

IN THE SUPREME COURT OF OHIO

RICHARD HOUCK, et. al.,

Appellants,

vs.

BOARD OF PARK COMMISSIONERS, HURON
COUNTY PARK DISTRICT, et. al.,

Appellees.

OHIO SUPREME COURT
Case No. 06-1262

On Appeal from the Erie County Court of
Appeals, Sixth Appellate District

**BRIEF OF *AMICI CURIAE* BOARD OF PARK COMMISSIONERS,
COLUMBUS AND FRANKLIN COUNTY METROPOLITAN PARK
DISTRICT, AND BOARD OF PARK COMMISSIONERS, FIVE RIVERS
METROPARKS, IN SUPPORT OF DEFENDANTS-APPELLEES**

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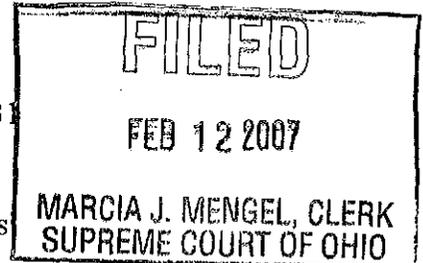


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I.

INTRODUCTION

A. Metro Parks and Five Rivers – Background and Mission

The Columbus and Franklin County Metropolitan Park District (“Metro Parks”) was formed in 1945 to conserve, protect, and maintain open spaces for the use and enjoyment of the citizens of Central Ohio. Metro Parks currently operates fourteen public parks that encompass over 23,000 acres of land and water in Central Ohio. These public parks, which are spread across seven central Ohio counties, offer the public a variety of recreational and educational opportunities and a chance to enjoy the natural beauty of Central Ohio’s forests, fields, and waterways. Each year, Metro Parks welcomes over five million visitors who enjoy hiking, canoeing, cross-country skiing, golfing, and a host of other activities. In addition, Metro Parks’ nature centers offer year-round educational programs for children and adults.

Five Rivers MetroParks (“Five Rivers”), serving the greater Dayton and Miami Valley area, was formed in 1963 through the efforts of concerned citizens seeking to preserve, protect, and maintain natural areas and their ecosystems for the use and enjoyment of the public. Five Rivers operates twenty five different parks encompassing over 12,700 acres of land and water. Due to the topography of the Miami Valley, Five Rivers’ parks include a number of delicate and rare river corridor and wetland ecosystems. In fact, the name Five Rivers was chosen in recognition of the importance of the Great Miami River, Stillwater River, Mad River, Twin Creek, and Wolf Creek waterways and their river corridors.

Metro Parks and Five Rivers, like all Ohio park districts, are governed by court-appointed boards of park commissioners whose members serve three-year terms without compensation. For its day-to-day operations, Metro Parks relies on a dedicated team of over 200 full- and part-

time employees and more than 750 uncompensated volunteers, who perform grounds upkeep and maintenance, assist with wildlife management projects, and help monitor the trails and public areas of the parks. Similarly, Five Rivers relies on a team of approximately 275 full-time, part-time, and seasonal employees and more than 400 uncompensated volunteers.

B. Interest of Amici Curiae

The central purpose behind all Ohio park districts is to maintain and protect open, natural spaces for public use and enjoyment. As stewards of these public park lands, park districts like Appellees, Metro Parks, and Five Rivers face unique challenges not shared by other political subdivisions. Public parks often occupy hundreds or even thousands of acres of open, unimproved land that is meant to be kept in its natural state and must be maintained and supervised on limited budgets. By law, all Ohio park district boards serve without compensation, and like Metro Parks and Five Rivers, all park districts rely heavily on seasonal employees and a host of volunteers to survey, monitor, and maintain the vast public lands with which they have been entrusted.¹ Park lands are by nature open to the public and continually subjected to public intrusion and prescriptive use. In many instances, enclosing such lands would be inappropriate or impractical, and it is virtually impossible to consistently monitor every remote corner of each park. Indeed, for park districts like Five Rivers, fencing or otherwise restricting the free flow of plant and animal species to and from public lands maintained as natural areas would impede, and in many cases completely undermine, the habitat and ecosystem preservation goals for which such parks were established.

¹ Indeed, unlike Metro Parks, which has one of the larger budgets among Ohio's park districts and enjoys the benefit of retaining numerous year-round full- and part-time paid employees, many of the more rural Ohio park districts operate as entirely volunteer organizations, making it virtually impossible to consistently and continually monitor park boundaries.

As a result of these unique challenges, a decision subjecting public park lands to the harsh doctrine of adverse possession would yield dire consequences for park districts and the public in general. Although park districts make every effort to protect the public land with which they are entrusted, these public, volunteer-reliant organizations cannot reasonably be expected to exercise the same level of vigilance as a private landowner. Unlike private landowners, who often have the ability to fence and monitor finite, private parcels, park districts lack the resources to constantly monitor vast tracts of land that, by their very purpose, must be kept open to the public.

Moreover, seasonal staff turnover can be high from year to year, which can limit some park districts' ability to consistently monitor remote park boundaries. The boundaries of park lands are typically kept in their natural state and are seldom well-marked. Because they are unable to adequately monitor and protect all of their lands, a rule allowing adverse possession to be asserted against park districts might force them to restrict public access. Moreover, several Ohio park districts, including Five Rivers, oversee lands that are subject to environmental covenants that expressly forbid fencing, which would pose a danger to such fragile ecosystems. Finally, Appellants' proposed rule might also be seen by some as an invitation to misuse park property in an effort to obtain title by adverse possession. All of these potential implications leave Metro Parks and Five Rivers deeply concerned about the change in the law being advocated by Appellants. Metro Parks and Five Rivers respectfully submit that such a change would fundamentally alter the way park districts operate and hinder their ability to serve the public for which they were created. Both legal precedent and sound public policy require that the law be left intact and that Ohio park districts remain immune from losing public lands to adverse possession.

II.

STATEMENT OF CASE AND FACTS

Amici Curiae adopt the statement of case and facts presented by Defendants/Appellees Board of Park Commissioners, Huron County Park District, et. al.

III.

ARGUMENT

A. Fairness and Public Policy Require that Park Lands Remain Immune from Adverse Possession

Appellants' argument turns on the central assertion that "fairness" requires park districts to be treated like private citizens—i.e., that if park districts can *obtain* property by adverse possession, it is only fair that adverse possession also be available *against* park districts. Appellants' "fairness" theory is flawed, however, because it ignores the many unique functions and characteristics of park districts that distinguish them from private landowners and would make it inequitable to treat the two alike.² Indeed, the public policy implications borne out by these distinguishing features of park districts make it critical that public park lands remain immune from adverse possession.

1. Many Park Districts Lack the Resources Required to Actively Monitor Park Boundaries

First, by imposing a heightened duty of vigilance upon park districts, a decision to change the current rule protecting park lands from adverse possession would threaten to stretch some of

² In addition, recent case law suggests that the legal premise to Appellants' argument—that park districts may *acquire* property by adverse possession—may be incorrect. From the legal principles that park districts "may sue and be sued" and "may acquire lands," Appellants deduce that "there is no prohibition against either park districts or private citizens asserting real property claims or defenses of adverse possession against each other." Appellant's Brief at 4. However, while the issue remains unsettled, there is no statutory provision granting park districts the right to obtain property by adverse possession, and at least one Ohio court has intimated that they may not. *See Law v. Metroparks*, 2006 Ohio 7010 at ¶ 22 ("[T]he statutes delineating the corporate powers of a park district do not authorize the acquisition of park property by adverse possession."); *see also Nottke v. Bd. of Comm'rs, Erie Metroparks*, 2005 Ohio 323 at ¶¶ 23-25 (refusing to grant summary judgment to park district on alternative adverse possession theory). This issue is not presently before the Court, of course, but does underscore the weakness of Appellants' premise.

the more rural park districts' already limited resources past the breaking point. As courts have historically noted, "the same active vigilance cannot be expected of [the public], as is known to characterize that of a private person, always jealous of his rights and prompt to repel any invasion of them." *Heddleston v. Hendricks* (1895), 52 Ohio St. 460, 465. This is particularly true of park districts, which oversee vast tracts of land and often operate as largely volunteer organizations with limited financial resources.

Unlike a private landowner who holds a vested interest in closely monitoring property boundaries and remote parcels of land, those entrusted with public lands, like park districts, often lack the resources or means to constantly monitor their boundaries. Park districts oversee thousands of acres across Ohio and often rely heavily on part-time, seasonal, and volunteer workers. Such employees, though earnest and well-intentioned, lack the historical knowledge or experience of a private landowner to identify and closely monitor boundary lines or to guard against prescriptive uses. Moreover, a seasonal and volunteer workforce is subject to frequent turnover, making it difficult to maintain consistent monitoring and reporting of potential encroachment. Additionally, regardless of the nature and size of a park district's staff, public parks are often expansive,³ and exact boundary lines are seldom clearly marked, making frequent and consistent monitoring of property lines and rights-of-way virtually impossible on some rural park districts' limited budgets.⁴

The people of Ohio should not be penalized for their park districts' inability to perform the added police function of protecting public park lands from adverse possession. The people

³ For example, the combined boundaries of the fourteen public parks in the Metro Parks system alone stretch approximately 234 miles.

⁴ The situation facing park districts tasked with monitoring expansive, remote tracts of land could not be farther removed from the only circumstance in which public lands may be obtained by adverse possession in Ohio—where a street in the middle of a municipality has actually been *fenced off* by an owner of adjoining land. See Ohio Rev. Code Ann. § 2305.05 (2006). In effect, the statutory exception in Section 2305.05 sets forth a sort of *heightened* "open and notorious" standard that falls at the opposite end of the spectrum from the facts of this case.

have entrusted their park districts with some of the State's most valued real property and charged them with preserving these lands in their natural state, which many of them do with limited funds and volunteer workforces. It would be patently unfair to add to the duties of these public, volunteer-reliant organizations by placing public park lands in jeopardy while shouldering park personnel with the risk of loss. To prevent this undue strain on Ohio's park districts, sound public policy demands that the law remain unchanged and that park lands remain immune from adverse possession.

2. Subjecting Park Districts to Adverse Possession Would Diminish the Public's Ability to Enjoy Public Parks

Second, if the Court were to change the law to permit public park lands to be taken by adverse possession, park districts might be forced to restrict public access to park properties, which would diminish the public's ability to enjoy its public parks. To protect his or her land from adverse possession, a private landowner will typically mark and closely monitor boundary lines and might enclose all or part of his or her property or post signs restricting access. A private landowner might also construct improvements on his or her property or put the property to a use that precludes adverse uses by others. But park districts cannot go to the same lengths as private landowners. The very purpose of park districts is to conserve Ohio's natural resources and open spaces for public enjoyment. *See* Ohio Rev. Code Ann. § 1545.11 (West 2006). By definition, public park lands are meant to be kept open to the public and often cannot be fenced or posted, and the public value of many park lands and their beneficial effect on neighboring properties would be severely diminished if park districts were forced to take such measures. Moreover, given the size and remoteness of some parks, monitoring or staking out boundary lines is often impracticable. Thus, the only way park districts could provide similar protection for some park properties would be to restrict or deny public access.

In short, the purposes and uses of public park lands fundamentally differ from those of private property. This discourages, and in some instances precludes, park districts from taking the same steps to safeguard the public lands with which they are entrusted. In order to provide comparable protection for public park lands to that afforded private property, some park districts might be faced with a choice of either expending resources they simply do not have or limiting the very public access for which park lands are held, thus defeating the very purpose for the establishment of Ohio park districts.

3. Subjecting Park Districts to Adverse Possession Would Severely Undermine Some Park Districts' Ability to Protect and Conserve Natural Areas

Third, even if they were not faced with financial limitations, fencing is not an option for park districts like Five Rivers that have been tasked with the protection and maintenance of natural habitats because fencing is often prohibited by the terms of express environmental covenants, would in some instances impede the restoration of previously altered lands, and can threaten the very existence of certain natural areas.

In addition to their inability to actively patrol park boundaries, environmental covenants with the Ohio Environmental Protection Agency ("Ohio EPA") often bar park districts like Five Rivers from employing one of the most basic measures taken by private landowners to prevent adverse possession—fencing their property. Protection of increasingly rare grasslands, old growth forests, river corridors, and wetlands constitutes one of the most important duties of park districts. In recognition of these important conservation goals, the Ohio Legislature passed Ohio Revised Code §§ 5301.80 to 5301.92 for the purpose of allowing landowners, usually park districts, to enter into environmental covenants with the Ohio EPA that protect the conservation,

aesthetic, and ecological values of these lands (“Environmental Covenants”).⁵ Environmental Covenants require that subject parcels be kept in a state at least as natural as that existing at the time the covenants are entered into and usually include a plan by which the land will be fully restored to its natural state. Pursuant to that goal, Environmental Covenants generally prohibit a wide variety of activities and uses, including the erection of fences.⁶

Even when not prohibited by Environmental Covenants, erecting fences is typically not a viable option for park districts like Five Rivers because it would interfere with controlled and natural succession efforts. As part of its mission to restore and protect natural ecosystems, Five Rivers relies heavily on controlled succession and natural succession (collectively “Succession Restoration”). Succession Restoration involves allowing lands that were previously altered for agricultural or other use to revert to their natural state through the natural influx of native plant and animal species. Succession Restoration is a gradual process by which an area is first inhabited by plant and animal species that are early colonizers. These early colonizers transform the environment such that it becomes hospitable to later colonizers. It is only after several iterations of this process that a stable and mature ecosystem emerges, and because Succession Restoration relies on a steady and natural influx of colonizing species, fencing or otherwise enclosing these lands can impede, and in many cases simply prevent, this process.

Moreover, fences not only prevent the establishment of natural ecosystems, but can often destroy them by interfering with edge habitats and causing habitat fragmentation. The “edge effect” refers to the various consequences on vegetation and wildlife that occur as a result of habitat fragmentation. See Lyndall Rowley, Robyn Edwards and Paul Kelly, *Edges – Their*

⁵ The Ohio EPA has also initiated a number of programs, including the Water Pollution Control Loan Fund and the Water Resource Restoration Sponsor Program, to provide financial assistance in furtherance of the important policy of preserving and protecting Ohio’s natural ecosystems.

⁶ For instance, Five Rivers maintains over 80% of its land base as natural areas, many of which are subject to Environmental Covenants that expressly forbid fencing.

Effect on Vegetation and Wildlife, Land for Wildlife, Nov. 1999 at 6 (1999). The edges of a habitat ("Edges") may be planned or natural. An example of a naturally occurring Edge is where a forest borders onto grassland. In contrast to Edges, a "core" habitat ("Core") refers to the stable and biologically diverse interior of a natural area. Planned Edges and naturally occurring Edges serve as important transition and protective buffer zones for Core habitats. The ability to establish, control, and eventually phase out Edges is essential to re-establishing and maintaining Core habitats.⁷

Edges that are neither part of a carefully formulated restoration and maintenance plan nor naturally occurring, such as those created by boundary fences based on property lines, have a number of deleterious effects. For instance, many species that thrive in the specialized ecological niches of the Core are often not present in Edges. *Id.* Edge species, which due to their evolution are generalists with a wider tolerance range, often outcompete and displace the species associated with the Core. *See* Andren, H. & Anglestam, P., (1988) *Elevated Predation Rates as an Edge Effect in Habitat Islands: Experimental Evidence*, *Ecology* 69: 544-47. Edges also allow weeds to invade and proliferate in the Core, thereby displacing Core vegetation. These effects are not limited to ground level species, as Edges often contain different and fewer bird species than the Core. *Id.* Essentially, if an existing Core is segmented by a new Edge, the Edge species will, over time, displace the Core species such that the Core habitat will recede from the Edge line. Ultimately, depending on the species involved and the geometric orientation

⁷ In order to better understand and visualize the relationship between Edges and Cores, one might draw a large white square with a smaller black square in the center. The outer boundary of the white square represents an Edge, with the area between the Edge and the black center square representing the transition and buffer zone. The central black square represents the Core habitat. A sufficiently large transition and buffer zone is essential to the existence and proper maintenance of the Core. In order to visualize the problems caused by Edges that are neither naturally occurring nor part of an ecological restoration plan, such as fencing erected according to property lines, one might draw a second white square, but this time dissect the square with a diagonal line (representing a fence) cutting it into two triangles. By thus fragmenting the habitat, it becomes readily apparent that there is far less space surrounded by adequate transition and buffer zones in which a Core can exist.

of the Edges, a Core habitat can be destroyed or displaced entirely by the encroachment of adjacent Edge habitats caused by fencing.⁸

Thus, even if limited financial resources were not an issue, Appellants' proposed rule of law would leave many park districts utterly unable to protect the natural areas they hold in trust from adverse possession. For park districts like Five Rivers, preventive enclosure measures such as fencing are often prohibited under the terms of express Environmental Covenants, can have severe deleterious effects on the reintroduction and protection of natural habitats, and may even result in the destruction of the very ecosystems such park districts were established to protect.

4. Subjecting Public Park Lands to Adverse Possession Would Invite Encroachment and Abuse

Fourth, subjecting vast and often remote public park lands to adverse possession could invite squatters and neighboring landowners to make improper use of remote park lands or to encroach upon park boundaries in hopes of obtaining title. Unlike school boards and municipalities, park districts often oversee vast, secluded parcels that are more susceptible to such long-term intrusions. Public parks are also subject to constant public use, which is by nature open and notorious. While it would admittedly remain difficult for opportunistic individuals to satisfy the strict long-term time requirements of the adverse possession doctrine, Appellants' proposed rule might encourage attempts and could force park districts to defend against frequent legal challenges aimed at quieting title or securing prescriptive easements over

⁸ A 2001 interagency report examining the feasibility of using fences to reduce animal/vehicle collisions done by the Maine Secretary of State, Turnpike Authority, and the Departments of Transportation, Fisheries and Wildlife, and Public Safety (collectively, the "Maine Work Group") reached similar conclusions on the impracticality and deleterious effects of habitat fencing. See Maine Interagency Work Group on Wildlife/Motor Vehicle Collisions, *Collisions Between Large Wildlife Species and Motor Vehicles in Maine*, Interim Report, April 2001. The Maine Work Group's report concludes, among other things, that the maintenance costs for such fences can be prohibitively high, that widespread application is impractical, and that such fences eliminate wildlife travel corridors and increase habitat fragmentation. The Maine Work Group also examined the feasibility of using wildlife passage structures to mitigate these effects and concluded that installation and maintenance costs were prohibitive, the choice of effective passage locations was limited, and that such animal passage structures have had mixed results.

certain parcels. Additionally, such opportunistic individuals might attempt to construct improvements on park lands. In some of the more expansive public parks, adverse uses of land might not be discovered until serious and permanent damage had been done.

In essence, a rule that subjects park properties to adverse possession might be seen by some as an invitation to begin scoping out and laying claim to park lands, which would undermine the very purpose and policy behind Ohio's public park system. Most park districts lack the resources or means to ward off such intrusions, and Metro Parks and Five Rivers respectfully ask that the Court deliver the clear message that public park lands remain off limits and are protected from adverse possession.

B. Ohio Law Currently Prohibits Adverse Possession Against Park Districts

In addition to the policy concerns cited above, legal precedent clearly supports the decision of the lower court. Under Ohio law, park districts are currently immune from adverse possession, as is the general rule with all political subdivisions. *See Law v. Metroparks*, 2006 Ohio 7010 at ¶ 22. Ohio courts have long recognized that the public cannot be held to the same standard of vigilance that might be expected of a private landowner and held that public lands generally may not be obtained by adverse possession. *See Heddleston*, 52 Ohio St. at 465. The sole statutory exception to that general rule is a narrow one. Courts have strictly construed section 2305.05 of the Ohio Revised Code to permit adverse possession against a municipal corporation only where a street or alley shown on a recorded plat has been enclosed with a fence for at least twenty-one years by an owner of adjacent property. *See Ohio Rev. Code Ann. § 2305.05* (West 2006); *see also 1540 Columbus Corp. v. Cuyahoga County* (1990), 68 Ohio App. 3d 713, 718, 589 N.E.2d 467. The current case obviously falls outside that narrow exception, and as the *Law* Court recently recognized, for the policy reasons set forth above, it

would be wholly inappropriate to carve out a second exception to be applied against park districts.

In *Law*, the Lake County Court of Appeals recently held that park districts remain immune from claims of adverse possession. As in the present case, the plaintiffs in *Law* sought the application of adverse possession to quiet title to former railroad property that had been purchased by Lake Metroparks. The plaintiffs had constructed certain improvements on the disputed property, including shrubbery, a garden, and a tool shed. Relying on the longstanding rule that public lands are generally not subject to adverse possession, Lake Metroparks filed a motion for summary judgment, which was denied. Lake Metroparks appealed.

On appeal, the Lake County Court of Appeals reversed the trial court's decision and granted summary judgment to Lake Metroparks, citing the decision of the Court of Appeals in the instant case in the process. Specifically, the *Law* Court noted the lower *Houck* Court's reliance on "the disfavor with which courts look upon claims of adverse possession and the relative 'narrowness of the authority for permitting adverse possession to any political subdivision.'" *Id.* at ¶ 9 (quoting *Houck*, 2006 Ohio 2488 at ¶¶ 15-17). The *Law* Court then went on to note additional reasons why park districts should remain immune from adverse possession claims.

As the *Law* Court explained, encroachments and obstructions of public park lands like those at issue here constitute a public nuisance, "which 'no length of time can legalize.'" *Law*, 2006 Ohio 7010 at ¶ 18 (quoting *Little Miami RR Co. v. Comm'rs. of Greene County* (1877), 31 Ohio St. 338, 349. Because the property at issue was "held by [a] park district and . . . open for public travel," the Court distinguished *Brown v. Bd. of Educ.* (1969), 20 Ohio St. 2d 68, which had previously been limited in its application "to property held by [a] board of education, the

property of which is not a legal highway or street.” *Law*, 2006 Ohio 7010 at ¶ 17 (quoting *1540 Columbus Corp*, 68 Ohio App. 3d at 719). Noting that boards of education and park districts serve vastly different public purposes and have received disparate legal treatment, the Court held that *Brown* has no application to cases like this one. The *Law* Court also recognized that public policy requires the application of adverse possession against public lands to remain extremely limited because “[t]he public, for whom the municipality holds the property in trust, should not suffer for a government’s inattention no matter what the land’s purpose.” *Law*, 2006 Ohio 7010 at ¶ 23 (quoting *Nusekabel v. Cincinnati Pub. Sch. Employees Credit Union, Inc.* (1997), 125 Ohio App. 3d 427, 436).

Here, the facts are nearly identical to those in *Law*. Thus, the same reasoning applies, *Brown* is similarly inapplicable, and public policy demands the same result. It remains the law in Ohio that public park lands may not be taken by adverse possession, and as set forth in detail above, a reversal of the law would impose a severe strain on already limited park district resources, would diminish park districts’ ability to serve the public whose lands they protect, and might open the floodgates for opportunistic claims by those who would see the new rule as an advertisement for free park land. Thus, Metro Parks and Five Rivers respectfully submit that sound public policy requires that public park lands remain immune from adverse possession.

IV.

CONCLUSION

For the foregoing reasons, *Amici Curiae* Board of Park Commissioners, Columbus and Franklin County Metropolitan Park District, and Board of Park Commissioners, Five Rivers MetroParks, respectfully submit that the Court should affirm the Court of Appeals' decision and hold that park districts are immune from having real property taken by adverse possession under Ohio law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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