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**MERIT BRIEF OF APPELLEE NEW 52
PROJECT,INC.**

I. STATEMENT OF THE CASE AND FACTS

Appellee, New 52 Project, Inc. (“New 52”), is in general agreement with the Statement of the Case and Facts submitted by Appellant, Director, Ohio Department of Transportation (“ODOT”).

II. ARGUMENTS IN RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW

Appellant ODOT's Proposition of Law No. 1:

A court of common pleas has no jurisdiction to decide whether a state highway easement has been abandoned, because R.C. Title 55 gives the Director of Transportation exclusive authority to abandon or vacate portions of the state highway system.

Appellee New 52 Project, Inc.'s Response to Appellant's Proposition of Law No. 1:

A cause of action exists for abandonment of an easement no longer used for highway purposes and R.C. 5511.01 and R.C. 5511.07 do not oust the courts of jurisdiction to decide such a cause of action.

In its first proposition of law, ODOT suggests that (1) because the provisions of R.C.5511.01 and R.C. 5511.01 are the exclusive means of ODOT's abandoning any portion of the highway system, (2) because policy considerations favor such an interpretation, and (3) because statutory intent favors such an interpretation, the courts have no part in determining whether or not a highway easement has been abandoned. Each prong of that argument is incorrect.

ODOT's argument first ignores authority from this court that clearly delineated the proposition that clearly held that a common-law abandonment based on nonuser was possible. *E.g., Kelly Nail & Iron Co. v. Lawrence Furnace Co.* (1889), 46 Ohio St. 544, 22 N.E. 639; *Fox v. Hart* (1842), 11 Ohio 414.

Despite ODOT's assertion that the statutory method of relinquishing highway property is exclusive, a close reading of the statutes will show that in fact the statutes are not so intended.

R.C.5511.01 does not by its terms provide an exclusive mechanism for the abandonment of all state highway property:

The director may, upon giving appropriate notice and offering the opportunity for public involvement and comment, abandon a highway on the state highway system or part of such a highway which the director determines is of minor importance or which traverses territory adequately served by another state highway, and the abandoned highway shall revert to a county or township road or municipal street.

Clearly by its terms, this statute is limited to the situation where a *highway* is being abandoned and has no application to the situation here, where a highway easement is no longer being used for highway purposes. Otherwise, the requirement that the property become a county or township road or municipal street becomes nonsensical.

Likewise, by its terms, R.C. 5511.01 deals only with the situation where ODOT has determined that a highway is to be abandoned. Its terms do not encompass the situation where a portion of the highway property has been *de facto* abandoned, even though the fact of abandonment is unacknowledged or contested by ODOT. The interpretation urged by ODOT would make the Director's determination of abandonment *vel non* completely untestable and unreviewable. Such an unlimited discretion is contrary to our legal system, and has been at least since *Dr. Bonham's Case* (1610), 8 Co. Reports 114 (Court of Common Pleas), wherein Lord Coke remarked that no person should be a judge in his own case.

Neither does R.C.5511.07 contrary to the prior Supreme Court holdings allowing the common-law abandonment of a highway easement. As with R.C. 5511.01, R.C. 5511.07 speaks only to the determination of ODOT that a given highway or portion thereof "is no longer necessary for the purposes of a public highway." It therefore does not encompass the situation here – where an easement is no longer being used for highway purposes at all.

Neither would the holding that a common-law abandonment is possible provide the threat to the highway system that ODOT suggests. The suggestion that thereby ODOT might lose property by inadvertence is fanciful. Given the statutory period of twenty-one years for an abandonment to occur, it is unlikely that ODOT would fall prey to a moment's inattention and lose a valuable piece of property.

Nor do the policy considerations suggested by ODOT apply in the present case. The use of the easement at issue in this case for recreational or trail purposes is problematic, since the easement is hardly suited for those purposes. Nor are damages likely, as envisioned by R.C. 5511.07; the complaint clearly alleges that the easement bisects plaintiff's fee – thus making plaintiff the only abutting landowner.

Appellant's suggestion that the General Assembly "displaced the common law of abandonment with regard to state highways" falls afoul of the fact that this Court in 1889 held that such a common-law abandonment could occur, *Kelly Nail & Iron Co. v. Lawrence Furnace Co.* (1889), 46 Ohio St. 544, 22 N.E. 639, thirty-five years after the General Assembly began the displacement of common law abandonment according to ODOT.

The last policy consideration stated by ODOT is the Federal requirement that if unneeded highway property is not sold for fair market value, the Federal Highway Administration must approve the transfer. However, those regulations state that "The term fair market value as used for acquisition and disposal purposes is as defined by State statute and/or State court decisions." C.F.R. 710.403(d). Certainly, for purposes of R.C. 5511.07, the fair market value for land relinquished to the underlying fee owner is zero: "The director shall make the vacation of a highway or portion of a highway to an abutting landowner or current underlying fee owner of

record at no cost.” Such a finding of fair market value could be adapted to a common law action of abandonment.

Appellant ODOT’s Proposition of Law No.2:

Because the decision to relinquish a public right-of-way, even if unused for twenty-one years, involves a careful balancing of public and private interests, a court of common pleas has no jurisdiction to adjudicate whether a state highway easement has been forfeited.

Response to Proposition of Law No. 2: *Bigler v. Twp. of York* (1993), 66 Ohio St.3d 98 is inapposite to the matter presented here; therefore, its reasoning should not be extended to causes of action for abandonment of state highway easements.

ODOT asserts that the reasoning set forth in *Bigler* is applicable to case at bar and leads to the conclusion that a common pleas court lacks jurisdiction to adjudicate whether a state highway easement has been abandoned. The reasoning set forth in *Bigler*, however, was based on an analysis of R.C. 5553.042. R.C. 5553.042 is not at issue here, and it is entirely distinguishable from R.C. 5511.01. The reasoning applied in *Bigler*, therefore, has no bearing on the effect R.C. 5511.01 has, if any, on a common law cause of action for abandonment of a highway easement.

R.C. 5553.042 addresses the procedure for vacation of township roads where such roads have been abandoned and unused for twenty-one years. It provides two mechanisms for vacating a township road: (1) a formal proceeding for vacation pursuant to the procedures set forth in R.C. 5553.04 through 5553.11; or (2) a petition filed by abutting landowners with the board of county commissioners. Under either procedure, a township road may not be vacated unless it has been abandoned and unused for twenty-one years. Significantly, R.C. 5553.042 provides that the county commissioners may deny a landowner’s petition even if the

commissioners determine that a township road has been abandoned and unused for twenty-one years.¹

Given this language, the *Bigler* court determined that R.C. 5553.042 would be rendered meaningless if abutting landowners could bring an action to quiet title on the grounds of abandonment. *Id.* at 101. In other words, a cause of action for abandonment of a township road is necessarily inconsistent with the authority and discretion afforded county commissioners in R.C. 5553.042. Accordingly, *Bigler* held that a common pleas court has no jurisdiction to quiet title to a township road. *Id.* at paragraph 2 of the syllabus. The statute at issue here, R.C. 5511.01, is nothing like R.C. 5553.042.

R.C. 5511.01 does not address the situation where a state highway or highway easement remains unused for any period of time, let alone for twenty-one years. Instead, R.C. 5511.01 provides that the director of ODOT may abandon a “highway” (the statute says nothing about a highway easement) that the director determines is of “minor importance or which traverses territory adequately served by another highway.”² Unlike a township road under R.C. 5553.042,

¹ The relevant section of R.C. 5553.042 states:

(B) A township shall lose all rights in and to any public road, highway, street or alley which has been abandoned and not used for a period of twenty-one years, after formal proceedings for vacation as provided in 5553.04 to 5553.11 of the Revised Code have been taken. Upon petition for vacation of such a public road, highway, street, or alley filed with the board of county commissioners by any abutting landowner, if the board finds that the public road, highway, street, or alley has been abandoned and not used for a period of twenty-one years as alleged in the petition, the board, by resolution, *may* order the road, highway, street, or alley vacated, and the road, highway, street, or alley shall pass, in fee, to the abutting landowners, as provided by law * * *. [Emphasis added.]

² The relevant portion of R.C. 5511.01 states:

The director may, upon giving appropriate notice and offering the opportunity for public involvement and comment, abandon a highway on the state highway system or part of such highway which the director determines is of minor importance or

if a highway is abandoned pursuant to R.C. 5511.01, ownership thereof is not transferred to the abutting landowners; rather, the highway reverts to a county or township road or municipal street. R.C. 5511.01 contains no provision giving the director of ODOT the discretion and authority to reject a petition or any other “claim” by a servient estate owner that a highway easement has been unused for twenty-one years and therefore has been abandoned.

Neither does R.C. 5511.01 provide for the submission of the issue to a disinterested factfinder, as R.C. 5553.042 provides for the submission of the issue to the county commissioners.

In short, R.C. 5511.01 does not address the effect a twenty-one year abandonment may have on a state highway easement and the ability of the servient estate owner to assert title to the underlying easement. In contrast, the statute at issue in *Bigler*, R.C. 5553.042, does address the effect a twenty-one year abandonment of a township road may have on an abutting landowner’s ability to gain title to the township road. Under R.C. 5553.042, the county commissioners retain the sole authority to determine whether an abandonment will result in the transfer of title to the abutting landowners. R.C. 5511.01 grants no such exclusive authority to the director of ODOT in relation to state highway easements.

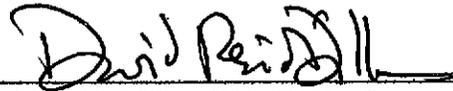
Because R.C. 5553.042 and R.C. 5511.01 are distinguishable, the reasoning in *Bigler* has no application to the meaning of R.C. 5511.01 or its effect, if any, on the common law cause of action for abandonment of a highway easement. The court of appeals, therefore, did not err in not extending its reasoning to this case.

which traverses territory adequately served by another state highway, and the abandoned highway shall revert to a county or township road or municipal street. A report covering that action shall be filed in the office of the director, and the director shall certify the action to the board of the county in which the highway or portion of the highway so abandoned is situated.

IV. CONCLUSION

Because the State of Ohio recognizes a common law action for abandonment of a highway easement and because the provisions of R.C. 5511.01 and R.C. 5511.07 do not provide the sole means of pursuing such a cause of action, the court of appeals decision should be affirmed.

Respectfully submitted,

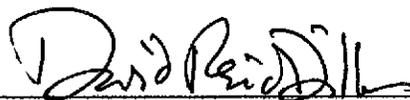


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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Merit Brief of Appellant was served upon the following, by regular United States mail, postage prepaid, this 7th day of October, 2008:

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