

# 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 ERIE COUNTY  
/ COURT OF APPEALS,  
/ SIXTH APPELLATE DISTRICT

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## REPLY BRIEF OF APPELLANTS HOUCK, ET.AL.

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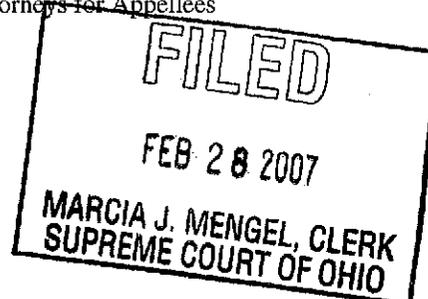
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## ***REPLY ARGUMENT***

### **Proposition of Law No. 1: Ohio Park Districts Can Be Divested Of Real Property By Private Citizens Through The Doctrine Of Adverse Possession Where All Of The Elements Of Adverse Possession Are Shown.**

This appeal does not require this Court to broadly “come to grips with an indisputable truth [that] publicly-owned land is a valuable public asset”<sup>1</sup> anymore than this Court is required to broadly “come to grips” with the sacred truth that the United States and Ohio Constitutions prohibit private property from being taken by a public entity without just compensation.<sup>2</sup> Nor does this appeal ask this Court to address the issue of adverse possession as it relates to highways, roads and bridges. Finally, this Court is not faced with determining whether the broader concept of statutes of limitations on actions serves a useful public purpose. Instead, this appeal focuses on the very narrow issue of whether Ohio park districts, in matters relating to real property ownership and improvements, are held to the same rules of law applicable to private citizens, including statutes of limitations preventing ejectment actions, i.e. the doctrine of adverse possession. Stated another way, this Court is asked to determine whether *R.C. §1545.07, et. seq.* prevents adverse possession claims against Appellees. It does not.

Appellees’ alternative Proposition of Law asserts: “[I]and owned by park districts established under Ohio R.C. Chapter 1545 cannot be taken by adverse possession.”<sup>3</sup> This proposition is patently incorrect under Ohio law and logic. In fact, Appellees’ enabling legislation states that they “...shall be a body politic and corporate, and *may sue and be sued* as provided in sections 1545.01 to 1545.28” and have the power to acquire property “...either within or without the park district...” either “...(1) by gift or devise, (2) by purchase...or, (3) by appropriation.”

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<sup>1</sup> Appellees Brief at 9

<sup>2</sup> Ohio Constitution I, §1 “All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.” See also, Ohio Const. I, §19 “...where private property shall be taken for public use, a compensation therefor shall first be made in money...” United States Constitution, Amendment V “...nor shall private property be taken for public use, without just compensation”

<sup>3</sup> As a corollary, Appellees also assert that only record title should be considered as evidence of ownership in real property disputes involving Appellees.

R.C. §§1545.07;1545.11 (Emphasis added). Other than in the area of tort immunity, no Ohio case or statute limits the “sue or be sued” language of Appellees’ enabling legislation. Certainly, by these enabling statutes, a park district which purchases real property may “sue or be sued” relative to determining ownership of that property.<sup>4</sup> Appellees have “made [themselves] amenable to the laws governing litigants, including the plea of the statute of limitations.”<sup>5</sup> It would be illogical to thereafter find that suits relating to their acquisition and ownership of the real property are improper. Such a finding would effectively prevent a park district from entering into contracts for acquisition, maintenance, repair or improvement of park land because no one would enter into such a contract knowing that they have no right to sue the park district in the event of a dispute regarding the contract because the park district may claim some sort of manufactured immunity formerly recognized under common law. If this Court were to adopt Appellees’ premise then this Court would also be grafting an exception onto R.C. §2305.04 preventing its operation against Appellees. Such a rule would sabotage the integrity of government contracts and undermine the fundamental principle that the rule of law constrains governments as well as citizens. More importantly, such proposition would allow Appellees, as in this case, to acquire and assert record title from questionable grantors and obtain *greater* rights to the acquired land than previously held by the grantor even if Appellees acquired title twenty years, eleven months and thirty days after Appellants possession. Further, various political subdivisions would be able to assert ownership to real property held by private citizens for generations on the strength of a flaw in record title. Appellants merely sought to assert a quiet title action to prove actual and superior ownership right to the disputed land by clear and convincing evidence. In this case, Appellees conceded in their motion for summary judgment that, as in *Brown v. Board of Education* (1969) 20 Ohio St. 2d. 68 (“*Brown*”), Appellants’ use of the property was open, notorious, continuous, uninterrupted,

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<sup>4</sup> This is the same conclusion reached by this Court in *Brown v. Board of Education* (1969) 20 Ohio St.2d. 68 with respect to enabling legislation of school boards. Discussed *infra*. This is also in keeping with reasoning set forth in *Marrek v. Cleveland Metroparks Bd. of Commrs* (1984) 9 Ohio St.3d. 194.

<sup>5</sup> *State ex. rel. Board of Education of Springfield v. Gibson* (1935) 130 Ohio St. 318, 199 N.E. 185 “*Gibson*” “*when a board of education or school district is clothed with the capacity to sue and be sued, it is thereby rendered amenable to the laws governing litigants, including the plea of the statute of limitations.*” at 186.

exclusive, hostile, and adverse as to the area encompassed by the railroad trackage and ditch. Appellees apparently disputed, as a matter of law, (1) whether record title transfer to Appellees in the nineteenth year of Appellants' occupation allegedly terminated adverse possession claims even though possession continued uninterrupted for an additional two and one-half (2 1/2) years; and (2) whether "cultivation" since 1949<sup>6</sup> was sufficient to demonstrate the element of "hostility" with respect solely to the northern section of the disputed land.<sup>7</sup>

While Appellants agree that public property is a valuable public asset it is equally true that private property serves as both the foundation and economic engine for our capitalist society.<sup>8</sup> Private property ownership is the most basic and elemental bundle of rights originating on the English field of Runnymede in 1215.<sup>9</sup> Such weighing of benefits is not automatically resolved in favor of preservation of public lands at all costs, including the constitutionally protected inviolate right of private property. Disputes between public and private entities involving real property always have the unspoken consideration of balancing competing public and private interests. The value of publicly owned land is not the question before this Court. Rather, the question is whether

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<sup>6</sup> This includes the time period the railroad line was closed from 1978 to the present when Appellants took control of the entire disputed section.

<sup>7</sup> Both lower courts found that the culture of crops was not "adverse" to a railroad's interest because a railroad has no need to occupy the land and is only interested in keeping down vegetation that would increase a fire hazard. Appellate Decision at 8 (A11) citing *Barnhart v. Detroit, Toledo & Ironton Rd. Co.* (1929) 8 Ohio Law Abs. 22. However, this result is inapposite to a long line of cases finding that cultivation of farmland is sufficient to satisfy the adverse element of adverse possession. See: *1540 Columbus Corp, infra*, citing 16 O. Jur. 3d. (1979) Adv. Possession §15 "using a building for storage is of a different nature and character than improvements, enclosures and cultivation." *Oeltjen v. Akron Associated Investment Corp* 106 Ohio App. 128; 16 O. Jur 3d. Adverse Possession §16 note 26. See Appellants' Merit Brief at page 15. 3 Am. Jur 2d. Adverse Possession §21.

In addition, some states have statutes allowing adverse possession by cultivation. See for example: N.Y. Real Prop. Acts Law §§ 512, 522 (McKinney 1979); see also Nev. Rev. Stat. Ann. §11.100 (Michie 1986) private land can be adversely possessed if it is "cultivated or improved" in the usual way. In this case, the northern area was under cultivation since before 1949 and, thusly, adversely possessed for more than 21 years *before* Appellees took title in 1998.

<sup>8</sup> Appellants assert that comparing, weighing and resolving these two concepts in real estate matters is manifest in the jury verdict of every appropriations action.

<sup>9</sup> If this Court adopts Appellees' assertion then it logically should subsequently find that every governmental entity which *surrenders* public property to private corporations for economic development at *less than fair market value* does an illegal disservice to the community because the value of the public property asset has not been "insulated from loss" but "exposed to it." Appellees' Brief at 9.

the land is publicly or privately owned in the first instance. Even in cases where ownership is unquestionably held by the public entity it is not unreasonable to impose a duty to occasionally observe and assess the property for trespassing squatters at least once every twenty years.

Appellees argue that a public body politic should be treated differently than a private citizen and that private citizens should not be afforded all the rights and privileges of Appellees in litigation disputes involving real property ownership and improvements. Notwithstanding the fact that Appellees can point to no statute authorizing this unequal treatment, Appellees apparently seek privileges greater than are currently afforded the State of Ohio, which waived its immunity and consented to be sued and have its liability be determined “...in accordance with the *same rules of law applicable to suits between private parties.*”<sup>10</sup> (Emphasis added). Appellees inexplicably claim that “the rationale of the doctrine [of adverse possession] is concerned with the use of the land, not the identity of the owner.”<sup>11</sup> Yet, Appellees’ very argument for preventing assertion of the doctrine against them is grounded on the identity of Appellees--- public entities with the lofty purpose of promoting the “collective community good.”<sup>12</sup> Appellees would have this Court adopt a rule that the “collective community good” should cause private citizens to lose their real property rights, and improvements thereon, *without compensation*, unless they can present *clear and undisputed record title* evidence of ownership.<sup>13</sup> Moreover, Appellees assert that a private citizen is prevented from showing ownership of the very land they have occupied for a lengthy period of time. On the other hand, park districts claim this “greater good” grants them *greater* rights than the ordinary citizen and entitles them to utilize the entire gamut of admissible evidence outside of

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<sup>10</sup> R.C. §2743.02(A)

<sup>11</sup> Appellees Brief at 20.

<sup>12</sup> Appellees Brief at 3.

<sup>13</sup> For example, ownership to real property once held by a political subdivision in the 1800’s but transferred without proper authorizing legislation could be re-obtained by the political subdivision if only record title were allowed as evidence. Adverse possession allows the Courts to recognize reality of possession over flawed title documents if the evidence justified such conclusion by clear and convincing evidence. It is legal recognition of the axiom “possession is nine-tenths the law.”

mere record title to establish ownership, *including adverse possession evidence*.<sup>14</sup> Lost in this view is adverse possession's "great purpose" to quiet titles by allowing the Courts to consider *all* evidence of true ownership.<sup>15</sup> The doctrine of adverse possession serves as a quasi-statute of limitations by preventing ejectment actions after twenty-one (21) years. See also: R.C. §2305.04. Private citizens should not be subject to ejectment actions and loss of their real property improvements after expiration of a lengthy period of years simply because a park district, in the twilight days of private occupancy, obtains bare record title without ever surveying, reviewing, or even bothering to casually observe the true physical state of the property. Every other concerned owner is required to exercise this limited amount of due diligence with respect to his property, and had the park district ever set eyes on the property, Appellants' claim of ownership and occupation would have been clearly manifest by ditch maintenance and installation of a roadway and chainlink gate.<sup>16</sup> Amici Franklin and Columbus Metroparks "relies on a dedicated team of over 200 full- and part-time employees and more than 750 uncompensated volunteers" while Five Rivers Metroparks has "275 full-time, part-time, and seasonal employees and more than 400 uncompensated volunteers." (hereinafter "Amici Metroparks") at 1-2. Yet Amici Metroparks claim that they should not be held to the same standards as a single private large landowner?<sup>17</sup> The main *purpose* of park police and employees is to observe, protect and police park property and its visitors. If they do not visually inspect park property occasionally in twenty-one (21) years then "[i]n such instances, the loss should be ascribed to its true cause, the want of vigilance on the part

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<sup>14</sup> Appellees' Brief at Section B.3, page 19.

<sup>15</sup> Paul E. Basye, *Clearing Land Titles* §54 (2d ed 1970)

<sup>16</sup> It is interesting that Appellees ask this Court to overturn *Brown, supra*, as inapposite to the case at bar, yet admit that in *Brown*, "this Court was asked to resolve a title issue in circumstances in which the record owner appeared unconcerned about the adverse use." Appellees Brief at 14. Query: how is that different from the facts of the case at bar when Appellees held record title for 2 1/2 years before demonstrating any concern about the adverse use and never checked the actual state of the property prior to purchase?

<sup>17</sup> Amici Metroparks Brief at 3.

of the sufferer.”<sup>18</sup> It should not be unreasonable to require Appellees to periodically view the condition of their property for unauthorized development at least once every twenty-one (21) years while engaging in their normal routines and ensuring compliance with environmental covenants and their land use plans.

**The Doctrine Of Adverse Possession Remains Alive And Well Against Public Entities**

Appellees assert that they have always had immunity from claims involving real property other than claims directly involving record title to the property and this Court should not “change the law”.<sup>19</sup> Appellees cite Professor Latovic (sic) to support their claim that adverse possession, either by caselaw or statute, does not run against political subdivisions or the State.<sup>20</sup> In fact, in Latovick, Adverse Possession Against the States: The Hornbooks Have It Wrong<sup>21</sup>, she wrote that “[t]he hornbook rule is that adverse possession statutes do not run against land owned by state governments. Yet, in practice, the land of many states is subject to loss by adverse possession. Few states have statutes that simply and explicitly protect all state land from adverse possession.”<sup>22</sup>

The doctrine of adverse possession, generally, “provides that an owner of land may lose his land if he fails to promptly eject trespassers.” Latovick, supra at 1. If the trespasser satisfies all the common law requirements then the passing of the statutory time period creates a new title in the adverse possessor.

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<sup>18</sup> *Shampton et. al. v. City of Springboro, et. al.* 98 Ohio St. 3d. 457 (2003) (finding a lease was unenforceable against the City because plaintiff negligently failed to ascertain the authority of the city manager to enter into the agreement.)

<sup>19</sup> Appellees Brief generally at 10-11, 24. Amici Metroparks argue that this Court would “change the law” if it favored Appellants. Amici at 6.

<sup>20</sup> Appellees incorrectly assert that “[p]laintiffs’ proposed rule goes further than mere recognition of another exception... Instead it changes a basic principle of hornbook law entirely.” Appellees’ Brief in Opposition at page 2.

<sup>21</sup> 29 U. Mich, J.L. Ref. 939 at 1.

<sup>22</sup> Professor Latovick argues that state legislatures should pass statutes to protect all state land from adverse possession. This writer found only three states that completely prohibit adverse possession against a governmental entity: New Mexico, Illinois and Alabama.

The continued viability of the doctrine of adverse possession is justified by the following explanations:

First, an owner who fails to assert ownership within twenty-one years deserves to lose their property because they have slept on their rights<sup>23</sup> or are “unconcerned about the adverse use.”<sup>24</sup>

“The unarticulated premise behind this justification is that if the true owner had made productive use of his land himself, the land would not have been available for the adverse possessor to use. The law at once punishes the owner directly for failing to protect his rights and sanctions him indirectly for not making economic or productive use of his land.” *Latovick, supra* at 2. This explanation operates as a statute of limitations to ejectment actions and is no different than a bar or laches to other actions after the statute of limitations has expired. Ohio recognizes that actions to “recover title to or possession of real property” must be brought within twenty-one (21) years. R.C. §2305.04. Ohio is near uniform in its application of all statutes of limitations to both private individuals and bodies politic and no exception, by statute or caselaw, is made for political subdivisions in ejectment actions other than municipal streets and alleys at R.C. §2305.05. See Appendix at 46.

Many states have codified the period for adverse possession while other states have enforced the common law period of twenty-one (21) years. See R.C. §2305.04. Other states have also recognized the retreat or elimination of sovereign immunity, subjecting bodies politic to claims of adverse possession, and have enacted legislation modifying the length of the statute relating to claims against public property. The doctrine of adverse possession is not on the decline contrary to the assertions of Appellees, Amici for Appellees, and some lower Ohio court opinions. In fact, a number of states allow adverse possession against governmental entities by statute or caselaw or

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<sup>23</sup> “Sometimes it is said that, if a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example.” *Oliver Wendell Holmes, The Path of the Law*, 10 Harv. L. Rev. 457, 476 (1897).

<sup>24</sup> Professor Richard Powell explains that adverse possession “rests upon social judgments that there should be a restricted duration for the assertion of ‘aging claims,’ and that the elapse of a reasonable time should assure security to the person claiming to be an owner. The theory upon which adverse possession rests is that the adverse possessor may acquire title at such time as an action in ejectment by the record owner would be barred by the statute of limitations. *Powell, Powell on Real Property* P1012[2][a] (Rohan ed. 1996) as cited at FN 10, *Latovick, Adverse Possession Against the States: The Hornbooks Have It Wrong*. Quote in body is from Appellees Brief at 14.

have waived immunity from adverse possession claims altogether.<sup>25</sup> Some states allow adverse possession against state lands but require a longer possession period than private lands before ejectment actions are prohibited.<sup>26</sup> Some of those states, such as California, Montana and Idaho,

<sup>25</sup> California: Ten years. Cal. Civ. Proc. Code §315 (West, 1982)

Connecticut: Twenty-one years. *Goldman v. Quadrato*, 114 A. 2d. 687 (Conn 1955); In *American Trading Real Estate Properties Inc v. Town of Trumbull*, 547 A. 2d. 796, 800-02 (Conn, 1990) the Court held that a would-be adverse possessor must establish both the elements of adverse possession and that the municipality has consciously abandoned any plans for the parcel. Adverse possession is still available under this hyper-test contrary to assertions of Amici Subdivisions.

Florida: Twenty-one years. 1990 Fla Laws Ch.90-105 (eff. June 17, 1990)

Idaho: Ten years. Idaho Code §5-202 (1990)

Kentucky: Twenty years. Ky Rev. Stat. Ann, §413.150 (Michie, 1992) "The limitations prescribed in this chapter shall apply to actions brought by or in the name of the Commonwealth the same as to actions by private persons, except where a different time is prescribed by statute." *Kentucky Coal & Timber Dev. Co. v. Kentucky Union Co.*, 214 F. 590, 627 (E.D. Ky, 1914); *Meade v. Sturgill*, 467 S.W. 2d. 363, 364 (Ky. 1971); *Whitley County Land Co. v. Powers' Heirs*, 144 S.W. 2, 5 (Ky, 1912)

Louisiana: Twenty-one years. *Prothro v. Natchitoches*, 265 So. 2d. 242, 244-45 (La. Ct. App 1972)

Maryland: Twenty-one years. *Siejack v. Mayor of Baltimore*, 313 A. 2d. 843, 846-67 (Md. 1974) municipal property not devoted to a public use can be acquired by adverse possession.

Michigan: Twenty-one years. Mich Rev. Stat Ch. 139 §11; *Caywood v. Department of Natural Resources*, 248 N.W. 2d. 253, 258 (Mich., 1976)

Montana: Ten years. Mont. Code Ann. §70-19-302 (1995)

New Jersey: Twenty-one years. *Devins v. Borough of Bogota* 592 A. 2d. 199 (N.J. 1991) since New Jersey law no longer grants the statet sovereign immunity from suit in tort or contract such a rule is not an "undue burden on municipalities"

New York: Twenty-one years. N.Y. C.P.L.R. Law §211(c) (McKinney 1990); *City of Tonawanda v. Ellicott Creek Homeowners Ass'n* 449 N.Y.S. 2d. 116, 121-22 (App. Div. 1982); *Long Island Land Research Bureau v. Town of Hempstead*, 118 N.Y.S.2d. 857 (App. Div. 1954), aff'd 125 N.E.2d. 872 (NY. 1955); *Lewis v. Village of Lyons* 389 N.Y.S.2d. 674,76 (1976); *Mileau Corp v. City of New York* 421 N.Y.S.2d. 258,259-60 (1979)

North Carolina: Twenty-one years or, when no color of title, thirty years. N.C. Gen. Stat. §1-35(2) (1983)

North Dakota: Forty years. N.D. Cent. Code §28-01-01 (1991)

Oklahoma: Twenty-one years. Okla. Stat. Ann. Title 12, §93; Title 60, §§332, 333

South Dakota: Forty years. S.D. Codified Laws §15-3-4 (Michie, 1984)

Tennessee: Tenn. code Ann. §28-1-113 (1980) Adverse possession is permitted where the adverse possessor has held the land under color of title and a document has been on file with registrar for more than thirty years.

Texas: Twenty-one years. *Brown v. Fisher*, 193 S.W. 357, 362-63 (Civ. App., 1917)

Vermont: Twenty-one years. *Jarvis v. Gillespie* 587 A.2d, 981 (1991) municipal land is presumed for public use but presumption can be rebutted by demonstrating that town has abandoned any plans for the land.

Washington: Twenty-one years. *Kesinger v. Logan*, 756 P. 2d. 752, 755 (Wash. App. 1988), aff'd 779 P.2d. 263 (Wash, 1989); *Sisson v. Koelle*, 520 P.2d. 1380, 1383 (Wash App. 1974)

West Virginia: Twenty-one years. W. Va. Code §55-2-19 (1994)

Wisconsin: 1979 Wis. Laws 323; Wis. Stat. §893.29(1). In 1979, the Wisconsin legislature moved to increase the state's exposure to adverse possession by cutting the time period for adverse possession of state land in half to twenty (20) years, the same as for private persons possessing private lands.

<sup>26</sup> California: Cal. Civ. Proc. Code §315 (West, 1982) ten years where five years for private lands.

Idaho: Idaho Code §5-202 (1990) ten years where five years for private lands.

Montana: Mont. Code Ann. §70-19-302 (1995) ten years where five years for private lands.

North Carolina: N.C. Gen. Stat. §1-35(2) (1983) twenty-one years or, when no color of title, thirty years where twenty for private lands.

North Dakota: N.D. Cent. Code §28-01-01 (1991) forty years where twenty-one for private lands.

have considerably shortened the period for adverse possession from the common law twenty-one (21) years to five (5) years and made ten (10) years the period for adverse possession against public entities. In sum, the application of the doctrine is widespread and under frequent revision, many times making application of the doctrine easier and less arduous than at common law. The proper way to change our statute of limitations for ejectment actions in Ohio is through the General Assembly. However, our General Assembly has chosen not to act thereby leaving this Court with the doctrine at common law; the statutory scheme established for Ohio park districts; R.C. §2305.04; and this Court's analysis of the doctrine in *Brown*.

Second, the property should be put to its highest and best use.<sup>27</sup> Appellees claim this theory justifying adverse possession is sufficient reason to deny its operation by asking this Court to engage in a weighing of competing societal interests. On the one hand is the public interest in conservancy and nature, and on the other hand, private property rights and economic development. The property should be put to its highest and best use. However, that is an unartful and subjective test at best. Many uses have both positive and negative aspects to them, rendering such considerations a more appropriate determination of the state legislature rather than this Court. A bright-line rule that the public conservancy interests of park districts always outweigh private property interests is not a prudent rule for this Court to adopt. Appellants simply suggest that where, as here, a private property owner has been in adverse possession of private property for nineteen (19) years and a governmental entity takes possession without ascertaining the true nature, condition, and occupation of the property, and where the adverse possessor continues in possession for an additional two and one-half (2 1/2) years; the governmental entity must be barred by R.C. §2305.04 from asserting any ejectment action to gain control of the property.<sup>28</sup> The action of the park district in this case constitutes an unlawful taking without compensation if the park district

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South Dakota: S.D. Codified Laws §15-3-4 (Michie, 1984) forty years where twenty-one for private lands.

<sup>27</sup> *Nusekabel v. Cincinnati Public School Employees Credit Union, Inc.* (Hamilton Co. App. 1997), 125 Ohio App. 3d 427 at 434, Appellees' Brief at 20.

<sup>28</sup> Of course, the governmental entity can always acquire the property in an eminent domain/appropriation action at fair market value.

insulates itself from adverse possession.

*Third, the possessor has earned the land by working it and putting it to use.* The connection between property and adverse possession “is further back than the first recorded history. It is in the nature of man’s mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.”<sup>29</sup> Adverse possession encourages property owners to maintain and control their property or surrender it to someone who will do so. Part of this control is the prosecution of ejectment actions. While it could be argued that the State of Ohio might be overly burdened by imposing such a requirement over the entire State, park districts operate within a localized area, most having their own police force primarily dedicated to preventing trespassing and vandalism.

*Fourth, adverse possession provides certainty in title.*<sup>30</sup> This is one of the most important reasons for maintaining the viability of the doctrine. It provides proof of meritorious titles and correction of conveyancing errors. It recognizes factual reality over flawed chain of record title and allows extrinsic proof of ownership provided that proof is by clear and convincing evidence. This justification is probably one of the most important today.

*Fifth, the doctrine of adverse possession does not impose any undue hardship upon park districts different than that of ordinary private citizens.* It is overly presumptuous for Appellees to suggest that “[p]rivate parties rightly can be presumed to have the ability and resources to monitor and protect their property interests.”<sup>31</sup> Park districts usually have a police force and multiple individuals tasked with the responsibility to police, maintain and oversee park property and visitors. Indeed Amici Metroparks state that they have 950 and 675 people respectively, dedicated to

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<sup>29</sup> Oliver Wendell Holmes, *The Path of the Law*, supra, at 477.

<sup>30</sup> Basye, *Clearing Land Titles* §54 (2d. ed. 1970) noting adverse possessions “great purpose” is “to quiet titles.” *Latovick*, supra at FN 14.

<sup>31</sup> Appellees’ Brief at 19.

performing this task.<sup>32</sup> Appellees' argue that one purpose of park district property is to lie fallow. Assuming the truth of this assertion, wouldn't this fact make observation of overnight squatters easier let alone those present for twenty years? Adoption of Appellees' claim that adverse possession imposes an "undue hardship" upon them encourages Appellees to not use, police, maintain, or even in this case, look at and identify their property. If the property is so irrelevant and inconsequential to a governmental body that it fails to utilize it or even review it in twenty-one (21) years then it arguably serves a more useful public purpose in generating taxes by a return to the tax rolls rather than lying fallow. New Jersey reasoned that since its state law no longer grants sovereign immunity from certain tort and contract suits that such a rule is not an "undue burden" and the court was "reluctant to adopt a policy that would encourage [governmental entities] not to use, dedicate, or even identify their property."<sup>33</sup>

Sixth, adverse possession stimulates the public entity to actively pursue ejectment claims and inventory their property more effectively. Appellees claim that they cannot observe, review and protect their property in a timely manner, i.e. twenty-one (21) years period. If Appellees' reasoning is sufficient then it logically flows that all governmental entities are not bound by any laws for the same reason. If Appellees lack this rudimentary capacity then perhaps they lack to capacity to carry-out their public trust mandate.

Seventh, there are many persons who share the view that our society prefers development to non-development of land and action to inaction. While Appellees cogently express the near universal premise of every park employee that a community can never have too much green space and parks; this view is not necessarily shared by all. One commentator expressed this thought in this manner:

**"The idea of preserving land resources intact for future use has never gained much popular acceptance. To be sure, many conservationists stress the need for saving certain resources for future use; and some have probably overemphasized this**

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<sup>32</sup> Amici Metroparks' Brief at 2.

<sup>33</sup> *Devins v. Borough of Bogota* , 592 A. 2d. 199 (1991) citing three reasons: first, statutes of limitations allow repose and avoid adjudications based on stale evidence; second, adverse possession promotes certainty of title thereby protecting the possessor's reasonable expectations; and third, allowing adverse possession promotes active and efficient use of land and "tends to serve the public interest by stimulating the expeditious assertion of public claims."

point. But most people react negatively to a policy of nonuse. They favor the maintenance and saving of land resources, but only to the extent to which conservation policies can be made consistent with a program of effective current use.”<sup>34</sup>

*Ohio Cases Including The Recent Law Decision Support Allowing Adverse Possession Of Park District Property*

At the outset, this Court should take notice of Appellees heavy reliance on the recently decided *Law v. Lake Metroparks*, 2006-Ohio-7010, (Lake Co. App. Dec. 20, 2006) (“*Law*”). Appellees’ reliance and citation to this case misleads the Court. This 2-1 decision of the Eleventh District relied primarily on the Huron County Court of Common Pleas and the Sixth District’s decisions *in this case*. Amazingly, Appellees’ attempt to establish some weight and credibility to the *Law* decision despite the fact that the Eleventh District’s reasoning and authority were derived from the current case before the Court. The heart of the matter is that this case presents an issue of first impression since the applicability of adverse possession against park districts has never been before this Court. Indeed, there is not much case law to speak of addressing adverse possession actions against political subdivisions of the State outside of actions involving public roads or highways. This distinction is outcome determinative thereby allowing this Court to draw a narrow line in deciding this case reaffirming the Court’s fundamental holding in *Brown* without having any impact on any public road or highway cases.

Appellees’ reliance on *Nusekabel v. Cincinnati Public School Employees Credit Union, Inc.* (Hamilton Co. App. 1997), 125 Ohio App. 3d 427 (“*Nusekabel*”); *Wyatt v. Ohio Department of Transportation* (Lake Co. App. 1993), 87 Ohio App. 3d 1 (“*Wyatt*”); *1540 Columbus Corp. v. Cuyahoga County* (Cuyahoga Co. App. 1990), 68 Ohio App. 3d 318 (“*Columbus Corp*”); and *Bryan v. Killgallon*, Case no. WMS-81-6 (Williams Co. App. Sept. 25, 1981, *unreported*) (“*Bryan*”) are also misplaced because they fundamentally misapprehend the issue in this case. *See*, discussion *infra*.

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<sup>34</sup> Raleigh Barlowe, *Land Resource Economics: The Political Economy of Rural and Urban Land Resource Use* 284 (1958); *See also*: Stephen S. Visher, *The Public Domain in Conservation of Natural Resources* 15, 19 (Smith ed. 3rd. ed. 1965) cited in Latovick, *supra* at FN13.

*The Brown Decision Governs This Case And Is Good Law*

Although Appellees cite several Appellate decisions in support of their argument that park districts are not subject to adverse possession, this Court's decisions in *Brown, supra*, and *Gibson, supra at FN5*, compel the Court to find that park districts are subject to adverse possession claims. This Court has never stated that *Brown* was limited to the facts as presented and there is no reason to do so now. The fundamental issue involved in *Brown* was the seemingly contradictory opinions in *Gibson* and this Court's decision thirty years earlier in *Board of Edn. v. Volk* (1905), 72 Ohio St. 469, 74 N.E. 646 ("*Volk*"). It is not difficult to see how this Court reached their decisions in *Gibson* and *Brown*, and how these decisions directly answer the question presented here. The cases cited by Appellees, and the Appellate decisions limiting or not applying *Brown*, do not affect the outcome of this case because the issue before the Court in *Brown* was not before the Appellate Districts. In fact, all appellate decisions limiting *Brown* were *ALL* public road or highway cases and are logically and analytically distinct from the factual scenarios presented in *Brown* and the current case. See: Latovick, *Adverse Possession of Municipal Land* 31 U of Mich J.L. Ref 475, Winter 1998 at FN 120-5 (listing twelve states that take this approach, including Ohio in *1540 Columbus Corp.*).

In 1905 this Court decided *Volk, supra*, based on the statutory reading of §2676, Ohio Revised Statutes. R.S. §2676 outlined the capability and powers of a board of education in legal actions and limited the legal actions of a board of education to those powers conferred by statute. Because *Volk* involved a *tort* action against the board of education, and because R.S. §2676 did not authorize tort actions, this Court held that the board of education was immune from a suit *in tort*. Of course, later legal developments have dramatically changed education boards' tort liability, but *Gibson* in 1935 presented an entirely different factual scenario. R.C. §3313.17 had been passed into law by the time *Gibson* was decided. While the substance of R.C. §3313.17 and R.S. §2676 are substantially similar, *Gibson* involved suit on a *contractual* obligation entered into by the board of education. Because R.C. §3313.17 authorized boards of education to enter into contractual relationships, the necessary corollary to this authorization was that boards of education maintained

the ability to *sue and be sued* to enforce their *contractual* obligations and in reference to holding real property. The issue of State sovereignty plays no role under these circumstances. Who would enter into contractual agreements with political subdivisions of the State if there were no avenue to enforce those rights?

As the Court stated in *Gibson*, “[w]hen a board of education or school district is clothed with the capacity to sue and he [sic] sued, it is thereby rendered amenable to the laws governing litigants, including the plea of the statute of limitations. To give one character of litigants special privileges over other litigants is to create artificial distinctions which have no place in a progressive democracy.” *Gibson* at 321. The Court went further to state that “[w]hen it is rendered subject to suit without consent, it is automatically stripped of its attribute of sovereignty and of the exemptions and immunities available to sovereignties.” *Id.* at 322. Most importantly, “[w]here a statute does not expressly except a subordinate *political subdivision* from its operation, the exemption therefrom does not exist.” *Id.* (emphasis added).<sup>35</sup>

Thus, when *Brown* came before the Court in 1969, *Volk* stated that boards of education (as a political subdivision) were immune from tort suits because boards of education were established to conduct school purposes and torts were not an authorized function, and *Gibson* stated that boards of education (as a political subdivision) were to be treated like ordinary litigants when conducting business they were authorized to perform. Appellees characterize this posture as “unusual” and state that the Court was asked to reconcile these two decisions.<sup>36</sup> No reconciliation is or was necessary. R.C. §3313.17 states:

**The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property.**

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<sup>35</sup> Even so, the State long ago waived sovereign immunity for political subdivisions in non-tort suits. *See* R.C. §2744.09.

<sup>36</sup> Appellees’ Brief at 14.

Since R.C. §3313.17 specifically grants school boards the power to deal with real property, and since the suit in *Brown* involved real property and contained no exemption from the statute of limitations, this Court properly decided that adverse possession could run against the school board because “where a statute does not expressly exempt a subordinate political subdivision from its operation, the exemption therefrom does not exist.” *Brown, supra* at 70 (quoting *Gibson, supra* at syllabus ¶3).

Now, looking at the enabling legislation for park districts, one finds eerily similar language. R.C. §1545.07 states in pertinent part:

**The commissioners . . . shall constitute the board of park commissioners of the park district. Such board shall be a body politic and corporate, and may sue and be sued as provided in sections 1545.01 to 1545.28 of the Revised Code . . . For the purposes of acquiring, planning, developing, protecting, maintaining, or improving lands and facilities . . . the board may hire and contract for professional, technical, consulting, and other special services, . . . In procuring any goods, the board shall contract as a contracting authority under sections 307.86 to 307.91 of the Revised Code, to the same extent and with the same limitations as a board of county commissioners.**

There is no provision in R.C. §1545.01, *et seq.*, exempting park districts from any statute of limitations running against them in adverse possession claims. The enabling statute clearly gives park districts the authority to deal with real property, sue and be sued relating to that real property, with no exemption from any statute of limitations. This posture is exactly the same as *Brown*, and compels the same result. In fact, just as in *Brown*, no other element of adverse possession was disputed other than the mandatory 21 years.<sup>37</sup> Appellees must be treated as ordinary litigants under this situation, and there is no state statute, caselaw or policy reason to do otherwise.

**Roads And Public Highways Are Different And Cases Dealing With Roads And Public Highways Do Not Apply To This Case**

Appellees cite to *Lane v. Kennedy* (1861) 13 Ohio St. 42; *McClelland v. Miller* (1876) 28 Ohio St. 488; *Little Miami RR. Co. v. Greene Cnty. Cmmrs.* (1877) 31 Ohio St. 338 (“*Little Miami*”); *Lake Shore & Michigan S.Ry. Co. v. Elyria* (1904) 69 Ohio St. 414; *Heddleston v.*

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<sup>37</sup> Appellees do dispute whether cultivation from 1949 to 2001 of the northernmost portion of the disputed property satisfies the hostility element of adverse possession as a matter of law.

*Hendricks* (1895) 52 Ohio St. 460; *Nusekabel*; *Wyatt*; *Columbus Corp.* and *Bryan* in support of their argument that adverse possession cannot run against political subdivisions. In conjunction with the differing enabling legislation cited above, these cases do not apply to the case at hand because *every one of these cases involves a public road or highway*. Public roads and highways are different. The recognition that public roads and highways are different eviscerates Appellees' attempts to establish persuasive authority through caselaw.

As this Court stated in *Hernik v. Director of Highways* (Ohio 1959) 169 Ohio St. 403, 160 N.E. 2d 249, at syllabus ¶1:

**The act of February 18, 1804 (2 OL 136) relating to the laying out and opening or roads which were to be financed with 3 percent of the money derived from the sale by the federal government of public lands in Ohio was applicable to all roads subsequently laid out and opened in accordance therewith, and that part of such act which provided that all such roads (known as 3% roads) "shall be 66 feet in width, and shall be and remain public highways" operated to create in the state a 66-foot right of way for each "3%road" laid out and opened in accordance therewith, and such 66-foot right of way CANNOT BE SAID TO HAVE LATER BEEN LESSENERED BY THE MERE PEACEFUL ENCROACHMENT THEREON FOR A NUMBER OF YEARS BY A PRIVATE INDIVIDUAL.** (Emphasis added).

Thus, at the early dawn of Ohio Statehood, a law was passed specifically proscribing all future "3%" public roads from adverse possession. The vestige of this early law has permeated the jurisprudence of the State ever since. There is good reason for this. Not only was State alienation of dedicated lands initially restricted by federal sale establishing most of Ohio's roads, but grave concerns for public safety, health, and interstate/intrastate commerce and movement are implicated when public roads are taken for private use. *Brown*, 2 OL 136, and subsequent caselaw *provides for the explicit exemption of public roads from adverse possession!* Roads are not an issue in this case where a park district swoops in to buy land at the eleventh hour and then claims immunity. These points cannot be stressed enough. Appellees and Amici for political subdivisions incorrectly attempt to persuade this Court that there is a long standing tradition in the State of Ohio that has repeatedly rejected the idea that the doctrine of adverse possession may run against a political subdivision. Even the General Assembly recognizes that roads are unique. This recognition of the unique position of public roads and highways prompted passage of R.C.§2305.05. Appellants are aware of no case since *Brown*, other than road and highway cases,

denying adverse possession using a *Brown*-type analysis (other than *Law* which followed the lower court holding in the case at bar.) The issue is precise, and the theoretical policy pleas made by the Appellees and Amici skirt legal reality. This Court need only focus on the narrow issue promoted by Appellants despite Appellees', and their Amici, attempts to expand the issue into a bright-line rule prohibiting the applicability of adverse possession against any State entity.

While public roads and highways are different, Amici for political subdivisions point out some common characteristics that park districts have with other political subdivisions. Amici for political subdivisions state that “[t]he overwhelming weight of authority suggests that Ohio’s political subdivisions have not consented to claims of adverse possession despite (1) their corporate authority (2) their ability to sue and be sued; and (3) their having powers to acquire, hold, possess, and dispose of real property.”<sup>38</sup> While Amici for political subdivisions incorrectly assert that political subdivisions must first consent to adverse possession claims before they are subject to such claims, they are correct in pointing out the similar characteristics of park districts under *R.C.* §511.23-25 and §1545.07 and other political subdivisions:

\* Boards of Education: (1) bodies politic and corporate. *R.C.* 3313.17; (2) capable of suing and being sued. *R.C.* 3313.17; and (3) ability to acquire, hold, and dispose of real property. *R.C.* 3313.17.

\* Counties: (1) bodies politic and corporate. *Section 1, Art. X of the Ohio Constitution; R.C.* 301.22; (2) capable of suing and being sued. *R.C.* 301.22; and (3) ability to acquire, hold, and dispose of real property. *Section 1, Art. X of the Ohio Constitution; R.C.* 715.01.

\* Municipal Corporations, or Cities and Villages: (1) bodies politic and corporate. *Sections 1-3, Art. XVIII of the Ohio Constitution; R.C.* 715.01; (2) capable of suing and being sued. *R.C.* 715.01; and (3) ability to acquire, hold, and dispose of real property. *R.C.* 715.01.

\* Townships: (1) bodies politic and corporate. *Sections 1-2, Art. X of the Ohio Constitution; R.C.* 503.01; (2) capable of suing and being sued. *R.C.* 503.01; and (3) ability to acquire, hold and dispose of real property. *R.C.* 503.01.

\* Library Districts: (1) bodies politic and corporate. *R.C.* 3375.33; (2) capable of suing and being sued. *R.C.* 3375.33; and (3) ability to acquire, hold and dispose of real property. *R.C.* 3375.33.

Despite Amici for political subdivisions’ amazing claim that case law establishes that every political subdivision with these characteristics is exempt from claims of adverse possession, notice

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<sup>38</sup> Amici for political subdivisions Brief at 14.

that no case cited by Amici in support of this proposition was decided after *Brown* in 1969 or after abolition of sovereign immunity. See, *Gallipolis v. Gallia Cty. Fair Co.* (1929), 34 Ohio App. 116, 170 N.E. 174 (Counties and Townships); *Fleming v. Steubenville* (1931), 44 Ohio App. 121, 184 N.E. 701; *Application of Loose* (1958), 107 Ohio App. 47, 153 N.E.2d 146 (Municipalities). In addition, passage of R.C. §2305.05 specifically authorizes adverse possession claims against municipalities and there is absolutely no case law at all to support Amici's proposition for library districts or park districts before this case. Amici for political subdivisions rely on blanket statements of glittering generalities about the former role sovereign immunity played in claims against the State. The more thoughtful and applicable analysis is that done in *Brown*, which recognized the specific characteristics of certain political subdivision, changing immunity law, the necessity of treating litigants alike, and the absence of any exemption from the doctrine of adverse possession for a political subdivision.

**Ohio R.C. §2744 And Equitable Estoppel Law Have No Application**

R.C. §2744 *et. seq.* establishes a comprehensive scheme for adjudicating claims based on negligence against political subdivisions--it recognizes that political subdivisions have relinquished any common law claim of absolute immunity and outlines when certain claims will be allowed and others disallowed. Adverse possession in this case lies outside this framework because it is not based on negligence and instead relies on the enabling legislation of the particular subdivision to contract in matters involving real property.

In *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 697 N.E.2d 610, this Court noted that the Political Subdivision Tort Liability Act, codified in R.C. §2744 *et. seq.*, sets forth a three-tiered analysis for determining whether a political subdivision is immune from liability for injury or loss to property. The first tier of the analysis begins with the general rule of immunity that political subdivisions are not liable in damages for the personal injuries or death of a person. R.C. §2744.02(A). Next, this general rule of immunity is subject to five exceptions. R.C. §2744.02(B). Lastly, if one of the exceptions contained in R.C. §2744.02(B) is present, then

the political subdivision may be able to reinstate immunity if they can show that a defense contained in R.C.§2744.03 applies. However, this analysis is predicated on the distinction of the political subdivision's actions for purposes of *tort* liability. Tort liability is not an issue in this case.

In *Hortman v. Miamisburg* (2006), 110 Ohio St.3d 194, 198, 852 N.E.2d 716, this Court held that the doctrines of equitable estoppel and promissory estoppel are inapplicable against a political subdivision when the political subdivision is engaged in a governmental function. This Court analyzed *Hortman* within the context of R.C.§2744 *et. seq.* because the causes of action in that case were for negligence, conversion sounding in tort and promissory estoppel. When a political subdivision is engaged in a governmental function, that is to say a role that they are authorized to perform in their official capacity, R.C.§2744 *et seq.* insulates political subdivisions from liability based on the tortious conduct of their employees. This policy has often been buttressed by the argument that fear of tort liability may impede or prevent government actors from carrying out their official, governmental duties. These concerns do not apply in this case. Even if R.C.§2744 *et. seq.* analysis were performed in this case, which Appellants strongly feel that it should not, R.C.§2744.09(A) specifically provides that political subdivisions are not immune from *contractual* liability.<sup>39</sup> It is an extreme and untenable stretch to read the Political Subdivision Tort Liability Act, and this Court's holding in *Hortman*, and leap to the conclusion that **all** equitable remedies against political subdivisions are unavailable. And even were such a strained reading countenanced, the doctrine of adverse possession is not strictly an equitable remedy. It holds aspects of both legal and equitable remedies. The statute of limitations for actions "...to recover the title to or possession of real property..." thereby allowing or preventing a ejection action *by anyone* operates to recognize and enforce adverse possession as a remedy at law. R.C.§2305.04.

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<sup>39</sup> Appellants are careful not to cite to *State v. First, Inc.* (Apr. 3, 1990), 2nd Dist. No. 11486, 1990 WL 40668, by this Court's order in *State v. First, Inc.* (1991), 59 Ohio St.3d 603, 571 N.E.2d 436, but only points out that the issue involved there, whether promissory estoppel is available against a political subdivision in a contractual context where the subject matter of the contract is within the authority of the person acting on behalf of the State, follows analytically in the footsteps of the *Brown* analysis; although Appellants are not arguing that promissory estoppel applies here--only that in non-tort suits no immunity exists regardless of the function being performed if the suit involves an action the political subdivision is authorized to perform then all claims and defenses are available unless specifically exempted.

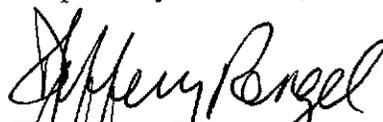
*Nuisance Law Has No Application To This Case*

Lastly, the nuisance analogy performed by the court in the *Law* case has no bearing on this case. A nuisance is defined as “a distinct civil wrong consisting of anything wrongfully done or permitted which interferes with or annoys another in the enjoyment of his legal rights.” *Taylor v. Cincinnati*, 143 Ohio St. 426, 55 N.E.2d 724, (1944). Unlike an adverse possession claim, a nuisance does not involve a claim of ownership to real property, but merely an interference with another’s quiet enjoyment of their undisputedly owned property. Moreover, a nuisance consists of a lawful act so negligently or carelessly done as to create a potential and unreasonable risk of harm which in due course results in personal or property injury to another. Nuisance effectively merges to become a tort negligence action. *Allen Freight Lines, Inc. v. Consolidated Rail Corp.*, 64 Ohio St.3d 274, 595 N.E.2d 855, (Cuyahoga 1992). As discussed *supra*, a negligence action has nothing to do with an action to quiet title on the basis that the procedural statute of limitations has run preventing an ejectment action thereby endowing real property ownership rights through the doctrine of adverse of possession,. Once again, the *Law* Court misapplied the statement about “nuisances” taken from *Little Miami, supra*, and incorrectly attempted to analogize it to the case at hand even though *Little Miami* involved public roads and highways, “which no length of time can legalize.” *Id.*

**CONCLUSION**

For the foregoing reasons, Appellants Richard Houck, et. al., respectfully request that this Court reverse the decision of the Sixth District Court of Appeals, and find, as a matter of law, that Ohio park districts are not immune from the statute of limitations running against park districts, and that park district land may be acquired through application of adverse possession. Based upon the undisputed facts of this case, Appellants are entitled to judgment as a matter of law.

Respectfully submitted,



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This is to certify that a copy of the foregoing Appellants' Reply Brief has been sent by ordinary United States mail, postage prepaid, on this 27th day of February, 2007 to:

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(Cite as: Not Reported in N.E.2d)

**C**

City of Bryan v. Killgallon.Ohio App., 1981.Only the Westlaw citation is currently available.  
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Williams County.

City of Bryan, APPELLEE,

v.

William Carpenter Killgallon, et al.,  
APPELLANTS.

**COURT OF APPEALS NO. WMS-81-6, TRIAL COURT NO. 22551.**

WMS-81-6, 22551

September 25, 1981.

Defendants-Appellants.

C.A. No. WMS-81-6, C.P. No. 22551.

Court of Appeals of Ohio, Williams County.

September 25, 1981.

Messrs. Craig L. Roth and Robert T. Lowe, Counsel for Appellants.

Mr. Joseph R. Kiacz, Counsel for Appellee.

DECISION AND JOURNAL ENTRY

PER CURIAM

\*1 Finding all assignments of error not well taken, judgment of the Williams County Common Pleas Court is affirmed at appellants' costs and cause is remanded to said court for execution of judgment and assessment of costs. See Opinion by Douglas, J., on file.

\*1 A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

Andy Douglas, J., John H. Barber, J., George M. Glasser, J., concur.

\*1 Judge George M. Glasser, Lucas County Common Pleas Court, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

City of Bryan, Plaintiff-Appellee,

v.

William Carpenter Killgallon, et al.,

DOUGLAS, J.

OPINION

\*1 A municipal corporation is not subject to the loss of its property by adverse possession except as set forth under R.C. 2305.05.

\*1 This cause came before this court on appeal from judgment of the Williams County Court of Common Pleas which ordered appellants, William and Susan Killgallon, to remove any portion of appellants' fence, at 805 Noble Drive, Bryan, Ohio, that encroached upon appellee city of Bryan's right-of-way along Noble Drive, Bryan, Ohio.

\*1 On October 15, 1979, appellee filed a complaint in the Williams County Court of Common Pleas seeking an order directing appellants to remove a fence they had constructed within the seventy foot right-of-way of Noble Drive, a dedicated street in the city of Bryan, Ohio. Appellants filed an answer

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and counterclaim and an amended answer and counterclaim in which appellants claimed ownership in the right-of-way by virtue of adverse possession and raised the defenses of estoppel, abandonment and laches. On November 13 and 14, 1980, a trial was held to the court. On February 11, 1981, the trial court entered judgment in favor of appellee. From that judgment, appellants appeal.

\*1 Appellants present five assignments of error.

Appellants' first assignment of error is as follows:

\*1 "1. THE TRIAL COURT ERRED IN RULING THAT THE DEFENDANTS COULD NOT RELY UPON ADVERSE POSSESSION PURSUANT TO R.C. 2305.04."

\*1 Appellants contend that the trial court erred in determining that appellants could not acquire title to the right-of-way by virtue of adverse possession pursuant to R.C. 2305.04. In support of this contention, appellants urge consideration of a line of early cases, such as *Cincinnati v. First Presbyterian Church* (1838), 8 Ohio 299, and *Williams v. First Presbyterian Society* (1853), 1 Ohio St. 478, which held that "Municipal corporations are subject to the operation of the statute of limitations, in the same manner and to the same extent as natural persons." *Cincinnati v. Evans* (1855), 5 Ohio St. 594, at the syllabus.

\*1 Those early cases were subsequently severely criticized by the Ohio Supreme Court and other courts. See, for example, *Heddleston v. Hendricks* (1895), 52 Ohio St. 460; *Gallipolis v. Gallia County Fair Co.* (1929), 34 Ohio App. 116. In the later cases, several lines of authority developed with respect to the applicability of the doctrine of adverse possession and the statute of

\*2 In other cases, the courts recognized the earlier rule as to municipal property owned in connection with a private and proprietary function, but held property owned in a public and governmental capacity exempt from the operation of the statute of limitations. See *Wright v. Oberlin* (1902), 3 C.C. (N.S.) 242 at 248. With respect to public highways and streets, three theories developed under which

such property was held exempt from acquisition by adverse possession.

\*2 The first theory, in harmony with the concept of property held in a public capacity discussed above, held ". . . that no public body holding rights in the streets or highways can lose the same by such methods [adverse possession]." In re Application of Loose (1958), 107 Ohio App. 47 at 51. The second held that any encroachment upon a public highway or street constituted a public nuisance in favor of which the statute of limitations does not run. *Heddleston, supra.* (Based upon Section 6921 of the Ohio Revised Statutes. See also, R.C. 5589.01). The third held encroachments upon public highway property to be a matter of sufferance until such time as the property was needed for its designated purpose and, therefore, not adverse to the right of the public entity in such property. *McClelland v. Miller* (1876), 28 Ohio St. 488.

\*2 Thus, our review of the case law in this area leads us to the conclusion that the title to municipal property dedicated for public streets cannot be acquired by adverse possession pursuant to R.C. 2305.04. We find this conclusion to be in accord with R.C. 2305.05, the enactment of which evidences the legislative intent to limit acquisition of such property by adverse possession to cases in which the statutory requirements have been met.

\*2 With respect to municipal property in general, our review of the law reveals that the weight of authority is to the effect that, in the absence of legislation to the contrary, title by adverse possession cannot be acquired as against a municipal corporation just as it cannot be so acquired as against a state. See 55 A.L.R. 612, Section 34. From the standpoint of public policy, we find this to be the better rule. The setting aside of land for future public use in order to provide for orderly development is, in and of itself, a valuable use of land resources. That the public might later be deprived of the use of such land by operation of the statute of limitations imposes upon municipalities the burden of continual inspection of all public lands. Such a burden would be prohibitive and contrary to the public interest.

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Further, having considered the case law in Ohio, we find that while the early Ohio rule has not been specifically overruled, it has, in effect, been overruled by the limitations placed upon it by the later cases. For the foregoing reasons, we find the rule in Ohio to be that municipal property cannot be acquired by adverse possession except as set forth under R.C. 2305.05. We, therefore, find appellants' first assignment of error not well taken.

\*2 Appellants' second assignment of error is as follows:

\*2 "2. THE TRIAL COURT ERRED IN RULING THAT R.C. 2305.05 WAS INAPPLICABLE."

\*2 Appellants contend that the trial court erred in determining that the requirements of R.C. 2305.05 had not been met. R.C. 2305.05 provides that:

\*2 "If a street or alley, or any part thereof, laid out and shown on the recorded plat of a municipal corporation, has not been opened to the public use and occupancy of the citizens thereof, or other persons, and has been enclosed with a fence by the owners of the inlots, lots, or outlots lying on, adjacent to, or along such street or alley, or part thereof, and has remained in the open, uninterrupted use, adverse possession, and occupancy of such owners for the period of twenty-one years, and if such street, alley, inlot, or outlot is a part of the tract of land so laid out by the original proprietors, the public easement therein shall be extinguished and the right of such municipal corporation, the citizens thereof, or other persons, and the legislative authority of such municipal corporation and the legal authorities thereof, to use, control, or occupy so much of such street or alley as has been fenced, used, possessed, and occupied, shall be barred, except to the owners of such inlots or outlots lying on, adjacent to, or along such streets or alleys who have occupied them in the manner mentioned in this section."

\*3 Thus, R.C. 2305.05 requires, in addition to adverse possession and occupancy for at least twenty-one years, that the street has not been opened to the public use and that the street has been enclosed with a fence by the owner or owners of

adjacent lots. Our review of the record reveals that Noble Drive had been open to the public and that the portion of the drive in issue had not been completely enclosed by the fence. See Application of Loose, supra. We, therefore, find that the trial court properly determined that the requirements of R.C. 2305.05 had not been met. We further find appellants' second assignment of error not well taken.

\*3 We shall consider appellants' third, fourth and fifth assignments of error together since the same issues are raised therein. Appellants present those assignments of error as follows:

\*3 "3. THE TRIAL COURT ERRED IN RULING THAT THE CLAIMS AND DEFENSES OF ESTOPPEL, WERE NOT SUBSTANTIATED.

\*3 "4. THE TRIAL COURT ERRED IN RULING THAT THE CLAIMS AND DEFENSES OF ABANDONMENT WERE NOT SUBSTANTIATED.

\*3 "5. THE TRIAL COURT ERRED IN RULING THAT THE CLAIMS AND DEFENSES OF LACHES WERE NOT SUBSTANTIATED."

\*3 Appellants contend that appellee's action should have been barred by equitable principles. Appellants argue that appellee had acquiesced in appellants' use of the right-of-way by not asserting its right therein earlier and that appellants had relied thereon to their detriment.

\*3 We find the case of Fleming v. Steubenville (1931), 14 Ohio Law Abs. 51, to be dispositive of these issues. We note particularly the language quoted by the court therein, at 54, which is as follows:

\*3 "It has been held that non-user is evidence of abandonment; and many of the courts, influenced, perhaps, by the hardships that would result from a contrary holding in the particular cases under consideration, have applied the doctrine of equitable estoppel where the claimant had made expensive improvements and acquired, or apparently acquired, rights of such a nature and under such circumstances that to deprive him of them seemed highly inequitable and unjust. We doubt, however, if the doctrine of some, if not most,

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of these cases can be sustained upon principle, at least where the city or the local authorities have done no affirmative act to mislead the claimant. It is difficult to conceive upon what principle an equitable estoppel can be securely placed in such cases, for the person who encroaches upon a public way must know, as a matter of law, that the way belongs to the public, and that the local authorities can neither directly nor indirectly alien the way, and that they can not divert it to a private use. As the person who uses the highway must possess this knowledge, and in legal contemplation does possess it, one of the chief elements of an estoppel is absent. An estoppel can not exist where the knowledge of both parties is equal and nothing is done by the one to mislead the other. In addition to this consideration may be noted another influential one already suggested in a different connection, and that is, the private use of the public way was in the beginning and wrong each day of its continuance, and it is a strange perversion of principle to declare that one who bases his claim on an original and continued wrong may successfully appeal to equity to sanction and establish such a claim. It is, at all events, a great stretch of the doctrine of estoppel and a wide departure from the rule laid down by the earlier decisions and confirmed by many of the modern authorities. And even in states in which the general doctrine of equitable estoppel is recognized and applied in particular cases it is generally held that mere encroachment on a highway by a fence or the like, especially if not of such a character as to charge the municipality with notice, will not estop the public from asserting its right to the land actually belonging to the highway. The mere fact that there is such an encroachment or possession or that the public officials saw or might have seen some improvement in course of construction where the municipality has done nothing to induce it or mislead is usually, and we think correctly, held insufficient. It may be, however, that where there has been an abandonment or there have been misleading acts or other peculiar circumstances, as in some of the cases cited in the first two notes to this section, and improvements have been made and rights acquired on the faith thereof, such a case may be made as will justify the application of the doctrine of estoppel.” (Emphasis added).

\*4 Applying the reasoning set forth in the Fleming case, above to the circumstances of this case, we find that the trial court did not err in dismissing appellants' claims and defenses of estoppel, abandonment, and laches. We, therefore, find appellants' third, fourth, and fifth assignments of error not well taken.

\*4 On consideration whereof, the court finds substantial justice has been done the parties complaining, and judgment of the Williams County Court of Common Pleas is affirmed.

\*4 This cause is remanded to said court for execution of judgment and assessment of costs. Costs to appellants.

\*4 JUDGMENT AFFIRMED.

\*4 Barber and Glasser, JJ., concur.

\*4 Judge George M. Glasser, Common Pleas Court of Lucas County, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

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END OF DOCUMENT

**C**

United States Code Annotated Currentness

Constitution of the United States

▣ Annotated

▣ Article V. Amendments

**→ Article V. Amendments**

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Const. Art. I, § 19

**C**

Baldwin's Ohio Revised Code Annotated Currentness

Constitution of the State of Ohio

§ Article I. Bill of Rights (Refs & Annos)

**→ O Const I Sec. 19 Eminent domain**

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

(1851 constitutional convention, adopted eff. 9-1-1851)

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**§ 301.22. County declared body politic and corporate.**

Every county adopting a charter or an alternative form of government is a body politic and corporate for the purpose of enjoying and exercising the rights and privileges conveyed under it by the constitution and the laws of this state. Such county is capable of suing and being sued, pleading and being impleaded.

**HISTORY: GC § 2394-1; 116 v 132; Bureau of Code Revision. Eff 10-1-53.**

**§ 503.01. Corporate powers and status; appraisal or valuation of realty.**

Each civil township is a body politic and corporate, for the purpose of enjoying and exercising the rights and privileges conferred upon it by law. It may sue and be sued, plead and be impleaded, and receive and hold real estate by devise or deed, or receive and hold personal property for the benefit of the township for any useful purpose. The board of township trustees shall hold such property in trust for the township for the purpose specified in the devise, bequest, or deed of gift. Such board may also receive any conveyance of real estate to the township, when necessary to secure or pay a debt or claim due such township, and may sell and convey real estate so received. The proceeds of such sale shall be applied to the fund to which such debt or claim belonged. The board of township trustees may acquire real property within the unincorporated territory of the township in order to provide needed public improvements to the property pursuant to sections 5709.73 to 5709.75 of the Revised Code. The board of township trustees may enter into contracts with municipal corporations pursuant to section 715.70, 715.71, or 715.72 of the Revised Code to create a joint economic development district.

Whenever the board finds it necessary to determine the value of any real property the township owns or proposes to acquire by purchase, lease, or otherwise, the board may employ for reasonable compensation competent appraisers to advise it of the value of the property or expert witnesses to testify to the value in an appropriation proceeding.

**HISTORY: RS § 1376; S&S 910; S&C 1565; 62 v 172; GC § 3244; Bureau of Code Revision, 10-1-53; 138 v H 408 (Eff 3-14-80); 142 v H 390 (Eff 10-20-87); 143 v H 174 (Eff 4-10-91); 145 v H 715 (Eff 7-22-94); 146 v H 269. Eff 11-15-95.**

### § 511.23. Powers and duties of board.

(A) When the vote under section 511.22 of the Revised Code is in favor of establishing one or more public parks, the board of park commissioners shall constitute a board, to be called the board of park commissioners of that township park district, and they shall be a body politic and corporate. Their office is not a township office within the meaning of section 703.22 of the Revised Code but is an office of the township park district. The members of the board shall serve without compensation but shall be allowed their actual and necessary expenses incurred in the performance of their duties.

(B) The board may locate, establish, improve, maintain, and operate a public park or parks in accordance with division (B) of section 511.18 of the Revised Code, with or without recreational facilities. Any township park district that contains only unincorporated territory and that operated a public park or parks outside the township immediately prior to July 18, 1990, may continue to improve, maintain, and operate these parks outside the township, but further acquisitions of land shall not affect the boundaries of the park district itself or the appointing authority for the board of park commissioners.

The board may lease, accept a conveyance of, or purchase suitable lands for cash, by purchase by installment payments with or without a mortgage, by lease or lease-purchase agreements, or by lease with option to purchase, may acquire suitable lands through an exchange under section 511.241 [511.24.1] of the Revised Code, or may appropriate suitable lands and materials for park district purposes. The board also may lease facilities from other political subdivisions or private sources. The board shall have careful surveys and plats made of the lands acquired for park district purposes and shall establish permanent monuments on the boundaries of the lands. Those plats, when executed according to sections 711.01 to 711.38 of the Revised Code, shall be recorded in the office of the county recorder, and those records shall be admissible in evidence for the purpose of locating and ascertaining the true boundaries of the park or parks.

(C) In furtherance of the use and enjoyment of the lands controlled by it, the board may accept donations of money or other property or act as trustees of land, money, or other property, and may use and administer the land, money, or other property as stipulated by the donor or as provided in the trust agreement.

The board may receive and expend grants for park purposes from agencies and instrumentalities of the United States and this state and may enter into contracts or agreements with those agencies and instrumentalities to carry out the purposes for which the grants were furnished.

(D) In exercising any powers conferred upon the board under divisions (B) and (C) of this section and for other types of assistance that the board finds necessary in carrying out its duties, the board may hire and contract for professional, technical, consulting, and other special services and may purchase goods and award contracts. The procuring of goods and awarding of contracts shall be done in accordance with the procedures established for the board of county commissioners by sections 307.86 to 307.91 of the Revised Code.

(E) The board may appoint an executive for the park or parks and may designate the executive or another

person as the clerk of the board. It may appoint all other necessary officers and employees, fix their compensation, and prescribe their duties, or it may require the executive to appoint all other necessary officers and employees, and to fix their compensation and prescribe their duties, in accordance with guidelines and policies adopted by the board.

(F) The board may adopt bylaws and rules that it considers advisable for the following purposes:

- (1) To prohibit selling, giving away, or using any intoxicating liquors in the park or parks;
- (2) For the government and control of the park or parks and the operation of motor vehicles in the park or parks;
- (3) To provide for the protection and preservation of all property and natural life within its jurisdiction.

Before the bylaws and rules take effect, the board shall provide for a notice of their adoption to be published once a week for two consecutive weeks in a newspaper of general circulation in the county within which the park district is located.

No person shall violate any of the bylaws or rules. Fines levied and collected for violations shall be paid into the treasury of the township park district. The board may use moneys collected from those fines for any purpose that is not inconsistent with sections 511.18 to 511.37 of the Revised Code.

(G) The board may do either of the following:

- (1) Establish and charge fees for the use of any facilities and services of the park or parks regardless of whether the park or parks were acquired before, on, or after the effective date of this amendment;
- (2) Enter into a lease agreement with an individual or organization that provides for the exclusive use of a specified portion of the park or parks within the township park district by that individual or organization for the duration of an event produced by the individual or organization. The board, for the specific portion of the park or parks covered by the lease agreement, may charge a fee to, or permit the individual or organization to charge a fee to, participants in and spectators at the event covered by the agreement.

(H) If the board finds that real or personal property owned by the township park district is not currently needed for park purposes, the board may lease that property to other persons or organizations during any period of time the board determines the property will not be needed. If the board finds that competitive bidding on a lease is not feasible, it may lease the property without taking bids.

(I) The board may exchange property owned by the township park district for property owned by the state, another political subdivision, or the federal government on terms that it considers desirable, without the necessity of competitive bidding.

(J) Any rights or duties established under this section may be modified, shared, or assigned by an agreement pursuant to section 755.16 of the Revised Code.

**HISTORY: RS §§ 1490-10, 1490-11; 97 v 412; 98 v 144, § 4; GC §§ 3420, 3421; 111 v 504; Bureau of Code Revision, 10-1-53; 129 v 235 (Eff 8-4-61); 130 v 216 (Eff 8-9-63); 131 v 237 (Eff 11-5-65); 135 v H 1100 (Eff 6-29-74); 137 v H 187 (Eff 8-26-77); 141 v S 393 (Eff 12-23-86); 143 v S 60 (Eff 7-18-90); 143 v H 717 (Eff 6-28-90); 148 v H 417. Eff 9-21-2000.**

#### **§ 511.24. Appropriation of land and materials for park purposes.**

When the board of park commissioners cannot, by deed of gift or by purchase, procure the lands or materials desired for park purposes upon terms which it regards as reasonable, the board may appropriate such lands or materials for that purpose under sections 163.01 to 163.22 of the Revised Code. If it is desired at any time to acquire additional grounds for enlarging and improving such park or parks, the board may purchase, appropriate, or accept a deed of gift for such lands in the manner provided for by sections 511.18 to 511.23 of the Revised Code, and improve them.

The board may accept and receive from any school, college, or university located within its boundaries, funds, land, or property for use in the improvement, expansion, or construction of athletic fields, stadia, or recreational facilities located within said park grounds, and may, upon such terms, conditions, and for such periods of time as it deems advisable, enter into leasing agreements for the use of said athletic fields, stadia, or recreational facilities with those schools, colleges, or universities having contributed such funds, land, or property, provided that the facilities erected upon said park land shall become and remain public property and shall remain open for public use except for the regular admission charge or parking charge levied by such school, college, or university for entrance to an athletic contest or recreational event. Such leasing agreements may provide for the school, college, or university's exclusive use of the necessary portion of the property during the period of an athletic contest or recreational event. The construction on such a facility shall not commence until the board of park commissioners is assured that adequate funds for its completion are available. The terms of each such contribution of funds, land, or property and the terms of each leasing arrangement shall first be approved by the court of common pleas, or by the board of township trustees if the board of park commissioners is appointed by the board of township trustees, before the board of park commissioners may accept such contribution or enter into such leasing arrangement.

When gravel or other material is desired for the construction, improvement, or repair of the roadway or other improvement authorized by sections 511.18 to 511.31 of the Revised Code, the board may appropriate and take such material, and for this purpose such board may go outside the township.

**HISTORY: RS § 1490-12; 97 v 413, § 6; GC § 3422; Bureau of Code Revision, 10-1-53; 130 v 217 (Eff 8-9-63); 131 v 238 (Eff 1-1-66); 132 v S 388 (Eff 9-13-67); 141 v S 393. Eff 12-23-86.**

### **§ 511.25. Sale of park lands.**

If the board of park commissioners of a township park district finds that any lands that the board has acquired are not necessary for the purposes for which they were acquired, it may sell and dispose of those lands upon terms that the board considers advisable and may reject any purchase bid received under this section that the board determines does not meet its terms for sale.

Except as otherwise provided in this section, no lands shall be sold without first giving notice of the board's intention to sell the lands by publication once a week for four consecutive weeks in a newspaper of general circulation in the township. The notice shall contain an accurate description of the lands being offered for sale and shall state the time and place at which sealed bids for the lands will be received. If the board rejects all of the purchase bids, it may reoffer the lands for sale in accordance with this section.

The board also may sell park lands not necessary for district purposes to another political subdivision, the state, or the federal government without giving the notices or taking bids as otherwise required by this section.

No lands acquired by a township park district may be sold without the approval of the court of common pleas of the county in which the park district is located, if the court appointed the board under section 511.18 of the Revised Code, or the approval of the board of township trustees, if the board of township trustees appointed the board of park commissioners under section 511.18 of the Revised Code.

**HISTORY: 148 v H 417. Eff 9-21-2000.**

**Analogous in part to former RC § 511.25 (GC § 3422-1; 101 v 130; 111 v 505; Bureau of Code Revision, 10-1-53; 125 v S 242; 132 v S 388; 138 v H 1062; 146 v H 99), repealed 148 v H 417, § 2, eff 9-21-2000.**

**§ 715.01. General powers of municipal corporations.**

Each municipal corporation is a body politic and corporate, which shall have perpetual succession, may use a common seal, sue and be sued, and acquire property by purchase, gift, devise, appropriation, lease, or lease with the privilege of purchase, for any authorized municipal purpose, and may hold, manage, and control such property and make any rules and regulations, by ordinance or resolution, required to fully carry out the provisions of any conveyance, deed, or will, in relation to any gift or bequest, or the provisions of any lease by which property may be acquired.

**HISTORY: Bates § 1536-100; 96 v 21, § 7; 97 v 504, § 7; 99 v 5, § 7; GC § 3615; 102 v 40; Bureau of Code Revision. Eff 10-1-53.**

**§ 1545.01. Park districts created.**

Park districts may be created which include all or a part of the territory within a county, and the boundary lines of such district shall be so drawn as not to divide any existing township or municipal corporation within such county.

**HISTORY: GC § 2976-1; 107 v 65; 108 v PtII, 1097; Bureau of Code Revision. Eff 10-1-53.**

Former GC § 2976-1 was repealed in 107 v 65, § 14.

**§ 2305.04. Recovery of real estate.**

An action to recover the title to or possession of real property shall be brought within twenty-one years after the cause of action accrued, but if a person entitled to bring the action is, at the time the cause of action accrues, within the age of minority or of unsound mind, the person, after the expiration of twenty-one years from the time the cause of action accrues, may bring the action within ten years after the disability is removed.

**HISTORY: RS §§ 4977, 4978; S&C 944, 945; 51 v 57, §§ 9, 10; 77 v 303; 83 v 74; 86 v 300; GC § 11219; Bureau of Code Revision, 10-1-53; 143 v S 125. Eff 1-13-91.**

The provisions of §§ 3, 4 of SB 125 (143 v - ) read as follows:

SECTION 3. Sections 1 and 2 of this act shall take effect six months after the effective date of this act.

SECTION 4. Sections 2305.04, 2305.11, 2305.16, and 2743.16 of the Revised Code, as amended by this act, shall apply only to causes of action that accrue on or after the date specified in Section 3 of this act, which is six months after the effective date of this act.

## § 2744.02. Classification of functions of political subdivisions; liability; exceptions.

(A) (1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

(2) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does

not have the responsibility for maintaining or inspecting the bridge.

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

(C) An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.

**HISTORY:** 141 v H 176 (Eff 11-20-85); 143 v H 381 (Eff 7-1-89); 145 v S 221 (Eff 9-28-94); 146 v H 350 (Eff 1-27-97); 147 v H 215 (Eff 6-30-97); 149 v S 108, § 2.01 (Eff 7-6-2001); 149 v S 106. Eff 4-9-2003.

See provisions, § 3 of SB 106 (149 v - ) following RC § 2744.01.

### § 2744.03. Defenses or immunities of subdivision and employee.

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

(4) The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of the person's sentence by performing community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2152.19 or 2152.20 of the Revised Code, and if, at the time of the person's or child's injury or death, the person or child was covered for purposes of Chapter 4123 of the Revised Code in connection with the community service or community work for or in the political subdivision.

(5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

(7) The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code.

(B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code.

**HISTORY:** 141 v H 176 (Eff 11-20-85); 141 v S 297 (Eff 4-30-86); 145 v S 221 (Eff 9-28-94); 146 v H 350 (Eff 1-27-97); 147 v H 215 (Eff 6-30-97); 149 v S 108, § 2.01 (Eff 7-6-2001); 148 v S 179, § 3 (Eff 1-1-2002); 149 v S 108, § 2.03 (Eff 1-1-2002); 149 v S 106. Eff 4-9-2003.

See provisions, § 3 of SB 106 (149 v - ) following RC § 2744.01.

See provisions, § 3(C) of SB 108 (149 v - ) following RC § 2744.01.

**§ 2744.09. Actions and claims exempted from provisions.**

This chapter does not apply to, and shall not be construed to apply to, the following:

- (A) Civil actions that seek to recover damages from a political subdivision or any of its employees for contractual liability;
- (B) Civil actions by an employee, or the collective bargaining representative of an employee, against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision;
- (C) Civil actions by an employee of a political subdivision against the political subdivision relative to wages, hours, conditions, or other terms of his employment;
- (D) Civil actions by sureties, and the rights of sureties, under fidelity or surety bonds;
- (E) Civil claims based upon alleged violations of the constitution or statutes of the United States, except that the provisions of section 2744.07 of the Revised Code shall apply to such claims or related civil actions.

**HISTORY: 141 v H 176. Eff 11-20-85.**

**§ 3313.17. Corporate powers of board.**

The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property.

**HISTORY: GC § 4834; 120 v 475 (518); Bureau of Code Revision. Eff 10-1-53.**

**§ 3375.33. Boards of library trustees are bodies politic and corporate.**

The boards of library trustees appointed pursuant to sections 3375.06, 3375.10, 3375.12, 3375.15, 3375.22, and 3375.30 of the Revised Code are bodies politic and corporate, and as such are capable of suing and being sued, contracting, acquiring, holding, possessing, and disposing of real and personal property, and of exercising such other powers and privileges as are conferred upon them by law.

**HISTORY: GC § 7628; 122 v 166; Bureau of Code Revision. Eff 10-1-53.**