

Case No. 2022-0628

In the Supreme Court of Ohio

On Appeal from The Court of Appeals
Seventh Judicial District
Mahoning County, Ohio
Case Nos. 2020 MA 0074 and 2020 MA 0082

THE BOARD OF COMMISSIONERS OF THE
MILL CREEK METROPOLITAN PARK DISTRICT
Plaintiff/Appellant

vs.

DIANE M. LESS, ET AL.
Defendant/Appellee

**BRIEF OF AMICUS CURIAE,
OHIO PARKS AND RECREATION ASSOCIATION,
IN SUPPORT OF THE POSITION OF
PLAINTIFF/APPELLANT
THE BOARD OF COMMISSIONERS OF THE MILL CREEK
METROPOLITAN PARK DISTRICT**

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SUMMARY OF ARGUMENT

Ohio law gives Ohio Park Districts, along with many other governmental entities, the power to acquire lands by appropriation. R.C. 1545.11. And Ohio law prescribes, with notable clarity, the procedure for appropriation. R.C. Chapter 163.

This case provides a particularly lucid example of what long experience repeatedly teaches: required legal procedures cannot be curtailed, circumvented, or ignored without severe damage to the integrity, accuracy and reliability of the resulting outcome. In this instance, the trial court's failure to conduct the evidentiary hearing required by Chapter 163 left only speculation, untethered to any record evidence, as the basis for deciding precisely those factual considerations upon which the exercise of the appropriation power depends. Where, as here, judicial review of agency action involves the concept of *prima facie* evidence, application of presumptions, and shifting burdens of proof and persuasion, it is essential that the underlying process be regular and thorough and give the parties – both those who benefit from the presumptions and those bearing the burden of rebutting them – full opportunity to develop the necessary record. This did not happen here.

To be sure, in addition to this procedural flaw, this case presents a substantive error, consisting of an improper reading of Chapter 1545 and a rejection of this Court's controlling precedents. But in keeping with settled rules of judicial restraint, the matter can – and should – be set aright by this Court's correction of the procedural flaw; specifically, the trial court's failure to adhere to the mandates of Chapter 163 by holding the required necessity hearing. In doing so, the Court should remand the matter to the trial court with explicit instructions to follow the procedures set out in Chapter 163.

Upon remand, and presumably the trial court's compliance with the accompanying instructions, an appropriate record will be developed. And with that record in place, the matter will presumably proceed in accordance with settled law, including this Court's governing pronouncements on the nature and extent of the appropriation powers set out in Chapter 1545.

STATEMENT OF FACTS

A. STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae, the Ohio Parks and Recreation Association ("OPRA" or "Amicus"), is a non-profit, public-interest organization that represents over 2,000 professionals and citizen board members striving to provide quality park and recreational facilities and opportunities for all Ohioans while conserving Ohio's natural resources. Organized in 1934 as the Ohio Recreation Association, and later merged with the Ohio Parks Association, OPRA pursues its mission to advance parks and recreation services to enhance the quality of life for the communities it represents. OPRA members hail from myriad park types -- municipal parks, Ohio state parks, and park districts formed under Ohio Revised Code Chapter 1545.

As a statewide parks organization, OPRA has an interest in securing its members' ability to do what parks do best: conserve natural resources, and provide Ohioans with access to open space and recreational activities. The power to acquire land, embedded in Ohio law, is an essential part of these core functions. And in furthering those interests, OPRA is likewise committed to ensuring that its members exercise their powers of appropriation within the State's legal framework. OPRA believes that the procedures to be followed in the exercise of those powers are spelled out clearly in Chapter 163. But on occasion that clarity has been eroded by lower courts that have provided conflicting guidance on the procedure a Chapter 1545 park must

follow to appropriate land -- specifically whether a necessity hearing is required before a court rules on a petition for appropriation.

In furtherance of the interests of its members' interests and the interests of all those who benefit from the parks, parkways, and other facilities its members provide for the general welfare, OPRA appears here as *amicus* to urge the Court to make clear that Ohio law requires that a court hold a necessity hearing as part of the procedure for ruling on a petition for appropriation. In doing so, the Court need not take up in this case the appellate court's erroneous rejection of this Court's precedents on the content and scope of Park Districts' powers under R.C. 1545.11.

B. DIANE LESS AND MILL CREEK

Amicus adopts by reference the Statement of Facts set forth in the Brief of Appellant, Mill Creek. It highlights just three essential and undisputed procedural facts:

1. Mill Creek's September 10, 2018 resolution stated that the taking of Ms. Less's property for use as a bikeway was "necessary." Ms. Less denied such necessity and Mill Creek's right to take her property.
2. The trial court did not hold a necessity hearing.
3. At no time did the trial court receive evidence or testimony that would allow it to determine whether the taking for use as a bikeway was necessary within the meaning of the controlling statutes and this Court's rulings.

The trial court therefore had no record on which to make factual findings. As a result, the trial could not sensibly apply the foundational concept of *prima facie* evidence and the long-settled presumptions in favor of the appropriating entity. The creation of such a record is the function of the necessity hearing. Indeed, without a hearing and an evidentiary record, the presumptions in favor of the appropriating entity necessarily stand un rebutted and require judgment in the entity's favor.

C. BIKEWAYS CONSERVE NATURAL RESOURCES

A century ago, this Court held that the creation of recreational trails entails the conservation of natural resources. *MacNab v. Board of Park Com'rs of Metropolitan Park Dist. of Cleveland*, 108 Ohio St. 497, 141 N.E. 332 (1923); *Snyder v. Board of Park Com'rs of Cleveland Metropolitan Park Dist.*, 125 Ohio St. 336, 181 N.E. 483 (1932). These time-honored decisions reflect this Court's recognition that generally, and particularly in the context of appropriations by parks and park districts, both "natural resources" and activities that conserve them, have a broad meaning. *Id.* 125 Ohio St. at 339. ("[T]o the extent to which a given area possesses elements or features which supply a human need and contribute to the health, welfare, and benefit of a community, and are essential for the welling being of such community and the proper enjoyment of its property devoted to park and recreational purposes, the same constitute natural resources.").

This resounding, entirely sensible holding provides an essential context for consideration of whether parkways, including recreational trails and bikeways, involve conservation of natural resources. And within that context, OPRA shares with this Court some publicly available evidence as to the conservation benefits of bikeways.

1. The Conservation Benefits of Recreational Trails.

American Trails, an organization focused on developing diverse trails and greenways, provides a succinct explanation of how trails conserve natural resources:

- Trails provide a buffer between the built and natural environments;
- Trails allow passive recreational use and educational access to protected areas;
- Trails increase the value of open space to the public by providing access;
- Trails enhance property values of communities by connecting them to open space areas;
- Trails provide an alternative mode of transportation;
- Trails encourage cleaner air by decreasing air pollution by automobiles;
- Trails support communities and business through eco-tourism; and

- Trails preserve culturally and historically valuable areas.¹

“Trails assist with preserving important natural landscapes, providing necessary links between fragmented habitats and providing tremendous opportunities for protecting plant and animal species.” *Id.* Trails can provide these benefits even in rural areas.

2. Bikeways Provide Conservation Benefits.

These conservation benefits extend to bikeways as well. Take, for instance, bikeways that are designated greenways. A greenway is a “linear corridor[] of land and water and the natural, cultural, and recreational resources [it] link[s] together.”² “While greenways may vary in size, ownership, and purpose, they share a common theme: to protect the resources that help create the unique character of a place and to integrate these special features into the surrounding landscape. Winding their way through our cities, suburbs, and rural areas, these diverse corridors of green highlight our natural and culture heritage” *Id.*

Substantial evidence demonstrates the conservation benefits of designated greenway bikeways as opposed to having bikes operate on conventional roads. Bicycles produce less carbon dioxide than automobiles and require less material to build. Bicycles also move almost silently, causing less disturbance to local wildlife.³ Beyond these obvious benefits, a bikeway allows riders to connect with the environment in a way they simply cannot when riding on a trafficked road. When riding on a bikeway, unlike a highway, a rider has the time and safety to

¹ How Trails Benefit the Environment - American Trails (<https://www.americantrails.org/resources/how-trails-benefit-the-environment>) (Last visited November 14, 2022)

² *Creating Greenways*, at p. 2. (<http://www.mass.gov/doc/creating-greenways/download>) (Last visited November 14, 2022).

³ *The Bicycle is a Catalyst for Nature Conservation* (<https://www.thenatureofcities.com/2013/04/28/the-bicycle-is-a-catalyst-for-nature-conservation>) (Last visited November 14, 2022).

be exposed to the elements. “One can divert, slow and stop to examine oddities, follow intriguing scents, chat to curious strangers, explore unchartered streets, or just quietly observe wildlife.” *Id.* This exposure to and immersion in nature is of the essence of conservation of natural resources.

But bikeways do more than conserve conventional natural resources like water and fresh air; they also serve and conserve the essential natural resource of human health. Studies in association with the Centers for Disease Control and Prevention indicate that approximately 64% of the U.S. population is overweight, a condition that can increase the risk of heart disease, cancer, diabetes, anxiety, and depression. Providing nearby trails, including bikeways, offers the option of regular physical activity that can lower the rates of obesity and its associated diseases.⁴ “We find that living within a half mile of a trail reduced the probability of being obese by 1.6 percentage points and the probability of being overweight or obese by 2.0 percentage points.”⁵; (“More non-motorized nature trails available for use by youth in a particular county lead to an increase in the physical activity rates as well as lower youth obesity rates.”)

OPRA’s member organizations have created many miles of bikeways specifically for the purpose of conserving natural resources and promoting the general welfare. For instance, the Columbus and Franklin County Metro Parks has designated nearly 100 miles of its multiuse trail as part of the Central Ohio Greenways, which are designed to “connect people to the places they live, work and play as well as preserve open space to promote air and water quality.”⁶ The

⁴ *Move More, Gain Less: Effect of a Recreational Trail System on Childhood BMI.* (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7074062/>) (Last visited November 14, 2022)

⁵ *Increased access to nature trails could decrease youth obesity rates, study finds.* (<https://www.sciencedaily.com/releases/2014/09/140911125918.htm>) (Last visited November 14, 2022).

⁶ Greenway Trails - Metro Parks - Central Ohio Park System (<https://www.metroparks.net/parks-and-trails/greenway-trails/>) (Last visited November 14, 2022)

Central Ohio Greenways exist to, among other things, “[p]romote conservation values with expanding greenways and benefiting water quality and wildlife habitat.”⁷

Likewise, Cleveland Metroparks unveiled the Red Line Greenway in 2021, an all-purpose trail that uses a former Regional Transit Authority (“RTA”) right of way along an existing railroad line that both connects eight Cleveland neighborhoods and increases natural habitat and resources via tree plantings.⁸ Its conservation purpose is clear from its funding—over \$2 million in federal Congestion Mitigation and Air Quality Improvement Program funds, which provides funding to projects designed to reduce traffic congestion and improve air quality, and \$500,000 from ODNR’s Clean Ohio Trails Fund, which funds the preservation of open spaces. The Redline Greenway conserves natural resources.

3. Collaboration on Bikeways.

No single Ohio entity is tasked with creating, or is empowered as the sole creator of, a bikeway system in Ohio. In fact, the Ohio Department of Transportation (“ODOT”), in its Ohio Bikeways—Overview Implementation Guide, details how it is working with local jurisdictions, including park districts, to designate additional trails and shared use pathways for Ohio’s state and U.S. Bike Route System.⁹

⁷ Strategic Action Plan - Central Ohio Greenways, pg. 3. (https://www.morpc.org/wordpress/wp-content/uploads/2017/12/COG_StrategicPlan_160201_withAppendix-FINAL.pdf) (Last visited November 14, 2022)

⁸ Cleveland Metroparks and Partners Announce the Opening of Red Line Greenway | Cleveland Metroparks. (<https://www.clevelandmetroparks.org/news-press/2021/may-2021/cleveland-metroparks-and-partners-announce-the-ope>) (Last visited November 14, 2022)

⁹ State & US Bike Route System Overview and Implementation Guide (ohio.gov) (https://www.transportation.ohio.gov/wps/wcm/connect/gov/973a9dde-239c-4543-8030-4e8d025a3d8c/Overview+and+Implementation+Guide+2022.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGK0N0JO00QO9DDDDM3000-973a9dde-239c-4543-8030-4e8d025a3d8c-nZ24sJA) (Last visited November 14, 2022)

Had the trial court in this case conducted the required necessity hearing, Mill Creek could and presumably would have presented evidence to confute any legal argument that the development of these trails is solely within the aegis of the Ohio Department of Natural Resources.

ARGUMENT

Proposition of Law No. 1:

When a property owner files an answer to a petition for appropriation, denying the right to make the appropriation, the inability of the parties to agree on the terms of conveyance, or the necessity of the appropriation, the court must hold a hearing on the matters denied. (R.C. 163.09, construed and applied; *Weir v. Wiseman*, 2 Ohio St. 3d 92, 443 N.E. 2d 152 (1982), approved and applied.)

Section 1545.11 of the Ohio Revised Code defines the power of Chapter 1545 Park Districts to acquire lands. And in turn, Chapter 163 sets out the procedures that govern that acquisition, along with other appropriations of property authorized by state law. R.C. 163.02(A). In particular, Chapter 163 sets out in sequential statutes the right of entry; the issuance of a notice of intent to acquire along with a good-faith offer; the filing of a petition for appropriation; a property owner's right to file answer denying part or all of the petition; and the trial court's obligation to conduct a hearing on the owner's denial of the right to make the appropriation, the inability of the parties to agree on the terms of conveyance, or the necessity of the appropriation. R.C. 163.03. *et seq.* R.C. 163.09(B)(1) ("When an answer is filed and any of the matters *** are specifically denied ***, the court *shall* set a day *** to hear those matters") (Emphasis added).

On its face, and in unequivocal language, the statute requires a hearing in response to one or more such denials. The requirement is not contingent on a party's demand for hearing, or on any other condition. Ohio appellate courts have from time to time adopted the confusing view that the special hearing on necessity is waivable under certain circumstances. See, e.g, *Bell v. Nichols*, 10th Dist. Franklin No. 10AP-1036, 2013-Ohio-2559; *Accord Belmont Cnty. v. Barack*,

7th Dist. Belmont No. 21 BE 0010, 2022-Ohio-1452; *Madison Cty. Bd. of Commrs. v. Bell*, 12th Dist. Madison No. CA2005-09-036, 2007-Ohio-1373; *Ohio River Pipe Line, L.L.C. v. Henley*, 761 N.E.2d 640, 642–643 (4th Dist., 2001). The statute does not provide for an implied waiver of the kind these cases appear to find. Rather, the statutory mandate for a hearing is plain.

In this case, Mill Creek filed its petition for appropriation on February 12, 2019, asserting its authority to appropriate certain portions of land and the necessity of the taking. Docket Sheet at 2. Ms. Less filed her answer to this petition on May 30, 2019, challenging both the legal authority and necessity of the appropriation. *Id.* at 6. Under the explicit language of the statute, these denials triggered the obligation of the trial court to conduct a hearing. It failed to do so.

That failure was and is reversible error. The appropriate remedy on appeal is remand to the trial court to conduct the required hearing. That is the remedy the appellate court should have granted to Ms. Less, rather than undertaking to make its own factual findings regarding authority and necessity. This Court should therefore reverse the appellate court’s judgment, which the appellate court entered without any legal authority and without any evidentiary basis, and remand the matter to the trial court with instructions to conduct the hearing required by R.C. 163.09, and to otherwise comply with the applicable statutory requirements.

In fashioning its remand order, this Court should correct the appellate court’s erroneous ruling that Mill Creek’s resolution authorizing the appropriation of Ms. Less’s property was legally deficient because it did not clearly state the conservation purpose in its resolution authorizing the taking of Ms. Less’s property. *Bd. of Commrs. Mill Creek Park Metropolitan Dist. v. Less*, 7th Dist. No. 20MA0074, 2022-Ohio-1289, 188 N.E.3d 641, ¶ 37. Contrary to the appellate court’s ruling, the Revised Code does not require the governing board of the agency to include a statement of conservation (or any other) purpose in the authorizing resolution. Rather,

Section 163.09(B)(1) provides that a “resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the *necessity* for the appropriation creates a rebuttable presumption of the necessity” Ohio Rev. Code Ann. 163.09(B)(1)(a), emphasis added. It might be a preferable practice for a park board to include in the reference a statement of the conservation purpose or a reference to the grounds set out in R.C. 1545.11. But the statute does not require such a statement. And the appellate court therefore plainly erred in ruling that the absence of a such a statement rendered the resolution legally inadequate.

Indeed, this point illustrates the utility of the required hearing. Where, as here, the property owner denies authority or necessity, the resulting hearing affords the opportunity for parties to adduce evidence regarding these matters. In that context, it is worth repeating that the statute provides that the resolution declaring necessity creates a presumption of necessity. But the presumption is rebuttable, making clear that the legislature intended to grant property owners the opportunity to present evidence rebutting the finding of necessity.

This underscores the appellate court’s error in undertaking a factual inquiry, conducted in the absence of a proper evidentiary record. The appellate court’s only proper action, upon concluding that no necessity hearing had been conducted, should have been to remand to the trial court with instructions to conduct the required hearing. This Court should do that now.

Proposition of Law No. 2:

Chapter 1545 authorizes a Park District to acquire land for the conservation of natural resources, including creation of parks and parkways, recreational trails, and bikeways. (R.C. 1545, construed and applied; *Snyder v. Bd. Of Park Comm’rs*, 181 N.E. 483, 484 (1932); *McNab v. Bd. Of Park Comm’rs*, 141 N.E. 332, 332 (1923); and *State ex rel. Coles v. Granville*, 116 Ohio St.3d 231, 2007-Ohio-6057, 877 N.E.2d 968 (2007) approved and applied.)

Section 1545.11 defines the power of board of park commissioners to acquire property. This Court has long held and has consistently confirmed that the power of Chapter 1545 park districts

to acquire land for the conservation of natural resources is broad, and that recreational trails conserve natural resources. *Snyder*, 181 N.E. at 484; *McNab*, 141 N.E. at 332. This Court resoundingly affirmed this time-honored principle fifteen years ago in *State ex rel. Coles v. Granville*, 116 Ohio St.3d 231, 2007-Ohio-6057, 877 N.E.2d 968 (2007), confirming that a park board has the statutory power under R.C. 1545.11 to appropriate land for the construction of a recreational trail.

This well-settled principle, embodied in the Revised Code and repeatedly declared and applied by this Court, has served the State well. Despite the long duration of this Court's holdings, and their footing in statutory language and sound policy, the appellate court expressed its own "concerns" about this Court's holdings that recreational trails conserve natural resources, going on to say that "We do not agree with these principles." *Board of Park Com'rs of Mill Creek* at ¶34, 36.

The appellate court is twice mistaken. First, the appellate court is factually incorrect in doubting that recreational trails, including bikeways, conserve natural resources. Were there a record in this case, which would have been created had the trial court conducted the required hearing, that record would doubtless have documented beyond cavil that recreational trails, including bikeways, conserve natural resources. The appellate court's foray into the factual inquiry, without the benefit of evidence, was an error of law that led inevitably to its mistaken factual conclusion.

Second, the appellate court is legally incorrect. The members of an appellate court panel may at times believe that the Supreme Court's controlling precedents on some subject are ill-advised. And the panel members are certainly free to say so in their opinion. But nothing in the concepts of *stare decisis* and the rule of law permits intermediate appellate courts to decline to

follow controlling Supreme Court decisions, or to dismiss them as doubtful and to then ignore them in reaching their own decisions

If this Court chooses to address the substantive issues in this case, it should reverse the appellate court unlawful act of ignoring this Court's rulings, and affirm the unbroken line of Supreme Court precedents holding that the construction of recreational trails conserves natural resources within the meaning of R.C. 1545.11.

CONCLUSION

This Court should reverse the appellate court and remand the matter to the trial court with instructions that it conduct the hearing required by R.C. 163.09(B)(1) and otherwise adhere to the requirements of Chapter 163. Such a reversal and remand will make clear to all concerned – park districts, property owners, and trial courts – that the statutory scheme that governs land appropriation is mandatory. Doing so will ensure that the scheme is followed, and in turn, will provide the evidentiary record necessary for sound determination and appellate review of authority and necessity, consistent with the concept of *prima facie* evidence and the application of presumptions and the other rules that reflect the customary deference due agency determinations.

If this Court chooses to address the substantive issues raised by the appellate court's erroneous ruling, the Court should reaffirm the fundamental principle that has governed park districts' property appropriations for nearly a century: the statutory authority of park districts to acquire land for conservation purposes includes acquisitions for the construction of parks, parkways, recreational trails, and bikeways.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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