.C. 5511.01 set forth exclusive procedures for abandonment. Decision Granting Defendant's Motion to Dismiss, Franklin County Court of Common Pleas, Dec. 21, 2006 (attached as Ex. 2, A-16); see App. Op. at ¶ 10. Because the complaint did not allege that ODOT had complied with those procedures, the trial court held that New 52 failed to state a claim for relief. See App. Op. at ¶ 11.

The Tenth District Court of Appeals reversed. The appeals court agreed that R.C. 5511.01 provided a mechanism to abandon a highway, but it disagreed that the mechanism was exclusive. App. Op. ¶ at 23. Noting that the statute "neither expressly repeals nor incorporates any aspect of the common law cause of action for abandonment of a highway easement," it concluded that a common law claim remained available to the fee owner. App. Op. at ¶¶ 23-24. Accordingly, the court decided that New 52's complaint sufficiently pleaded facts stating a claim for relief, and the court reversed and remanded the case for further proceedings. App. Op. at ¶¶ 24-25.

ODOT appealed to this Court, and the Court granted jurisdiction to hear the case. See Order of July 9, 2008, Case No. 2008-0574.

ARGUMENT

Appellant ODOT's Proposition of Law No. 1:

A court of common pleas has no jurisdiction to decide whether a state highway easement has been abandoned, because R.C. Title 55 gives the Director of Transportation exclusive authority to abandon or vacate portions of the state highway system.

Two statutes, R.C. 5511.01 and R.C. 5511.07, provide a process for ODOT's Director to "abandon" or "vacate" highway property interests. In the statutory scheme, "abandon" and "vacate" are terms of art with distinct meanings, as explained below. Taken together, these statutes provide a comprehensive scheme for ODOT to relinquish its property interests in

highways, and the scheme's comprehensiveness shows that allowing a common-law quiet title action would be inconsistent with the system that the General Assembly designed.

First, the abandonment of a state highway is governed by R.C. 5511.01 (the "Abandonment Law"), which says the Director of Transportation "may, upon giving notice and holding a hearing, abandon a highway on the state highway system or part thereof." If the Director decides to remove the road from the state highway system, then "the abandoned highway shall revert to a county or township road or municipal street." *Id.* Notably, this form of "abandonment" differs from what the dictionary definition of "abandon" seems to suggest, as the public interest in the road is merely delegated to a political subdivision; it does not transfer straight from ODOT to the private landowner holding the servient estate.

Second, the procedure for vacating state highway property is set forth by R.C. 5511.07 (the "Vacating Law"), which provides for a finding by the Director, notice by publication and by service on abutting landowners, and a hearing of claims. *Id.* ODOT must also serve the Director of Natural Resources, who is charged by statute with identifying "abandoned or unmaintained roads, streets, and highways" that are suitable for recreational use. *Id.*; R.C. 1519.03.

New 52 did not invoke either statutory process, but instead sued ODOT in common pleas court. In its complaint, New 52 sought "abandonment" of a perpetual highway easement that ODOT held. App. Op. at ¶ 7. But New 52 apparently used that term in a general sense rather than the statutory sense, for New 52 sought to have a sole property interest unencumbered by easement; it did not seek to have a local political subdivision take over the road. Alternatively, New 52 sought a declaration that the State's easement had been extinguished or forfeited, effectively quieting title in it. App. Op. at ¶¶ 7, 24. Most important, whatever the precise nature

of New 52's claim, it indisputably sought to invoke a common-law theory; it did not seek to force ODOT to use the procedures laid out in either statute.

The statutory scheme, standing alone, shows why a common-law action is inconsistent with the statutes. Not only do these statutes give the Director discretionary power to abandon or vacate state highway property, but they also regulate his exercise of that discretion. At common law, a plaintiff proves abandonment "by evidence of an intention to abandon as well as of acts by which the intention is put into effect; there must be a relinquishment of possession with an intent to terminate the easement." *West Park Shopping Center, Inc. v. Masheter* (1966), 6 Ohio St. 2d 142, 144 (internal quotation omitted). For state highways, however, the means by which the Director may express an intent to abandon, and the acts he must take to effectuate that intent, are spelled out by enacted law.

These statutes ensure that the right to use public highway property is not lost by inadvertence. Similar concerns animated *Houck v. Board of Park Commissioners*, 116 Ohio St. 3d 148, 2007-Ohio-5586, which held that adverse possession does not lie against the State and its political subdivisions, partly because of the difficulty inherent in actively controlling and managing thousands of acres of property spread out over hundreds of miles. *Id.* at ¶ 27. If the law does not allow an abutter's claim to title based on adverse use of public property, neither should it allow an abutter's claim to quiet title based on the nonuse of public property. Accordingly, the Abandonment and Vacating Laws preclude accidental loss by requiring reports and findings and other formal administrative action before any highway right-of-way can be relinquished.

Applying common-law abandonment doctrine to state highway easements would negate legislative intent in other ways as well. The Abandonment and Vacating Laws both provide for

notice and a chance for public involvement, which a lawsuit between two parties would not provide. The rights and interests of the public would not be, and could not be, considered by a court in deciding the merits of a common-law abandonment claim. Nor could the court decide whether the highway easement should be used for recreational or trail purposes, as R.C. 5511.07 and R.C. 1519.03 empower the Director of Natural Resources to do. If an administrative decision to vacate part of a state highway is being considered, the Director must consider claims for damage resulting from vacating. R.C. 5511.07. If the claims are too great, the Director can change course, because no final determination occurs until all the damage awards have been accepted or deposited in court. *Id.* But if a single abutter could force abandonment, the Director could not avoid other damage claims. Conversely, if the Director wanted to avoid damage claims entirely, he could do so by simply closing the highway to public use for twenty-one years, thereby “abandoning” it cost-free.

But the General Assembly long ago displaced the common law of abandonment with regard to state highways. In 1854, the Assembly provided that “all alterations of State and County Roads, now made and established, shall thereafter form a part of such road, and so much of the original road as lies between the points at which the alteration intersects, shall be and remain vacated.” 52 Ohio Laws 26 (1854). This statute automatically vacating old highway routes was amended in 1859 and 1883, codified as § 4635 of the Revised Statutes, and recodified as § 6859 of the General Code. It remained on the books substantially unchanged until 1915, when the General Assembly repealed it as part of a bill creating the state highway department and “a system of highway laws for the state of Ohio.” 1915 Am. S.B. No. 125, 106 Ohio Laws 574, 623, 664.

The General Assembly soon gave the director of the new highway department discretionary power to vacate or abandon roads from the state system into the inter-county highway system. 1919 H.B. No. 162, 108 Ohio Laws 478, 482-83. Then, in 1923, it gave the director the power to alter or relocate roads on the state highway system and to acquire property for that purpose “by easement deed.” But the right-of-way of the former highway would not be automatically vacated upon alteration of the highway route. Instead, the General Assembly decided that if “there is any portion of the existing road or highway which he deems not needed for highway purposes,” the director “may vacate and abandon such portion.” 1927 H.B. No. 67, 112 Ohio Laws 430, 440. That provision “fully set[] forth the procedure to be followed” when vacating state highway right-of-way and was considered “ample to protect the constitutional rights of abutting land owners.” 1944 Op. Atty. Gen. No. 7160. The same discretionary authority exists in today’s R.C. 5511.07, which allows the Director of Transportation, as part of his general supervision of the state highway system, to find that right-of-way “is no longer necessary for the purposes of a public highway” and then dispose of it.

This grant of discretionary authority over abandoning vacating of state highways—as conditioned by the required administrative procedures—is entirely inconsistent with common-law abandonment.

Other statutes, as well, would be defeated by allowing common-law abandonment of state highway easements. The Vacating Law requires ODOT to involve the Director of Natural Resources in any decision to dispose of a state highway right-of-way. R.C. 5511.07. The Ohio Department of Natural Resources (“ODNR”), in turn, must maintain a current inventory of unused highway property that is suitable for recreational use in the statewide trail system. R.C. 1519.03. To develop that recreational trail system, ODNR may acquire “any estate, right, or

interest” in real property, and ODOT may transfer to the Director of Natural Resources “any estate, right, or interest” in real property desired for that purpose. R.C. 1519.02.

Federal law reinforces ODOT’s duty to offer unneeded highway property for trail purposes. Federal Highway Administration regulations require state transportation departments, if they wish to dispose of any interest in real property that had been required for a federally-funded project, to offer the property first to other government agencies for use in parks, conservation, or recreational purposes. 23 C.F.R. § 710.409(b). If that offer is declined, the state transportation department may then sell the unneeded land to a private party for fair market value. 23 C.F.R. § 710.409(a); § 710.403(d).

Federal law also requires that if unneeded highway property is not sold for fair market value, the Federal Highway Administration must first approve the transfer, unless the property “is located outside the limits of the right-of-way” and “Federal funds did not participate in the acquisition cost of the property.” 23 C.F.R. § 710.403(d), (g). Because no factual record has been developed in this case, which remains at the motion to dismiss stage, nothing here indicates whether the land at issue involved federal funds. However, the land at issue was used as part of U.S. 52, so it is possible. More important, regardless of whether this particular case involves federal funding, other cases might, and bypassing ODOT’s statutory process in a court action makes it harder, if not impossible, for ODOT to comply with federal law as well as with state law. ODOT can best coordinate its property disposal activities with the Federal Highway Administration if ODOT is exercising administrative discretion as it considers possible abandonment or vacating, not if it is defending a lawsuit.

In light of the statutory scheme that the Assembly designed, the trial court was right when it held that it had no jurisdiction to decide whether the State had abandoned its highway

easement over the New 52 property. The appeals court's contrary view was wrong, and the Court should reverse.

Appellant ODOT's Proposition of Law No. 2:

Because the decision to relinquish a public right-of-way, even if unused for twenty-one years, involves a careful balancing of public and private interests, a court of common pleas has no jurisdiction to adjudicate whether a state highway easement has been forfeited. (Bigler v. Township of York (1993), 66 Ohio St. 3d 98, approved and followed.)

While the statutes alone show that the statutory scheme precludes a separate common-law remedy, the Court's precedent proves the point, as the Court has already rejected New 52's view in the near-identical context of roads controlled by certain political subdivisions. See *Bigler v. Township of York* (1993), 66 Ohio St. 3d 98. In *Bigler*, the Court held that a common pleas court lacked jurisdiction to quiet title to a township road because a statute, R.C. 5553.042, provided the exclusive mechanism for vacating the road. *Bigler's* reasoning applies with equal or greater force when state roads, not local roads, are involved, and neither the appeals court nor New 52 offers a persuasive distinction between the state and local contexts.

The Court in *Bigler* reasoned that, because the statute there gave the executive branch discretion to abandon or vacate a road, it would be inconsistent to allow a court action to override the executive's discretion, even if the road had been unused for twenty-one years. Specifically, the statute at issue in *Bigler* grants a board of county commissioners the discretion to vacate a township road, upon petition, if it finds the road has been abandoned and unused for twenty-one years. *Id.* at 100. The Court emphasized that discretion, explaining that "upon determining that an abandonment has occurred, along with finding nonuse for a period of twenty-one years, the board of county commissioners 'may'—and is not obligated to—order the road vacated." *Id.* at 100. This discretionary language, in the Court's view, "reinforces the broad public-policy nature of the decision to vacate a township road." *Id.* Administrative

discretion was needed because “conveying a public road into the hands of private ownership” requires a balancing of public and private interests that “is not possible in a quiet title action.” *Id.*

The Court contrasted this discretion with what would happen if a court action were allowed: The Court explained that if a quiet title action could be maintained, then after twenty-one years of nonuse, a court would be obliged to give clear title to the abutting landowners. *Id.* But the disposition of public road right-of-way is not just a contest between two claimants. Rather, the decision “to vacate a township road involves the careful weighing of widely diverse interests and public-policy considerations.” *Id.* at 100. Those considerations might lead the commissioners to keep a right-of-way intact and in public hands even if the road had been abandoned and unused for twenty-one years. *Id.* at 101.

Bigler’s reasoning applies here. Just as R.C. 5553.042 gives a board of county commissioners the discretion to vacate township road right-of-way, R.C. 5511.01 and R.C. 5511.07 give the Director of Transportation discretion to abandon or vacate the right-of-way of a state highway. The Director has that discretion for the same reasons, because the decision to vacate a road, even if unused, “involves the careful weighing of widely diverse interests and public-policy considerations.” *Id.* In particular, the Director, aided by professional engineers, often determines that ODOT needs to use land for something other than paved travel lanes. For example, each highway has a drainage system to capture and control storm-water runoff. Additional right-of-way may be used for purposes such as stabilization of slopes above or below the road surface, for lateral support, for the side-fall of plowed snow, for sight distance, for maintenance access, and even for scenic view. These uses, while not readily apparent, are nonetheless important to the proper functioning of the highway system. Thus, *Bigler’s*

principle—that administrators are better positioned than courts to assess the public need for an easement—applies here.

The Tenth District sought to distinguish *Bigler*, but its purported distinctions fail.

The Tenth District said that *Bigler* did not control because R.C. 5553.042 expressly provided for property owners to petition the county commissioners to ask them to exercise their discretion, and by purported contrast, the state-highway abandonment statute itself does not expressly provide an analogous petition process. App. Op. at ¶ 23. The appeals court seems to have concluded that the statutory petition mechanism in R.C. 5553.042 provided a clear substitute for a common law abandonment claim, and therefore displaced it. *Id.* But this distinction fails for two reasons.

First, *Bigler* was not concerned with the mechanics of how to ask the executive branch to act, versus how to ask a court to adjudicate; rather, *Bigler* was based on the broader concept that the statute vested discretion in the executive branch as opposed to the judiciary. That is, *Bigler* held that a board of county commissioners has exclusive jurisdiction precisely because the board could decide to keep road right-of-way in public hands even on facts that would require a court to rule it abandoned. 66 Ohio St. 3d at 101. Under R.C. 5553.042 and *Bigler*, a petitioner cannot assert a superior right to property once used for a township road and have that claim adjudicated, as he could in a common-law abandonment case. Instead, the petition is simply a way to ask the government, in its discretion, to relinquish the road. Again, the key point is how to ask, and which branch: the courts, or the body entrusted by the Assembly to maintain roads for the public? It is the latter, at both the State and local levels.

Second, the appeals court's distinction fails because citizens *can* petition ODOT to exercise its discretion to vacate and abandon, and no express statutory provision is needed to allow

citizens to do so. Citizens always have the right to petition their government to redress grievances; indeed, they have a constitutional right to do so. *Edwards v. South Carolina* (1963), 372 U.S. 229, 235. And in fact, since at least 1981 ODOT has had an internal procedure for considering requests to vacate highway easements. ODOT Office of Real Estate, Property Management, § 7404, *available at* <http://www.dot.state.oh.us/real>. Though the Director might decide to keep control of a highway easement that would be “abandoned” at common law, his power is no greater than the county commissioners’ discretion upheld in *Bigler*.

Significantly, too, if the Director of Transportation decides to abandon a state highway under R.C. 5511.01, the highway might end up as a township road. At that point, according to *Bigler*, the county commissioners have exclusive jurisdiction to decide whether the right-of-way should be vacated or remain under public control. The Tenth District’s view, combined with *Bigler*, would create the anomalous result that an unused part of the state highway system could be subject to court-ordered forfeiture *before* the Director decides to abandon it and convert it to a township road, but that same land would be protected against court action, under *Bigler*, *after* it becomes a township road rather than a State one.

The Tenth District’s other purported distinctions of *Bigler* also fail. The appeals court said that the state-highway abandonment statute did not expressly repeal the common-law cause of action. App. Op. at ¶ 23. That is true, but neither did the township-road statute at issue in *Bigler* include an express displacement of common law actions. Rather, the Court in *Bigler* relied on the concept of administrative discretion, and its inconsistency with court actions. The Court did not, and could not, point to any language expressly referring to court actions.

The appeals court’s final purported distinction of *Bigler*—namely, the idea that the state-highway Abandonment and Vacating Laws do “not concern servient estate owners’ claims,” but

address only ODOT's interests—is equally unfounded. See *id.* The petition procedure in R.C. 5553.042 (the statute at issue in *Bigler*) does not concern the property owners' "claims" any more than the Abandonment or Vacating Laws do. It does not give an owner any rights or any "claim" to be adjudicated or enforced. It tells owners only that they may ask the executive branch to exercise its discretion voluntarily in the private owner's favor. Again, under that scheme, the county commissioners have no obligation to vacate a township road, no matter how long it has been unused.

Beyond its purported distinctions of *Bigler*, the appeals court apparently rested its decision on some notion of fairness, but that reasoning is mistaken. In the appeals court's view, if a highway easement has not been used for twenty-one years, the owner of the servient estate should be able to extinguish it. But the appeals court failed to recognize that the State fully compensated New 52's predecessor-in-title for the burden that the perpetual highway easement imposed on the property. *State ex rel. Fogle v. Richley* (1978), 55 Ohio St.2d 142, 146. The original owner was paid for the value of the easement, and all later purchasers bought the land in light of that fact—that is, each later owner paid for the value of the servient estate subject to the easement. Thus, allowing the owner later to force abandonment of the property is no different, in principle, than allowing him to force a second appropriation of the property if the use of it changes. The Court rejected that latter idea in *Fogle*, and it should reject the equivalent idea in this case.

Finally, a ruling in New 52's favor would not aid other similarly situated servient estate owners, but might cause an administrative headache. When the government appropriates fee title to land already burdened by a perpetual highway easement, the owner can get nominal compensation only. 3 Ohio Jury Instructions, §301.5(4). Thus, if the Tenth District's approach

is followed, and ODOT faces the danger of losing easements by court order, the Director might feel forced to safeguard the perpetuity of the State's highway easements by appropriating fee title to all of them. That could occur at a nominal monetary cost to ODOT in compensation to owners, but would carry great administrative costs for ODOT, for the owners, and for the judiciary.

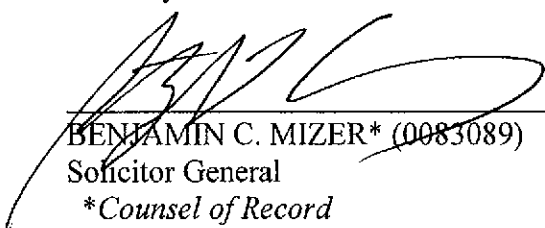
For all these reasons, the Court should follow its reasoning in *Bigler*, and it should hold that the statutory processes for abandoning or vacating ODOT-managed highways is the exclusive mechanism for eliminating easements, so common pleas courts have no jurisdiction to hear common law actions as an alternate path. And, although the Court should reverse and dismiss New 52's case, if it affirms instead, it should remand for further proceedings, as the case was resolved on a motion to dismiss.

CONCLUSION

For the above reasons, the Court should reverse the decision below and reinstate the trial court's judgment dismissing New 52's claim.

Respectfully submitted,

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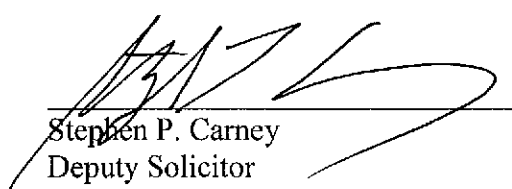
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Transportation

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Defendant-Appellant Director, Ohio Department of Transportation, was served by U.S. mail this 8th day of September, 2008 upon the following counsel:

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Jennifer A. Flints
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100 South Third Street
Columbus, Ohio 43215

Counsel for Plaintiff-Appellee
New 52 Project, Inc.



Stephen P. Carney
Deputy Solicitor

In the
Supreme Court of Ohio

08-0574

NEW 52 PROJECT, INC.,

Plaintiff-Appellee,

v.

GORDON PROCTOR, DIRECTOR, OHIO
DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

Case No. 2008-_____

On Appeal from the
Franklin County
Court of Appeals,
Tenth Appellate DistrictCourt of Appeals Case
No. 07-APE-06-0487

**NOTICE OF APPEAL OF DEFENDANT-APPELLANT
DIRECTOR, OHIO DEPARTMENT OF TRANSPORTATION**

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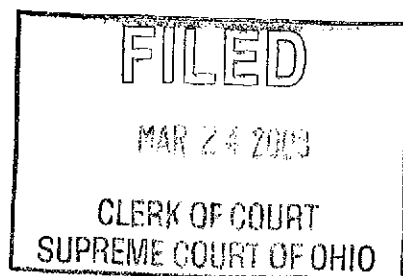
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Counsel for Defendant-Appellant

Director, Ohio Department of

Transportation



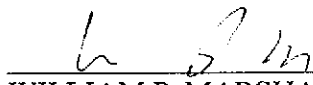
**NOTICE OF APPEAL OF DEFENDANT-APPELLANT
DIRECTOR, OHIO DEPARTMENT OF TRANSPORTATION**

Defendant-Appellant Director, Department of Transportation gives notice of his discretionary appeal to this Court, pursuant to Ohio Supreme Court Rule II, Section 1(A)(3), from a decision of the Franklin County Court of Appeals, Tenth Appellate District, journalized in Case No. 07-AP487 on February 7, 2008. Date-stamped copies of the Third District's Journal Entry and Opinion are attached as Exhibits 1 and 2, respectively, to the Appellant's Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case is one of public and great general interest.

Respectfully submitted,

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Attorney General of Ohio



WILLIAM P. MARSHALL* (0038077)
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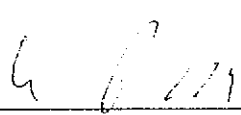
Counsel for Defendant-Appellant
Director, Ohio Department of
Transportation

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Defendant-Appellant Director, Ohio Department of Transportation, was served by U.S. mail this 24th day of March, 2008 upon the following counsel:

David Reid Dillon
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Counsel for Plaintiff-Appellee
New 52 Project, Inc.



William P. Marshall
Solicitor General

20499 - M49

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

2008 FEB -7 PM 12:18
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New 52 Project, Inc.,

Plaintiff-Appellant,

v.

Gordon Proctor, Director of the Ohio
Department of Transportation,

Defendant-Appellee.

No. 07AP-487
(C.P.C. No. 08CVH11-14899)
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on February 7, 2008, appellant's assignment of error is sustained, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with said opinion. Costs shall be assessed against appellee.

SADLER, BRYANT, and KLATT, JJ.

By


Judge Lisa L. Sadler

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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FRANKLIN CO. OHIO
2008 FEB -7 PM 12:15
CLERK OF COURTS

New 52 Project, Inc.,

Plaintiff-Appellant,

v.

Gordon Proctor, Director of the Ohio
Department of Transportation,

Defendant-Appellee.

No. 07AP-487
(C.P.C. No. 06CVH11-14899)

(REGULAR CALENDAR)

EXHIBIT 3

O P I N I O N

Rendered on February 7, 2008

David Reid Dillon, for appellant.

Marc Dann, Attorney General, and *Frederick C. Schoch*, for
appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

(1) Plaintiff-appellant, New 52 Project, Inc. ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas, in which that court granted the motion of defendant-appellee, Gordon Proctor, Director of the Ohio Department of Transportation ("appellee"), to dismiss appellant's complaint pursuant to Civ.R. 12(B)(6).

{¶2} Appellant advances one assignment of error for our review:

THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S
MOTION TO DISMISS WHEN THE COMPLAINT STATED A
CLAIM UPON WHICH RELIEF CAN BE GRANTED.

{¶3} Civ.R. 12(B)(6) authorizes a defendant to assert by motion that the plaintiff's complaint fails to state a claim upon which relief may be granted. Such a motion tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548, 605 N.E.2d 378. Therefore, a court must limit its consideration to the four corners of the complaint when deciding a Civ.R. 12(B)(6) motion to dismiss. *Singleton v. Adjutant Gen. of Ohio*, Franklin App. No. 02AP-971, 2003-Ohio-1838, ¶18.

{¶4} In addition, a court must presume that all factual allegations in the complaint are true and must draw all reasonable inferences in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753. However, "unsupported conclusions of a complaint are not considered admitted and are not sufficient to withstand a motion to dismiss." *Phelps v. Office of Attorney Gen.*, Franklin App. No. 06AP-751, 2007-Ohio-14, ¶4, quoting *State ex rel. Seikbert v. Wilkinson* (1994), 69 Ohio St.3d 489, 490, 633 N.E.2d 1128. Our review is de novo. *Krukrubo v. Fifth Third Bank*, Franklin App. No. 07AP-270, 2007-Ohio-7007, ¶11, citing *Penrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶5.

{¶5} We begin with an examination of appellant's complaint, filed November 13, 2006. Therein, appellant alleges that it is the fee owner of real property that is the servient estate with respect to an easement that appellee has held since January 2, 1959.

Appellant attached to the complaint, as Exhibit A, a copy of the recorded document evidencing conveyance to appellee of the easement at issue. The document, entitled, "Easement for Highway Purposes," provides that appellant's predecessor-in-title, in exchange for consideration paid, would "grant, bargain, sell, convey and release to [appellee] * * * a perpetual easement and right of way for public highway and road purposes in, upon and over the lands hereinafter described * * *." (Exh. A.)

{¶6} Appellant alleges that appellee used the easement "for highway purposes for some years, being used as the main route of U.S. 52 for ingress to and egress from Chesapeake, Ohio." (Complaint, ¶5.) Appellant further alleges, "Beginning approximately 1984 or 1985, the highway was rerouted and the previous highway became an exit ramp and was rerouted so it did not traverse the easement at issue here but instead deadended into First Street and thence connected with Third Street in Chesapeake (also County Road 1)." (Id. at ¶6.) Finally, the complaint states, "From and after that time, the easement held by defendant or a major portion thereof has ceased to be used as an exit or for any other highway purposes for a period exceeding the statutory period of twenty-one years and by the terms of the original conveyance or by law should be held to be extinguished and plaintiffs seized of the entire, unencumbered freehold." (Id. at ¶7.)

{¶7} Appellant prays for a declaration that appellee has abandoned the easement or that the easement has been extinguished, and that appellant is the sole owner of the real property, free from the easement.

{¶8} On December 21, 2006, appellee filed its motion to dismiss. Therein, it argued that appellant's complaint failed to state a claim upon which relief may be granted because: (1) the complaint is based upon a claim of adverse possession, which does not lie against the state; and (2) the complaint is based upon a claim of abandonment, which cannot occur through mere nonuse, but only through adherence to the procedures found in R.C. 5511.01.

{¶9} Appellant responded, arguing that its complaint does not advance a claim for adverse possession, but that it does state a valid claim that appellee has abandoned the easement through nonuse thereof, and that the easement is therefore extinguished. Appellant argued that R.C. 5511.01 is inapplicable because that statute only deals with abandonment of highways, and the land in question is no longer a highway, having not been used as a highway for over 20 years.

{¶10} In granting the motion to dismiss, the trial court reasoned that even if appellee has not used the subject easement for highway purposes since 1984 or 1985, because the original easement was for highway purposes, the easement remains a "highway" for purposes of R.C. 5511.01. The court determined that appellant has no common law cause of action for abandonment, citing the case of *Bigler v. York* (1993), 66 Ohio St.3d 98, 609 N.E.2d 529, in which the Supreme Court of Ohio held that a statute that prescribes procedures for abandonment of a township road provides the exclusive manner by which a township road may be abandoned.

{¶11} R.C. 5511.01 provides, in pertinent part:

The director [of the Ohio Department of Transportation] may, upon giving appropriate notice and offering the opportunity for

public involvement and comment, abandon a highway on the state highway system or part of such a highway which the director determines is of minor importance or which traverses territory adequately served by another state highway, and the abandoned highway shall revert to a county or township road or municipal street. A report covering that action shall be filed in the office of the director, and the director shall certify the action to the board of the county in which the highway or portion of the highway so abandoned is situated.

The trial court went on to conclude that because the complaint does not allege that appellee's director has complied with the procedures for abandonment of a highway under R.C. 5511.01, it fails to state a claim for abandonment of the easement.

{¶12} On appeal, appellant again argues that statutory procedures for governmental abandonment of a highway are inapplicable because this case does not involve a highway; rather, it concerns a public easement. Appellant argues that the rule applicable herein is set forth in the case of *Lawrence RR. Co. v. Williams* (1878), 35 Ohio St. 168. There, the Supreme Court of Ohio explained that when the public holds a highway easement, "The fee of the land remains in the owner; he is taxed upon it; and when the use or easement in the public ceases, it reverts to him free from incumbrance." *Id.* at 171-172.

{¶13} Appellant also directs our attention to the case of *Kelly Nail & Iron Co. v. Lawrence Furnace Co.* (1889), 46 Ohio St. 544, 22 N.E. 639, in which the Supreme Court of Ohio held that, notwithstanding then-existing Ohio statutes that prescribed abandonment procedures, a public entity's nonuse of a highway easement could work an abandonment thereof, if such nonuse continued for at least 21 years. The court stated, "we hold that where non-user [sic] by the public, of a street within a city is relied upon as

proving an abandonment of it, such non-user [sic] must be shown to have continued for a period of twenty-one years." *Id.* at 548. Appellant further cites the earlier case of *Fox v. Hart* (1842), 11 Ohio 414, in which the Supreme Court of Ohio held that the public right to a highway may be lost by nonuse.

{¶14} Finally, appellant cites our own case of *Burdge v. Bd. of Cty. Commrs.* (1982), 7 Ohio App.3d 356, 7 OBR 454, 455 N.E.2d 1055. In that case, the trial court found that a county road had been abandoned and quieted title in the abutting landowners on that basis. Citing *Kelly Nail & Iron*, *supra*, this court held that "abandonment by nonuse is a valid legal doctrine which may be proven in a factually proper case." *Id.* at 356. We rejected the county commissioners' and township's argument that R.C. 5553.042, et seq., which delineates the procedure to be followed for vacation of a county road, precludes an action to declare an abandonment through nonuse for at least 21 years.

{¶15} In response to appellant's arguments, appellee argues that the Supreme Court of Ohio rejected the rationale espoused in appellant's cases when it decided *Bigler*, the case upon which the trial court relied.¹ In *Bigler*, the plaintiffs sought to quiet title to land comprising a township road. The Supreme Court of Ohio rejected the plaintiffs' argument that the township lost all rights to the road through nonuse for 21 years, because R.C. 5553.042 provides that a township loses all rights to any road "which has been abandoned and not used for a period of twenty-one years, after formal proceedings

¹ We agree with appellee's argument that *Bigler* implicitly overruled our holding in *Burdge* because both of those cases involved the same issue and the same statute.

for vacation as provided in sections 5553.04 to 5553.11 of the Revised Code have been taken." In other words, the court enforced both requirements for abandonment contained in the statute: (1) nonuse for 21 years, by which the General Assembly incorporated the common law into the statute, and (2) formal vacation proceedings under R.C. 5553.04 to 5553.11, which vest discretion in the county commissioners whether to ultimately vacate the road and pass the title in fee to the abutting landowners. Appellee maintains that, under the rationale espoused in *Bigler*, R.C. 5511.01 is the exclusive method by which appellee may abandon a highway.

{¶16} Appellee also argues that appellant's abandonment claim is essentially equivalent to a claim for adverse possession, which generally does not lie against the state. *Houck v. Bd. of Park Comms.*, 116 Ohio St.3d 148, 2007-Ohio-5586, 876 N.E.2d 1210, ¶18. Appellee does not offer, and we are unable to find, any support for the notion that a servient estate owner's claim for abandonment of an easement is the functional equivalent of a claim for adverse possession. Moreover, the elements of each claim are substantively different. Abandonment focuses on the acts and omissions of the dominant estate-holder and requires that the owner of the servient estate prove both nonuse and an affirmative intent to abandon the easement. *Snyder v. Monroe Twp. Trustees* (1996), 110 Ohio App.3d 443, 457, 674 N.E.2d 741. Adverse possession, on the other hand, focuses on the acts of the one claiming prescriptive ownership, and requires proof of exclusive possession and open, notorious, continuous, and adverse use for a period of 21 years. *Grace v. Koch* (1998), 81 Ohio St.3d 577, 692 N.E.2d 1009, syllabus. Therefore,

we reject appellee's argument in this regard, and focus solely on its contention that R.C. 5511.01 precludes appellant's claim.

{¶17} Appellant argues that the *Bigler* case is not dispositive because the statute in *Bigler* incorporated the common law rule that public easements no longer in use will revert to the adjoining landowners; and it did not bar abutting landowners from asserting their exclusive rights to land no longer used as a public road. Appellant argues that here, because R.C. 5511.01 provides no mechanism for servient estate owners to call a public entity to account for its nonuse of a highway easement, and provides no reversion to the servient estate owner, the common law rule should be applied when invoked.

{¶18} Thus, we must endeavor to reconcile *Bigler*, in which the Supreme Court of Ohio held that "R.C. 5553.042 provides the exclusive remedy for abutting landowners who desire a township road to be vacated," with *Kelly Nail & Iron*, in which the court held that even where statutes prescribe procedures for a public entity to formally vacate a road, if the public entity has made no use of a road easement for 21 years, then an abutting landowner may bring a claim for abandonment.

{¶19} After *Kelly Nail & Iron*, the Supreme Court of Ohio has continued to develop the concept of a common law action for forfeiture of an easement through abandonment. "An abandonment is proved by evidence of an intention to abandon as well as of acts by which the intention is put into effect; there must be a relinquishment of possession with an intent to terminate the easement." *W. Park Shopping Ctr. v. Masheter* (1966), 6 Ohio St.2d 142, 144, 35 O.O.2d 216, 216 N.E.2d 761; see, also, *Wyatt v. Ohio Dept. of Transp.* (1993), 87 Ohio App.3d 1, 5, 621 N.E.2d 822.

{¶20} It is true that unlike the statute at issue in *Bigler*, the statute invoked here -- R.C. 5511.01 -- provides only for the Ohio Department of Transportation to initiate proceedings to abandon a highway easement, and mandates that any abandoned highway reverts to a county or township road or municipal street. The statute provides no mechanism by which an owner of a servient estate may claim an abandonment of a public highway easement and may quiet the title in himself on that basis. Accordingly, we must determine whether the landowner's common-law right survived the enactment of R.C. 5511.01,² or whether R.C. 5511.01 limited or eliminated the common law right.

{¶21} "In Ohio, 'not every statute is to be read as an abrogation of the common law. "Statutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment, and in giving construction to a statute the legislature will not be presumed or held, to have intended a repeal of the settled rules of the common law *unless the language employed by it clearly expresses or imports such intention.*" ' " (Emphasis sic.) *Danziger v. Luse*, 103 Ohio St.3d 337, 2004-Ohio-5227, 815 N.E.2d 658, ¶11, quoting *Bresnik v. Beulah Park Ltd. Partnership, Inc.* (1993), 67 Ohio St.3d 302, 304, 617 N.E.2d 1096, quoting *State ex rel. Morris v. Sullivan* (1909), 81 Ohio St. 79, 7 Ohio L. Rep. 408, 90 N.E. 146, paragraph three of the syllabus.

{¶22} "Thus, in the absence of language clearly showing the intention to supersede the common law, the existing common law is not affected by the statute, but continues in full force. There is no repeal of the common law by mere implication."

² The statute was first enacted prior to 1953.

(Citations omitted.) *Carrel v. Allied Prods. Corp.* (1997), 78 Ohio St.3d 284, 287, 677 N.E.2d 795. "The rule of strict construction refuses to extend the law by implication or inference and recognizes nothing that is not expressed." *Id.* at 288, citing *Iron City Produce Co. v. Am. Ry. Express Co.* (1926), 22 Ohio App. 165, 153 N.E. 316.

{¶23} By its plain language, R.C. 5511.01 provides a mechanism by which the director of the Ohio Department of Transportation may initiate proceedings to formally abandon a highway, whether or not that highway traverses an easement; but it says nothing at all about claims by servient estate owners asserting that the department has abandoned a highway easement through nonuse. The statute neither expressly repeals nor incorporates any aspect of the common law cause of action for abandonment of a highway easement. Given that R.C. 5511.01 does not concern servient estate owners' claims, and with no explicit statement that the statutory provisions in R.C. Chapter 5511 are the exclusive means by which a public entity may abandon or vacate a highway easement, we cannot infer that the General Assembly intended to repeal the common law action for forfeiture of a highway easement based upon abandonment through nonuse. See *id.* at 287-288.

{¶24} For these reasons, we hold that R.C. 5511.01 did not abrogate or limit the common law right of the fee owner of the servient estate to bring an action seeking a declaration that a public highway easement has been forfeited through abandonment. Accordingly, the trial court erred when it determined that no common law cause of action for abandonment is available. Appellant's complaint states that appellee has not used its highway easement, or a portion thereof, for more than 21 years; and that appellee, years

ago, constructed a new roadway to replace that which formerly traversed the easement; and prays for a declaration that appellee has forfeited the easement by abandonment. In light of all of the foregoing, appellant's complaint states a claim upon which relief may be granted.

{¶25} Accordingly, appellant's sole assignment of error is sustained, the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings.

Judgment reversed; cause remanded.

BRYANT and KLATT, JJ., concur.

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

2007 FEB 26 AM 11:20

NEW 52 PROJECT, INC.,

CLERK OF COURTS

Plaintiff,

Case No. 06CVH11-14899

vs.

JUDGE BESSEY

EXHIBIT 4

GORDON PROCTOR, DIRECTOR OF
THE OHIO DEPARTMENT OF
TRANSPORTATION,

Defendant.

**DECISION GRANTING DEFENDANT'S
MOTION TO DISMISS COMPLAINT,
FILED DECEMBER 21, 2006**

This matter is before the Court upon the Motion to Dismiss Complaint, filed by Defendant, Gordon Proctor, Director of the Ohio Department of Transportation (hereinafter "Defendant"), on December 21, 2006. On January 16, 2007, Plaintiff, New 52 Project, Inc. (hereinafter "Plaintiff"), untimely filed a Memorandum Contra Defendant's Motion to Dismiss Complaint. However, in the interests of justice it will still be considered by the Court. No Reply Memorandum was filed.

I. Background

On November 13, 2006, Plaintiff filed its Complaint against Defendant, seeking a "declaration that the easement in question has been abandoned by [D]efendant or that the easement has been extinguished and that [P]laintiff is the sole owner of said real estate."

On December 21, 2006, Defendant filed the Motion to Dismiss Complaint, which is now before the Court.

II. Standard of Review

"A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint." *Powell v. Vorys* (C.A.10 1998), 131 Ohio App.3d 681, 684, quoting, *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St. 545, 548, 605 N.E.2d 378. "In order for a trial court to grant a motion to dismiss for failure to state a claim upon which relief may be granted, 'it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.'" *Powell*, at 684, quoting, *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus. "In resolving a Civ.R. 12(B)(6) motion to dismiss, the trial court may consider only the statements and facts contained in the pleadings, and may not consider or rely on evidence outside the complaint." *Powell*, at 684, citing, *Estate of Sherman v. Millhon* (1995), 104 Ohio App.3d 614, 617, 662 N.E.2d 1098, 1100. "When a court rules on a motion to dismiss for failure to state a claim, the complaint's factual allegations must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party." *Sharon Ent., Inc. v. Kenworth of Cincinnati, Inc.* (1998), 131 Ohio App.3d 746, 749, citing, *Vail v. Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 649 N.E.2d 182, *Mitchell v. Lawson Milk Co.* (1995), 72 Ohio St.3d 279, 649 N.E.2d 753, 756. "A motion to dismiss can be granted only where the party opposing the motion, here, the [Plaintiff], is unable to prove any set of facts which would entitle it to the relief requested." *Sharon*, citing, *Kenty v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St.3d 415, 418, 650 N.E.2d 863, 865-866, *York v. Ohio St. Highway Patrol* (1991), 60 Ohio St.3d 143, 573 N.E.2d 1063.

III. Discussion

Plaintiff alleges that it was deeded to certain property subject to the State's highway easement for a portion of U.S. Route 52 in Lawrence County, Ohio. Plaintiff further alleges that the easement was used for highway purposes until 1984 or 1985 when the highway was rerouted. Plaintiff further alleges that the highway easement has not been used for highway purposes for over 21 years, and argues that the easement should be deemed extinguished or abandoned by the State.

Defendant contends that Plaintiff fails to state a claim for which relief can be granted, since (1) adverse possession is not permitted against the State, and hence Plaintiff cannot acquire ownership of a state highway easement through adverse possession, and (2) the State may only abandon portions of the state highway system pursuant to statute.

However, Plaintiff argues that while it is true that no amount of use can allow for adverse possession of state land, such law is irrelevant to the present case. More specifically, Plaintiff contends that it is not arguing that it has occupied or attempted to use the easement in question adverse to the State, but is instead arguing that the State's non-use of the easement effectively causes the ownership of the property to revert to the successor in interest to the original grantor of the easement. As such, the Court agrees with Plaintiff and finds that Defendant's arguments concerning adverse possession are irrelevant to the current case.

Defendant also argues that the abandonment of a portion of a state highway can only be accomplished by statute. Defendant argues that R.C. 5511.01 sets forth the procedure for the abandonment of state highways and states in pertinent part:

The director may, upon giving appropriate notice and offering the opportunity for public involvement and comment, abandon a highway on the state highway system or part of such a highway which the director determines is of minor importance or which traverses territory adequately served by another state highway, and the abandoned highway shall revert to a county or township road or municipal street. A report covering that action shall be filed in the office of the director, and the director shall certify the action to the board of the county in which the highway or portion of the highway so abandoned is situated.

As such, Defendant contends that since the above procedures have not taken place, the subject easement, or portion of the state highway, may not be considered abandoned property.

In an analogous situation involving a township road as opposed to a state highway, the Ohio Supreme Court declared that R.C. 5553.042 provided the only manner by which a township road could be abandoned to abutting landowners. The Court in *Bigler v. York* (1993), 66 Ohio St. 3d 98, specifically stated:

This statutory scheme which empowers the board of county commissioners to vacate a township road involves the careful weighing of widely diverse interests and public-policy considerations. We hold that R.C. 5553.042 is the exclusive remedy available to abutting landowners who desire to have a township road declared to be abandoned, vacated, and conveyed to them.

Conveying a public road into the hands of private ownership requires the decision maker to balance the interests of the abutting landowners with the public interests. That is not possible in a quiet title action.* * *

The discretionary language contained in R.C. 5553.042 reinforces the broad public-policy nature of the decision to vacate a township road. The statute provides that, upon determining that an abandonment has occurred, along with finding nonuse for a period of twenty-one years, the board of county commissioners "may" -- and is not obligated to -- order the road vacated. Thus, the statute gives the board of county commissioners the discretionary power to vacate the road, presumably, in order for

the board to become sensitive to the interests, requests, and needs of the community.

If this court were to hold that an action could also be brought in a court of common pleas to quiet title to a township road on the grounds of abandonment, we would directly undermine the discretion which the General Assembly expressly granted to the board of county commissioners in R.C. 5553.042. With this separate means to the same end, the statutory powers conveyed to the county commissioners in R.C. 5553.042 would be rendered meaningless. Abutting landowners desiring to vacate township roads would surely avoid petitioning the county commissioners. In a quiet title action, the common pleas court would be obliged to grant landowners' requests, as soon as the court determined that the property had been abandoned and not used by the public for a period of twenty-one years. *Burdge v. Bd. of Cty. Commrs.* (1982), 7 Ohio App.3d 356, 7 OBR 454, 455 N.E.2d 1055. Accordingly, we hold the court of common pleas does not have jurisdiction to quiet the title to a township road.

Bigler, 66 Ohio St. 3d at 100-101.

Based on the foregoing case law, the Court agrees with Defendant's arguments and finds that the decision to abandon a state highway must be made by the Director of Transportation pursuant to the guidelines set forth in R.C. 5511.01. To hold otherwise would be to hold that the various public policies and interests pertaining to the abandonment of a state highway are somehow less diverse, complex, or important than those relevant to the abandonment of a township road. Therefore, the Court further finds that since the highway easement at issue in the present case was not abandoned under R.C. 5511.01, no abandonment could have occurred, and Plaintiff has failed to state a claim upon which relief can be granted.

Although Plaintiff argues that R.C. 5511.01 is not applicable because the property in question is currently not being used as a highway, the original easement was for use as a public highway. As such, the Court finds that R.C. 5511.01 is applicable and any

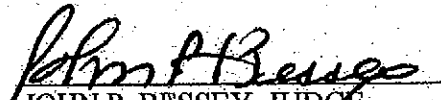
abandonment of such easement must be accomplished through the guidelines set forth in R.C. 5511.01.

IV. Conclusion

Based on the foregoing, and pursuant to Civ.R. 12(B)(6), the Court finds that Plaintiff's Complaint fails to state a claim upon which relief can be granted against Defendant. As such, the Court accordingly hereby **GRANTS** Defendant's Motion to Dismiss Complaint.

Counsel for Defendant shall submit the appropriate judgment entry pursuant to Loc.Rs. 25.01 and 25.02.

IT IS SO ORDERED.


JOHN P. BESSEY, JUDGE

Copies to:

David Reid Dillon, Esq.
Counsel for Plaintiff

Frederick C. Schoch, Esq.
Counsel for Defendant

EXHIBIT 5**5511.01 State highway system established.**

All state highways established by law shall continue to be known as state highways, and the state highway system established by law shall continue to be known as the state highway system.

Before establishing any additional highways as part of the state highway system, or making any significant changes in existing highways comprising the system, the director of transportation shall notify the general community of the project and offer an opportunity for appropriate public involvement in the project process.

The opportunity for public involvement shall satisfy the requirements of the "National Environmental Policy Act of 1969," 83 Stat. 852, 42 U.S.C.A. 4321 et seq., as amended, and may consist of activities including public meetings or hearings, small group meetings with local officials, individual meetings, news releases, public notices, workshops, newsletters, electronic communications, radio announcements, mail notification, and other activities considered appropriate for the exchange of information. The director or the director's designee shall provide the public involvement activities in each of the counties in which the highway proposed to be established is to be located or in which it is proposed to make those changes.

Any changes made in existing highways by the director or any additional highways established by the director following the public involvement activities shall be certified to the following authorities interested in them: the legislative authority of municipalities, the board of county commissioners, the board of township trustees, the municipal, county, and regional planning commissions, and the municipal, township, or county officer authorized to issue land use or building permits. Before any zoning change or subdivision plat is approved and before any permit for land use or the erection, alteration, or moving of a building is granted affecting any land within three hundred feet of the center line of a proposed new highway or highway for which changes are proposed, as described in the certification by the director, or within a radius of five hundred feet from the point of intersection of that center line with any public road or highway, the authority authorized to approve the zoning change or subdivision plat or the authority authorized to grant the permit for land use or the erection, alteration, or moving of the building shall give notice, by certified mail, to the director, and shall not approve a zoning change or subdivision plat or grant a permit for land use or the erection, alteration, or moving of a building for one hundred twenty days from date notice is received by the director. During the one hundred twenty-day period and any extension of it as may be agreed to between the director and any property owner, notice of which has been given to the authority to which the application has been made, the director shall proceed to acquire any land needed by purchase or gift, or by initiating proceedings to appropriate, or make a finding that acquisition at such time is not in the public interest. Upon purchase, initiation of appropriation proceedings, or a finding that acquisition is not in the public interest, the director shall notify the authority from which notice was received of that action. Upon being notified that the director has purchased or initiated proceedings to appropriate the land that authority shall refuse to rezone land or to approve any subdivision plat that includes the land which the director has purchased or has initiated proceedings to appropriate, and that authority shall refuse to grant a permit for land use or the erection, alteration, or moving of a building on the land which the director has purchased or initiated proceedings to appropriate. Upon notification that the director has found acquisition at that time not to be in the public interest, or upon the expiration of the one hundred twenty-day period or any extension of it, if no notice has been received from the director, that authority shall proceed in accordance with law.

A report of the change or addition shall be filed in the office of the director, and the report of the director making the change or establishing the highway shall be placed on file in the office of the department of transportation.

In no event shall the total mileage of the state highway system be increased under this section to exceed two hundred miles in one year.

The director, upon petition of the boards of the counties traversed by a highway or of citizens of those counties, may officially assign to a highway of the state highway system a distinctive name commemorative of a historical event or personage, or officially assign to a highway of the state highway system a commonly accepted and appropriate name by which the highway is known.

The director may, upon giving appropriate notice and offering the opportunity for public involvement and comment, abandon a highway on the state highway system or part of such a highway which the director determines is of minor importance or which traverses territory adequately served by another state highway, and the abandoned highway shall revert to a county or township road or municipal street. A report covering that action shall be filed in the office of the director, and the director shall certify the action to the board of the county in which the highway or portion of the highway so abandoned is situated.

The director shall make a map showing, by appropriate numbering or other designation, all the state highways. The map shall be kept on file in the director's office, and the director shall cause the map to be corrected and revised to show all changes and additions to the date of the correction. A copy of the map, certified by the director as a correct copy of the map on file in the director's office, shall be admissible as evidence in any court to prove the existence and location of the several highways and roads of the state highway system.

The state highway routes into or through municipal corporations, as designated or indicated by state highway route markers erected on the routes, are state highways and a part of the state highway system. The director may erect state highway route markers and other signs directing traffic as the director thinks proper upon those portions of the state highway system lying within municipal corporations, and the consent of the municipal corporations to that erection and marking shall not be necessary. However, the director may erect traffic signs in villages in accordance with section 5521.01 of the Revised Code. No change in the route of any highway through a municipal corporation shall be made except after providing public involvement activities.

Except as provided in sections 5501.49 and 5517.04 of the Revised Code, no duty of constructing, reconstructing, maintaining, and repairing such state highways within municipal corporations shall attach to or rest upon the director. The director may enter upon such state highways within any municipal corporation and construct, reconstruct, widen, improve, maintain, and repair them, provided the municipal corporation first consents by resolution of its legislative authority, except that the director need not obtain the consent of the municipal corporation if the existing highway being changed or the location of an additional highway being established was not within the corporate limits of the municipal corporation at the time the establishment or change is approved by the director, or if the director is acting pursuant to section 5501.49 of the Revised Code.

The director shall place in the files of the department a record of the routes of all such state highways

within municipal corporations, and shall cause them to be corrected and revised to show all changes and additions to the date of the correction. A copy of the record or any pertinent part of it, certified by the director to be a true and correct copy, shall be admissible in evidence in any court of the state for the purpose of proving the existence and location of any state highway within a municipal corporation.

When the director proposes to change an existing state highway and there exists upon the highway a separated railroad crossing, the director shall mail to the interested railroad company a copy of the notice, which shall be mailed by first-class mail, postage prepaid, and certified with return receipt requested, at least two weeks before the time fixed for any public involvement activity. When the director proposes to change an existing state highway within a municipal corporation, the director shall mail to the mayor or other chief executive officer of the municipal corporation a copy of the notice, which shall be mailed by first-class mail, postage prepaid, and certified with return receipt requested, at least two weeks before the time fixed for any public involvement activity.

Nothing in this section shall be construed to require providing public involvement activities before the construction, reconstruction, maintenance, improvement, or widening of an existing highway where no relocation is involved.

With the exception of the authority conferred upon the director by this section to erect state highway route markers and signs directing traffic and by section 5501.49 of the Revised Code, Chapters 5501., 5503., 5511., 5513., 5515., 5516., 5517., 5519., 5521., 5523., 5525., 5527., 5528., 5529., 5531., 5533., and 5535. of the Revised Code shall not in any way modify, limit, or restrict the authority conferred by section 723.01 of the Revised Code upon municipal corporations to regulate the use of streets and to have the care, supervision, and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporations, or the liability imposed upon municipal corporations by division (B)(3) of section 2744.02 of the Revised Code for negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads.

Effective Date: 04-09-2003

EXHIBIT 6**5511.07 Procedure for vacating highway.**

In pursuance of section 5501.31 of the Revised Code, the director of transportation, in vacating any highway or portion thereof on the state highway system that the director finds is no longer necessary for the purposes of a public highway, shall issue such a finding, which shall contain a description of the highway or part thereof to be vacated. Notice of such finding shall be published once a week, for two consecutive weeks, in a newspaper of general circulation in the county in which the highway, or part thereof, to be vacated lies, and a copy of the notice shall be served as in civil cases, or by registered first class mail, return receipt requested, upon each owner of property abutting on the portion of the highway to be vacated, and upon the director of natural resources. Any owner whose place of residence is unknown, or who is a nonresident of the state, shall be specifically named in the notice of publication and shall be directed in the finding to take due notice of the contents thereof. The director shall make any vacation of a highway or portion of a highway to an abutting landowner or current underlying fee owner of record at no cost.

The notice shall fix a date, not less than twenty days after the date of the final publication of the notice, and shall contain a determination that on or before that date claims for compensation and damage, or either, by reason of the vacation proceedings, must be filed in writing, in duplicate, with the district deputy director of transportation in whose district lies any portion of the highway to be vacated. Failure to file claims in that manner is a waiver of any claim for damage by reason of the vacation.

After considering any claims filed, the director shall make awards as the director considers just and equitable, and if, within ten days, the amount so awarded has not been accepted and waivers therefor signed, that amount shall be deposited in the probate court or court of common pleas of the county in which the vacation lies, wholly or in part, and the procedure to adjudicate such claims shall be that provided under section 5519.01 of the Revised Code.

No final determination shall be made by the director in vacating such highway or portion thereof until all awards are accepted, or deposit therefor made, in the probate court or court of common pleas.

No public utility shall be required to move or relocate any of its facilities that may be located in or on any highway or portion thereof being vacated. Any deed, transfer, or other instrument or conveyance made by reason of the vacation shall indicate the right of any public utility to continue its use or occupation of the highway or portion of the highway being vacated.

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