

IN THE SUPREME COURT OF OHIO

Richard Houck, *et al.*, : Case No. 06-1262
: :
Appellants : :
: :
vs. : [On Appeal from Huron County
: Court of Appeals, Sixth Appellate
Board of Park Commissioners, : District, Case No. H-05-018]
Huron County Park District, *et al.*, : :
: :
Appellees. : :

**AMICI CURIAE REPLY BRIEF OF OHIO FARM BUREAU FEDERATION, INC.
AND HURON COUNTY FARM BUREAU IN SUPPORT
OF APPELLANTS, RICHARD HOUCK, ET. AL.**

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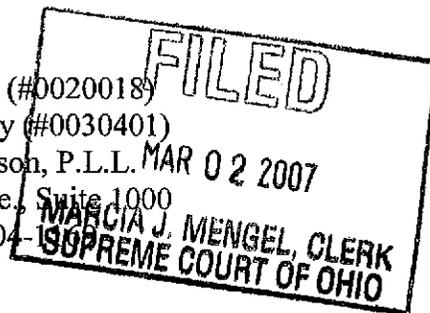


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REPLY ARGUMENT

In response to the brief submitted by *Amici Curiae* Board of Park Commissioners, Columbus and Franklin County Metropolitan Park District, and Board of Park Commissioners, Five Rivers Metroparks (hereinafter “Amici Metroparks”), *Amici Curiae* Ohio Farm Bureau and Huron County Farm Bureau (hereinafter “OFB”), on behalf of its members, reiterates its agreement with statements contained in Appellants’ Reply Brief. Further, similar to Appellees and Amici Metroparks, many OFB members also have large tracts of land, which often lie fallow in their natural state. Much of this farmland that often lies fallow for long time periods is not fenced. Yet, Ohio property law imparts an implicit duty to all OFB members (and the general public) to occasionally review their real property to determine whether a trespass or encroachment is occurring. Certainly, OFB members have an obligation to protect their land from any claim of ownership by another party. However, unlike many park districts, OFB members do not have an active police force and most do not have hundreds of employees or volunteers to help them with this task. Appellees suggest that it and other governmental political subdivisions are immune from adverse possession yet may claim private property from OFB members and the general public by adverse possession. In essence, Appellees seek to impose a “heightened duty of vigilance” upon the general public greater than any political subdivision. *Amici Political Subdivisions* at 4, citing *Heddleston v. Hendricks* (1895) 52 Ohio St. 460. It is not an unreasonable imposition upon all private citizens to periodically review their real property holdings. It promotes effective and efficient use of real property. Similarly, it is not unreasonable to require Appellees to adhere to the same real property rules as OFB members and private citizens. If Appellees’ and Amici Metroparks’ boundaries are not typically well marked, and their employees cannot reasonably determine boundary lines, then those boundaries should be properly marked. This is particularly the case if they feel that this fact prevents them from keeping an adverse and hostile party off their land for 21 years. It is not unreasonable to require Appellees to at least post boundary markers informing their employees of the physical

limits of their authority, particularly in the area of police enforcement. OFB believes that it is the rare Ohio metropark that does not have some sort of boundary marker over much of their property. OFB believes that every metropark has the physical capability of marking their boundaries and most do so in some manner. Similarly, it is the rare Ohio municipality or county that does not have a corporation limit sign at every main access highway into the political subdivision. Most park districts close main entrances after set park hours and would quickly discover a trespasser setting up residence on park property after just a few hours or days--rather than failing to discover that trespasser for decades.

Amici Metroparks' Brief claims that "those entrusted with public lands, like park districts, often lack the resources or means to constantly monitor their boundaries." Amici Metroparks Brief at 5. Adoption of Appellants' proposition of law would not require Appellees to "constantly monitor their boundaries." They would simply be required to review them at least once every 21 years---perhaps during their normal park ranger rounds or employee duties to monitor conservation covenants and restoration projects? Appellants' proposition does not require Appellees to "restrict public access to park properties." Amici Metroparks Brief at 6. Most Appellees have their own police force tasked with the responsibility of: (a) opening and closing various areas of the park; (b) enforcing traffic violations on park land; (c) arresting and removing trespassers; (d) policing for destruction, vandalism and other crimes on park property; and (e) enforcing park rules and regulations. Other park employees are tasked with protecting park lands and maintaining or establishing their environmental integrity. Often, access roads, hiking and biking trails and other alterations are made by the park district to make the area more accessible to the public.

The very tasks assigned to these park rangers and employees require them to regularly enter park property and control public access. Yet, Appellees and Amici Metroparks claim that they are unable to control public access? The elements of adverse possession are not satisfied by a mere trespass to the property and certainly not satisfied by an invitee-park user. There are no claims of ownership under these scenarios, not to mention the fact that it is absolutely

unforeseeable that the exclusivity requirement of adverse possession would be satisfied. It is also highly unlikely that the rare adverse possession claimant would go completely unnoticed for a 21-year period of time. Appellees and Amici for Appellees suggest that re-affirming present Ohio law, as set forth in *Brown v. Bd. of Educ., Monroeville Local Sch. Dist.*, (1969), 20 Ohio St. 2d 68, would open the floodgates and allow a land grab by "...opportunistic individuals" similar to the 1949 gold rush. Amici Metroparks at 11. Yet, unsurprisingly, *Brown* has been law since 1969 and no case of adverse possession of political subdivision property, other than streets and highways cases, have even reached an Ohio court of appeals. The various concerns of Appellees and its Amici seem greatly exaggerated. Their hollow assertions are a thinly veiled attempt to place park districts into a special category that is not authorized by law, logic, or reality. The reality is that the law does not protect park districts from adverse possession, so park districts are raising a slew of public policy panic theories in an effort to save them without any factual reference or basis. This is a case of first impression that does not change the law but will re-affirm what the law has been. It will impose no new additional duties on park districts and they will survive as school boards have since 1969 when *Brown* was first decided.

FENCING IS A VIABLE BUT NOT NECESSARY OPTION

Amici Metroparks' Brief claims "those entrusted with public lands, like park districts, often lack the resources or means to constantly monitor their boundaries." Amici Metroparks Brief at 5. They go on further to state that they rely heavily on part-time, seasonal and volunteer workers who "lack the historical knowledge or experience of a private landowner to identify and closely monitor boundary lines or guard against prescriptive uses." *Id.* They complain that it is "difficult to maintain consistent monitoring" of their park lands. *Id.* Further, they declare that "public parks are often expansive and exact boundary lines are seldom clearly marked," and that, given the size, "monitoring or staking out boundary lines is often impracticable." Amici Metroparks Brief at 5-6. The truth of the matter is that none of these declarations has anything to

do with any element of adverse possession, not to mention whether or not it should apply to park districts.

If this is the case, how can Amici Metroparks claim that if this Court does not adopt its position then “park districts might be forced to restrict public access to park properties.” *Id.* at 6. If they are capable of so easily restricting public access, then how is it so difficult to restrict the same public access as it relates to potential adverse possessors who must occupy the land for at least 21 years adversely to the park district?

Amici Metroparks’ Brief claims public park lands are meant to be kept open and “often cannot be fenced or posted” and that fencing “is not an option.” *Id.* at 6-7. This is not true. Keep in mind that the purpose is not to prevent entry but to notify park personnel of the location of the property boundary lines because employees lack the historical knowledge or experience of a private landowner to identify and closely monitor boundary lines or guard against prescriptive uses. *Id.* at 5. There are many different types of boundary markers or fences available for the purposes needed by Amici Metroparks. OFB agrees that a twelve-foot security fence may be impracticable both from a cost standpoint and from the standpoint of preventing free range of wildlife. Most OFB members never use such fencing. Other types of boundary markers could include: single chain and wood posts, split rail fencing, simple notice posting, fieldstone markers or walls, or single wire line with a hanging notice marker.

Not all park district property is in a remote and natural condition. If the land is undeveloped and remote, other types of boundary markers are quite practical. For example, Appellee Erie Metroparks utilizes split rail fencing along its Hull Road, Erie County, border which is neither cost prohibitive nor does it interfere with wildlife and Core or Edge development. Even less intrusive fencing or marking is also viable.

Amici Metroparks argue that the cost associated with fencing is prohibitive. This is an argument without specifics. However, a simple wooden post with a single chain strung between it is not expensive. Even that would not be required if the main purpose were to simply inform new employees of park boundaries due to “frequent turnover” of park personnel. Simple notice

posting is a lot less costly. While neither a fence nor a posting will stop a trespasser, it identifies lot lines thereby enabling park police rangers and employees to identify the trespass, which of course must occur for 21 uninterrupted years to turn into a viable adverse possession claim.

Amici Metroparks argue that they have an “inability to actively patrol park boundaries.” Amici Metroparks at 8. Most park borders are delineated by roads or ranger trails that can be traversed by motor vehicle. As for those remaining park areas generally inaccessible to the public, Amici Metroparks admit that adverse possession would probably not be an issue because any attempt to exercise hostile control would “**admittedly remain difficult for opportunistic individuals to satisfy the strict long-term time requirements of the adverse possession doctrine.**” *Id.* at 10 (emphasis added).

Amici Metroparks argue that they cannot erect fencing or post notices due to the presence of various environmental covenants. Regardless of the type of environmental covenant, all of them require at least occasional review to determine whether the environmental succession restoration or re-absorption are progressing properly and are in compliance with the agreement. The natural state of the land would make observation of an attempted adverse possessor all the more obvious. Posting the occasional notice of park boundary line would not necessarily be a violation.

Amici Metroparks argue that fencing prevents the “succession restoration” process. Amici Metroparks Brief at 8. While this may be true with a security fence it is certainly not true with all types of notice posting or boundary markers. Placing a post marker does not prevent or substantially interfere with the growth of natural grasslands, old growth forests, river corridors or wetlands. In fact, most park districts typically post informational markers throughout their parks to inform visitors of a wide variety of nature “facts” with lookout platforms, foot bridges and trail edge boundaries. Many park districts develop stoned or paved trails, yet argue that boundary markers are impractical?

Amici Metroparks argue that fences “prevent the establishment of natural ecosystems” and “can often destroy them by interfering with edge habitats and causing habitat

fragmentation.” Amici Metroparks Brief at 8. “Protection of increasingly rare grasslands, old growth forests, river corridors, and wetlands constitutes one of the most important duties of park districts.” *Id.* at 7. How does a split rail fence or a posted notice of park property prevent this? If these claims were true, fences could stop the spread of the ash borer or gypsy moth and prevent deer from becoming highway hazards.

Amici Metroparks’ Core and Edge discussion is equally disingenuous. A “marker” fence would not upset Core and Edge balances. Split rail fencing does not prevent small animals from crossing under nor prevent large animals, such as deer, from leaping over. As further support for its argument against fencing, Amici Metroparks’ Brief, at FN7, claims that running a fence through a Core habitat causes that habitat to be destroyed by fragmentation. “Essentially, if an existing Core is segmented by a new Edge, the Edge species will, over time, displace the Core species such that the Core habitat will recede from the Edge line.” However, this can occur anyway if both the Core and the Edge are not entirely owned by the park district. The adjacent property owner can put up a fence, even a security fence, through a Core area because the adjacent park district is not the complete owner of the entire Core area. More importantly, the adjacent owner, like an OFB member, would have a greater incentive to do so because the park district may attempt to adversely possess their property.

It is interesting that Amici Metroparks argues that if *Brown* is upheld, “some park districts might be faced with the choice of either expending resources they simply do not have [to erect boundary markers and prevent public access] or limiting the very public access for which park lands are held.” *Id.* at 7. If they can limit public access then wouldn’t boundary markers and some type of fencing assist them in this endeavor?

Amici Metroparks Brief claims that park districts will be forced to defend against frequent legal challenges aimed at quieting title or securing prescriptive easements. Amici Metroparks Brief at 10-11. This also is a superficial argument designed to invoke unfounded fears. Rather than maintaining the law’s *status quo* by upholding *Brown*, Appellees’ proposition of law would deny legitimate private property owners their real property if a record title flaw

exists since no evidence of long term ownership would be allowed into evidence, even if that long term occupation and ownership is multi-generation as is the case with most OFB members. *Brown* has been law since 1969 and no major encroachments on public lands have occurred in the intervening 38 years. In fact, since this case is one of first impression occurring in 2007, the idea that an avalanche of would-be adverse possessors will start running out to park districts to claim land is even more dubious. The 1969 school district case could have just as easily been a park district instead of a school district. But because of the minimal likelihood that the onerous requirements of adverse possession will be met under the conditions present in park districts, these fears are unfounded. The Court's ruling in this case will not change that. Conversely, opportunistic park districts might attempt to obtain record title to lands in the waning days of private possession knowing that evidence of long-term occupation is inadmissible in Court. We cannot forget how this case came before the Court--extraordinary facts that glaringly illustrate the negligence of the park district, not the bad actions of the Appellant.

Adopting Appellees' proposition of law would cause legally absurd results. Consider the very possible following scenario: Government (G) sells Blackacre to A intending to sell all of Blackacre. Through an error in transfer, legal description or enabling resolution, record title to Blackacre did not correctly transfer to A although A paid for all of Blackacre and A, his heirs and assigns occupied all of Blackacre undisturbed for 150 years. G discovers the record title error and re-asserts ownership. A cannot demonstrate ownership by occupancy, intent of the parties or any other aspect of possession. G obtains Blackacre.

PARK DISTRICTS ARE NOT PREVENTED FROM ASSERTING ADVERSE POSSESSION CLAIMS

Appellees assert that they should be entitled to utilize adverse possession against private individuals and thereby obtain private property without any compensation by extrinsic proof of occupancy and other elements of adverse possession upon public policy grounds. Appellees argue for this proposition based upon one incorrect assumption: that private property owners

“have the ability and resources to monitor and protect their property interests” and Appellees do not. Appellees’ Brief at 19. This is an assumption without any factual basis. There are both rich and poor park districts as there are rich and poor private landowners. All should be treated equally in the eyes of the law. While Appellees argue that “property should be put to its highest and best use,” citing *Nusekabel v. Cincinnati Public School Employees Credit Union, Inc.* (Hamilton Co. App. 1997), 125 Ohio App. 3d 427, it then proposes that all uses of park districts are the “highest and best use”¹ and implies that no uses by OFB members are a “highest and best use,” thereby allowing adverse possession by a park district but not against a park district. This is governmental arrogance in its highest and worst form, not to mention a disguised unconstitutional taking.

While Appellees assert that park districts have always had the right to utilize all evidence to prove adverse possession; Amici Metroparks argue that this proposition “may be incorrect” and that the issue of whether metroparks may acquire property by adverse possession “remains unsettled.” See: Amici Metroparks’ Brief at Note 2. Amici Metroparks claims that *Law v. Lake Metroparks*, 2006-Ohio-7010, (Lake Co. App. Dec. 20, 2006) (“*Law*”) has “intimated” that park districts may not use adverse possession. OFB believes that this is a further example of why the reasoning in the *Law* case is fundamentally flawed.

Amici Metroparks also cites *Nottke v. Bd. of Comm’rs, Erie Metroparks*, 2005 Ohio 323 (“*Nottke*”) for the proposition that park districts were denied the right to assert an adverse possession claim. *Nottke* remains pending at the trial court level. The Sixth District Court of Appeals simply held that Erie Metroparks’ adverse possession claim required trial on questions of fact thereby preventing summary judgment for Erie Metroparks. As Erie Metroparks’ (an Appellee herein) adverse possession claim was the only remaining claim before the trial court, a Court of Appeals decision denying adverse possession, as asserted by Amici Metroparks, would

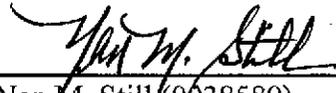
¹ “...land owned by the public benefits the community no matter how it may presently be used or who may be using it.” Appellees’ Brief at 20.

have required judgment in favor of *Nottke* as a matter of law. The Court of Appeals did not conclude the case in favor of *Nottke*.

CONCLUSION

For the aforementioned reasons and those set forth in the briefs of Appellants, *Amici Curiae* Ohio Farm Bureau and Huron County Farm Bureau request that this Court affirm the concepts set forth in *Brown v. Bd. of Educ., Monroeville Local Sch. Dist.*, (1969), 20 Ohio St. 2d 68 by applying the doctrine of adverse possession against Appellees herein.

Respectfully submitted,



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PROOF OF SERVICE

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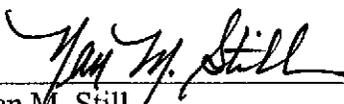
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