Supreme Court of Ohio Clerk of Court - Filed December 13, 2022 - Case No. 2022-0628

IN THE SUPREME COURT OF OHIO

THE BOARD OF COMMISSIONERS OF THE MILL CREEK METROPOLITAN PARK DISTRICT	CASE NO. 2022-0628
Plaintiff-Appellant, vs.	
DIANE M. LESS*, et al.*,	On appeal from the Court of Appeals of Ohio, 7th Appellate District, Mahoning county
Defendant-Appellees	Case Nos. 2020 MA 00074, 2002 MA 00082

AMICI BRIEF OF THE OHIO FARM BUREAU FEDERATION AND MAHONING COUNTY FARM BUREAU IN SUPPORT OF APPELLEES

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I. STATEMENT OF THE CASE AND FACTS

The Ohio Farm Bureau Federation accepts and incorporates herein the statement of the case and the statement of the facts as presented by Defendants-Appellees, Diane M. Less, et al.

II. STATEMENT OF INTEREST

The Ohio Farm Bureau Federation ("OFBF" or "Farm Bureau") is Ohio's largest general farm organization, with a mission of working together with Ohio's farmers to advance agriculture and strengthen communities. Ohio Farm Bureau is a federation of 86 county farm bureau organizations, representing all 88 counties in Ohio. Mahoning County Farm Bureau is one of those county farm bureau organizations.

Ohio Farm Bureau members own and rent land throughout the state and use it to produce virtually every kind of agricultural commodity found in this area of the country. The Ohio Farm Bureau is strongly committed to protecting private property rights preserved by the Ohio and U.S. Constitutions, as it has done for more than 100 years. OFBF participated as a member of the historic Eminent Domain Task Force in the early 2000's to lend its expertise and the experience of Farm Bureau members to the legislative reform process. While much is left to be desired in Ohio law to uphold the tenets of Ohio's constitutional private property right protections and this Court's lodestar holding in *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, we strive to see these rights protected at the local, state and federal level. *Knick v. Twp of Scott, PA,* 588 U.S. __, 139 S.Ct. 2162, 204 L.Ed.2d 558 (2019), *see also* Brief amicus curiae of Ohio Farm Bureau Federation (June 4, 2018) available at https://www.supremecourt.gov/DocketPDF/17/17-647/49121/20180604161651568_36343%20pdf%20Shuey.pdf (accessed June 21, 2022).

The landowners involved in this case are Farm Bureau members in Mahoning County. Across the state, Farm Bureau members are being asked to give up property, either willingly or through eminent domain, for various proposed projects. Eminent domain could impact any landowner, but when it comes to large scale projects, the fact is that it is often rural landowners (many of whom are Farm Bureau members) who are disproportionally burdened. Due to the lower density of people and buildings, the wide-open expanse of productive, fertile farmland is far too often and by too many seen only as "vacant land" or "empty land" and as the obvious choice for the placement of new infrastructure of all types. Instead, this land should be viewed as an incredibly vital ecosystem producing food, fuel, and fiber, benefiting the environment, and creating jobs and economic activity for the community and state.

Ohio Farm Bureau's member developed policy is staunch in its opposition to the use of the eminent domain power generally, and particularly where it impacts farmland. OFBF policy opposes the use of eminent domain by metropolitan or other park districts for recreational purposes, and instead supports the use of voluntary incentive-based programs for the creation and management of trails and greenways.

OFBF is extensively engaged on the topic of eminent domain. OFBF frequently hosts or presents at meetings providing information about the power of appropriation, the general uses, and the process that occurs when the property is taken for the government or a private company's use. Unfortunately, many regular Ohioans without an army of lawyers at their disposal do not know the ins and outs of eminent domain law, or the extent to which the U.S. and Ohio Constitutions grant them protection of their private property rights. OFBF takes incredibly seriously its role in informing landowners about their legal rights, particularly related to their private property. With the potential for members to be affected by the outcome of this case statewide, OFBF provides a

unique viewpoint of the issues pertinent to this case. The policy positions which underpin OFBF's viewpoint are positions chosen by everyday Ohio citizens, looking for solutions to the very real problems they face, looking for ways to address the issues of their neighbors, their communities, and the state of Ohio. They are farmers and landowners who wish to continue providing food, fiber and fuel to their friends and neighbors, and support the economy of this state and country.

As set forth more fully below, this Court should uphold the decision of the Seventh District Court of Appeals and affirm that Ohioan's private property rights are protected under the Ohio Constitution and laws of this state.

III. LAW AND ARGUMENT

AMICI'S RESPONSE TO APELLANT'S PROPOSITION OF LAW NO. 2

A. Transfer of the eminent domain power must be interpreted and construed narrowly to the benefit of the private property owner.

1. Statutes regulating eminent domain must be reviewed with heightened scrutiny.

The Ohio Supreme Court, in the landmark eminent domain case, ruled that heightened scrutiny must be applied in reviewing any statutes which regulate the use of eminent domain powers. *Norwood*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 at syllabus ¶ 3. As eminent domain is a constitutional power, and private property receives significant constitutional protection, it is imperative that the highest scrutiny is applied in interpreting any statutes which may grant such a power. The Seventh District applied the appropriate level of scrutiny to the appropriation at hand, and upheld the protections of the law for landowners accordingly.

2. Transfers of the eminent domain power require a heightened review favorable to the landowner

The legislature has within its power, the ability to transfer or delegate its authority to appropriate property. When this right "has been granted to a subdivision of the state, a person or a corporation the terms of the grant must be strictly pursued." *Pontiac Improvement Co. v. Board of Commissioners*, 104 Ohio St. 447, 454, 135 N.E. 635 (1922). Further, any doubt as to the propriety of the taking is to be resolved in favor of the property owner. *Id.*, *see also City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 at ¶70. As the attempted appropriation in this case rests upon a delegation of the appropriation power to a subdivision of the state, the statutes at issue must be reviewed with heightened scrutiny, and any doubts as to the taking resolved to the benefit of the landowner. *Norwood*, 2006-Ohio-3799 at ¶70.

While the delegation of the power is to a political subdivision, it is important to note that this particular type of political subdivision is largely insulated from accountability of the citizens at large. Park commissions are not elected entities, and are only held accountable to the voters through the election of the probate judge who appoints the members of the commission, and the approval or disapproval of any proposed levies to support the park district. *See* R.C. 1545.05 (appointment of park commissioners by probate judge), R.C. 1545.20-21 (tax levy for use of park district). This effectively shields park commissions from any direct accountability to the citizens. If citizens are displeased with the actions of the park commission who are running roughshod over their rights, the citizens cannot remove them from office at the ballot box. And with the various and important role that probate judges serve, it is unlikely that discontentment with a park commission is going to have much bearing on the election of a probate judge. While funding for a park district may come closer to providing accountability, citizens may also be conflicted as voting

down park district levies could harm current services they wish to maintain. These factors further support the need for heightened scrutiny when the appropriation power is delegated to a political subdivision.

The Seventh District recognized the heightened scrutiny which is to be applied to statutes delegating appropriation authority to subdivisions, and subsequently reviewed the proposed taking with the appropriate scrutiny.

3. When the appropriation power is delegated for limited purposes, those purposes must be narrowly interpreted

The requirement to use heightened scrutiny of delegated appropriation authorities must extend to a review of that delegation authority. When the General Assembly delegates the appropriation power, it can choose to specify how the power can be used. For example, the authority delegated to municipalities grants the ability to appropriate property for a number of purposes, including opening or widening streets, for parks and park entrances, for public halls and offices, prisons, hospitals, levees, or for air navigation facilities, just to name a few. R.C. 719.01. This is a broad power, though not without limitations, and it is the court's job to ensure that the power is not abused by "irregular or oppressive use." *Norwood*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 at ¶70, *citing Pontiac*, 104 Ohio St. 447, 458, 135 N.E. 635 (1922).

Other agencies to which there has been a delegation are also often limited to the use of the appropriation power to carry out their specific duties or missions. *See by example* R.C. 5537.06 (granting the Ohio Turnpike Commission the authority to appropriate property for purposes of constructing, maintaining and efficiently operating the Ohio turnpike system.), R.C. 306.36 (Regional transit authority may appropriate any land, rights, rights-of-way, franchise, power lines, easements, or other property, "necessary or proper for the construction or efficient operation of

any transit facility or access thereto..."). The limitations placed upon the delegated appropriation power must be given meaning and weight, lest the power be abused, just as the *Norwood* court recognized in the case of municipalities. *Norwood* at ¶70. If allowed to ignore those statutory limitations, the Ohio Turnpike Authority could seek to appropriate property, purportedly for turnpike purposes, in southern Ohio – hundreds of miles away from its facilities and likely wholly unrelated to any turnpike operation. One could scoff at this absurdity, that no such thing would ever happen – but the fact is it could not happen because the delegated power of appropriation has been limited by the legislature. The turnpike commission would be unlikely to seek such a taking because of the language limiting their power, and a court would likely move to stop such an abuse of appropriation power if it were ever to come to fruition. Limitations on the appropriation power must be recognized and narrowly interpreted in order to prevent abuse of the power. *See Pontiac* at 454, 458. As set forth in detail below, the Seventh District acted properly in reviewing the statutes granting limited authority to park commissions to appropriate, and ruled appropriately in this case.

B. The statutory authority granted to park districts to appropriate property is limited in scope to specific purposes, and park districts must be held to that limited grant of authority.

1. Rules of statutory construction require a review of the language to determine the legislature's intent in enacting a statute.

When construing a statute, it is well established that a court's "paramount concern" is to ascertain and give effect to the intention of the legislature. *State ex rel. Bohlen v. Halliday*, 164 Ohio St. 3d 121, 2021-Ohio-194, 172 N.E.3d 114, ¶16. Further, it is the guiding rule that a court must first look to the language of the statute itself to determine the legislative intent. *State ex rel. Choices for South-Western City Schools v. Anthony*, 108 Ohio St. 3d 1, 2005-Ohio-5362, 840 N.E.

2d 582, ¶40. The words used by the legislature in the statute must be taken in their usual, or customary meaning, and courts should not ignore the plain and unambiguous language of the statue. *See id., see also Pelletier v. City of Campbell*, 153 Ohio St.3d 611, 2018-Ohio-2121, 109 N.E. 3d 1210, ¶20 ("a court may not rewrite the plain and unambiguous language of a statute under the guise of statutory interpretation."). Effect must be given to the words used in the statute, not delete words used or insert words not used. *Cline v. Ohio Bureau of Motor Vehicles*, 61 Ohio St. 3d 93, 97, 573 N.E. 2d 77 (1991). If the language of a statute is ambiguous, a court may consider laws upon the same or similar subjects in order to determine the legislative intent. R.C. 1.49(D).

2. The plain and unambiguous language of R.C. 1545.11 limits park districts to appropriating property for specific purposes.

The statute at issue in this case, and the purported justification for the appellant's attempted appropriation, clearly states that park districts have the ability to use the eminent domain power "for conversion into forest reserves and for the conservation of the natural resources of the state…" R.C. 1545.11. The statute goes on to state that "to those ends," the district may "create" parks, parkways, forest reservations and other reservations and "afforest, develop, improve, protect and promote the use of the same in such manner as the board deems conducive to the general welfare." *Id.* As with other grants of the appropriation power, the General Assembly has chosen to limit the authority of the appropriation power exercised by an unelected political subdivision to very specific purposes: conversion into forest reserves and the conservation of the natural resources of the state.

Specifically, a park district's ability to appropriate property to "create" parks, parkways, forest reservations, and other reservations is not unlimited. Those parks, parkways, forest reservations and other reservations must be for the specified purpose of conversion into forest reserves and the

conservation of natural resources. Any other interpretation would ignore the limiting words "to those ends". As the Seventh District noted in its opinion, the "ends" that must be served by any use of the property are the conversion of forest reserves and the conservation of natural resources. *The Board of Commissioners of Mill Creek Park Metro Dist. v. Less,* 2022-Ohio 1289, 188 N.E.3d 614, ¶27 (7th Dist.).

Similarly, the park district's ability to "afforest, develop, improve, protect and promote the use of the same in such manner as the board seems conducive to the general welfare" is limited in the same way. It must be "to those ends"—i.e. for the specified purpose of—conversion into forest reserves and the conservation of natural resources.

The Seventh District correctly noted this unambiguous limitation in the statute and ruled correctly in limiting the appropriation.

3. The proposed appropriation at hand is not for the conversion into forest reserves nor for the conservation of natural resources.

While the Appellant Park District purports to appropriate property under R.C. 1545.11, it's resolution in no way supports the limited uses for which the appropriation power has been granted to them. The language of the resolution only references the park district's desire to construct an additional bike path. While the wish to construct a bike path may be a well-intentioned or even popular decision, it is not within the limited power to appropriate for the purposes of conversion to forest resources or conservation of natural resources.

Appellant attempts to provide an after-the-fact broad interpretation of a bike path as a conservation of natural resources due to lofty pronouncements of down-the-road impacts on climate change and greenhouse gases. While these again may be noble goals, they are not directly the conservation of natural resources of the state or area so as to support the strict review that must

be afforded to eminent domain statutes nor the taking of a property owner's constitutionally protected private property rights.

As the Seventh District noted, the focus is placed upon the phrase "conservation of natural resources," and the meaning of that language. *The Board of Commissioners of Mill Creek Park Metro Dist. v. Less,* 2022-Ohio 1289, 188 N.E.3d 614, ¶27 (7th Dist.). Merriam-Webster Dictionary defines "conservation" as "a careful preservation and protection of something," Merriam-Webster, "Conservation", https://www.merriam-webster.com/dictionary/conservation (accessed December 8, 2022). However, Appellant here seeks not to "preserve or protect something," but rather to build something anew on land that is currently responsibly farmed by Appellee. The other bike trails featured on Appellant's website show paved mini-roadways which will likely result not in "preservation and protection" but removal of trees, possible displacement of wildlife, and stormwater run-off, issues that are better addressed and "protected" in its current use as farmland. *See* Mill Creek Metro Parks, "Biking Opportunities", https://www.millcreekmetroparks.org/visit/biking/ (accessed December 8, 2022).

Appellant points to *Snyder v. Board of Park Commissioners* as support that the term "natural resources" goes beyond timber, oil, gas, minerals, lakes and submerged lands. *Snyder v. Board of Park Commissioners,* 125 Ohio St. 336, 181 N.E. 483 (1932). However, *Snyder* was applying the language of the (precursor) of R.C. 1545.11 to a specific property which laid between two pre-existing parks. The Court found that the appropriation would "protect[] and promot[e] the use of both parks as conducive to the general welfare," and "conserved, not only the natural resources of the land taken, but also the land already devoted to park purposes and already established." *Id.* at 340. The situation in *Snyder* was to conserve land and its natural features between two already

conserved properties and their natural features, a wholly different scenario than a strip of land through a farm.

Appellant also relies upon *State ex rel. Coles v. Granville,* a case challenging the authority of a park district to appropriate solely considering the establishment date language in R.C. 1545.11. *State ex rel. Coles v. Granville,* 116 Ohio S. 3d 231, 2007-Ohio-6057, 877 N.E.2d 968. In that case, the language regarding the date of creation of a park district in the last line of the statute was at issue, and the Court ruled the language was meant to apply to park districts both previously created and prospectively created to grant them the limited power of eminent domain for conversion to forest reserves and conservation of natural resources. *Id.* at ¶24-28. The further subject-matter purpose limitation of the appropriation authority cited in R.C. 1545.11 is not addressed nor analyzed by this Court, and was seemingly not challenged in that case. The mention of the trail in the Court's statement that "the board of park commissioners is authorized under R.C. 1545.11 to appropriate property for the construction and use of a recreational trail…" is merely dicta and was not part of this Court's analysis or material to the holding, as correctly stated by the Seventh District. *Id*. at ¶29, *The Board of Commissioners of Mill Creek Park Metro Dist. v. Less,* 2022-Ohio 1289, 188 N.E.3d 614, ¶26 (7th Dist.). .

As the Seventh District found, the language at issue in this case has seemingly not been analyzed, considered or ruled upon in any previous case, and it correctly found the language of R.C. 1545.11 to limit the purposes for which a park commission may appropriate property. *The Board of Commissioners of Mill Creek Park Metro Dist.* at ¶24.

4. Though R.C. 1545.11 is unambiguous in its limited grant of power, other statutes on the same subject matter are consistent with a limited reading of the appropriation power.

When reviewing statutory language the Court deems to be ambiguous, the Court is permitted to look to other statutes of the same subject matter to assist with interpretation. R.C. 1.49(D). Though R.C. 1545.11 is unambiguous, the Seventh District's reading is further bolstered by statutes of the same subject matter.

The Seventh District noted the Ohio Department of Natural Resources is expressly granted the ability to appropriate land for the purposes of establishing, protecting, and maintaining any state recreational trail. R.C. 1519.02. The statute expressly and clearly states that the Department of Natural Resources affirmatively holds the right to appropriate property for the types of trails Appellant wishes to construct. But here, there is no need to twist and contort the words "conservation of natural resources" into meaning "bike trail," because the legislature has clearly stated what it means. If the legislature meant for the park district's to also hold this power, they could have clearly stated so as they have in R.C. 1519.02.

The Clean Ohio trail fund is designated for matching grants to non-profit organizations and local political subdivisions to "purchase land or interests in land for recreational trails and for the construction of such trails...". R.C. 1519.05. This fund, however, specifically prohibits the use of such Clean Ohio funds for the "appropriation of lands, rights-of-way, franchises, easements, or other property through the exercise of the right of eminent domain." This further signals the General Assembly's intent and disfavor of the use of appropriation by political subdivisions for recreational trails. It is logical that the General Assembly would further its interest of prohibiting

the use of eminent domain for trails that is clear in R.C. 1545.11 through this statute, which would apply to all political subdivisions, including those with broader grants of appropriation power.

Further, when the legislature has intended for a property use to include "bike trails" or something of the like, it has chosen to use specific language stating as much. For example, R.C. 5501.31 speaks specifically to the ability of the director of transportation to "purchase property from a willing seller as required for the construction and maintenance of bikeways and bicycle paths." The legislature goes on in the same sentence to state that the director can also purchase property "to replace, preserve, or conserve any environmental resource if the replacement, preservation, or conservation is required by state or federal law." *Id.* In this statute, the legislature clearly makes a distinction between bikeways/bicycle paths and conservation of natural resources, indicating that they are not one in the same as Appellants argue.

Even in R.C. 5705.19, which allows for political subdivisions to pass a resolution to present a proposal to tax above the ten-mill limitation, the legislature has specifically set out as a permitted purpose "constructing, rehabilitating, repairing, or maintaining sidewalks, walkways, *trails, bicycle pathways,* or similar improvements, or acquiring ownership interest in land necessary for the foregoing improvements." R.C. 5705.19. Though this statute is not a grant of the power of appropriation, it is yet another example of the legislature specifically setting out terms referencing bicycle pathways or bike trails specifically. As the Seventh District stated, reading R.C. 1545.11 to include a right to appropriate land for bike trails "requires a lot of effort, interpretation and reference to cases from one hundred years ago." *The Board of Commissioners of Mill Creek Park Metro. Dist. v. Less,* 2022-Ohio-1289, 188 N.E.3d 614, ¶35 (7th Dist). By contrast, where the legislature specifically speaks to these types of recreational trails in other statutes, they have specifically referenced that use with language that is clear and unambiguous.

C. "Public need" and service to the "general welfare" should be interpreted based on the needs and local character of the community.

As was noted by this Court in *McNab v. Board of Park Commissioners,* 108 Ohio St. 497, 141 N.E. 332 (1923), "the public needs, as interpreted and applied to the public welfare of a densely populated districts, are quite different than the public needs of rural communities." *Id.* at 502. These differences should not only be noted, but are ripe for the review by the Court when the right to appropriate is based upon that premise. The Seventh District correctly noted this in its decision and found that contribution to health, welfare and benefits to the community are not served in a "rural area where it appears the public need is speculative at best and the harm to the private property owners is great." *The Board of Commissioners of Mill Creek Park Metro. Dist.* at ¶36.

Although greenways and public access spaces throughout Ohio could be of benefit in many places, that benefit is often outweighed in a rural area by the nuisance, harassment, and disruption to the landowners, like Appellee, that are forced to host these public spaces through no choice of their own. Farmers who abut recreational trails of all types – walking trails, bike trails, and public water trails – often endure trespassing and littering, threats to the safety of their livestock or the health of their crops, limited access to their property with their farm equipment, and risks to their own personal safety. The lack of patrol and policing on trails also weighs heavily on landowners in rural areas, where the county sheriff and their staff are the only law enforcement with jurisdiction to respond when issues arise and can often be stretched thin across the unincorporated areas of a county. Understandably, when a landowner has had their property forcefully taken away, it certainly does not engender much trust that the taking entity will be a good neighbor in the future. These significant harms must be given proper weight when considering an appropriation and the

"general welfare." The "general welfare," and "contributions to health, welfare and benefit to the community," must also be seen in light of the actual welfare of the landowner who must forever endure this burden upon their property. The Seventh District properly weighed the harms to the landowner and properly denied this taking as not for a purpose of the conservation of natural resources nor conducive to the general welfare.

IV. CONCLUSION

Appellee, like any landowner who has been pulled into court to lose their land, wants merely to continue living on and using her property without public intrusion. However well-intentioned the goal may be of adding recreational trails, that process should be accomplished through the cooperation of affected landowners and the acquisition of land via voluntary conveyance, not through broadening appropriation powers to unelected political subdivisions. The Seventh District correctly found that the Appellant Park District did not have the authority to take property in this instance. The Court should affirm this decision and allow Ms. Less to go back to life on her farm without public intrusion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on December 13, 2022, a copy of this Brief was served by regular U.S. mail or electronic mail upon the following counsel of record:

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