

In the
Supreme Court of Ohio

NEW 52 PROJECT, INC., : Case No. 2008-0574
: :
Plaintiff-Appellee, : :
: :
v. : On Appeal from the
: Franklin County
: Court of Appeals,
GORDON PROCTOR, DIRECTOR, OHIO : Tenth Appellate District
DEPARTMENT OF TRANSPORTATION, : :
: :
Defendant-Appellant. : Court of Appeals Case
: No. 07-APE-06-0487
:

**REPLY BRIEF OF DEFENDANT-APPELLANT
DIRECTOR, OHIO DEPARTMENT OF TRANSPORTATION**

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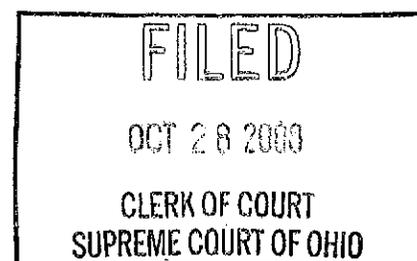


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INTRODUCTION

In its opening brief, the Ohio Department of Transportation (“ODOT”) explained that the statutory process for abandoning or vacating a state highway is an exclusive system, leaving no room for a residual common-law action for abandonment. That is true for all forms of abandoning or vacating state highways: The statutes displace common-law suits regardless of whether the highway was laid out over land held in fee simple or by easement. And it matters not whether the person wanting the ODOT Director to abandon is an abutting landowner or the owner of a servient estate underlying an easement.

All this is true because of the exclusive nature of the statutory system, and it is further confirmed by this Court’s decision in *Bigler v. Township of York* (1993), 66 Ohio St. 3d 98. In *Bigler*, the Court held that courts could not hear quiet title actions regarding township roads, because the relevant statute established an exclusive mechanism for vacating such roads. The Court explained in *Bigler* that the statute vested discretion in the relevant executive, namely, the board of county commissioners, and common-law court actions could not disturb that. The same is true at the State level, where executive discretion—here, the ODOT Director’s—is inconsistent with allowing court actions.

To all this, Plaintiff-Appellee New 52 Project, Inc. offers several arguments in favor of allowing a common-law action, thus circumventing the statutes, but none of its arguments is persuasive. New 52 insists that a few cases from the 1800s—long before the current statutes and before *Bigler* in 1993—support its view. But those cases do not even support New 52 on their own merits, aside from the fact that time, statutes, and *Bigler* have passed them by. New 52 also seems to say that the statutes do not apply to *easements* because they refer only to abandoning or vacating “highways” without referring specifically to the term “easements.” But ODOT cannot, of course, relinquish an easement on which a highway is built without also abandoning the

highway itself. And the relevant statutes were enacted at a time (in the 1920s) when virtually every mile of Ohio's highway system was built on easements, long before the advent (in the 1950s) of the modern practice of acquiring highway land in fee simple. So the statutes could only have had easements in mind.

Finally, New 52's attempt to distinguish *Bigler* falls flat. New 52 says that county roads are different from state ones, and that the statute regarding county roads differs from the one regarding state roads, but none of the purported differences concern *Bigler*'s fundamental principle that executive discretion is incompatible with court action. New 52 suggests that county commissioners somehow count as disinterested decisionmakers, in a way that the ODOT director does not, but that arbitrary assertion is both unsupported and unsupportable.

For all these reasons, the Court should reject New 52's request to recognize a common-law action against ODOT, and it should hold that the statutory scheme is the sole means for abandoning or vacating state highways, just as it is for county and township roads.

ARGUMENT

A. **Because the statutes governing state highway abandonment create an exclusive system, no common-law action for abandonment exists outside the statutory scheme.**

Under R.C. 5501.31, ODOT's Director has "general supervision of all roads comprising the state highway system." As part of that general power, the Director can decide, after notice and an opportunity for public comment, to abandon a road from the state system into the jurisdiction of the township or county in which it lies. R.C. 5511.01 (the "Abandonment Law"). The Director can also decide, after notice and a hearing of claims, to vacate a state highway easement and transfer it to the owner of the underlying fee. R.C. 5511.07 (the "Vacating Law").

New 52 argues that these statutes are not exclusive mechanisms. It says that it may sue ODOT under common-law abandonment doctrine, and in such a case, a court can require ODOT to relinquish a highway easement to the fee owner. But New 52 is wrong.

Each of New 52's counter-arguments fails. First, as detailed below, New 52's reliance on two nineteenth-century opinions is misplaced. New 52 Br. at 2. Not only did those cases predate the modern statutes and modern case law such as *Bigler* (detailed below at 13-17), but the merits of those old cases do not even support New 52's claim. That is, even the Court's pre-statutory common-law cases show that claims such as New 52's were not successful. Second, the modern statutes supplanted any common-law claims that purportedly existed, and New 52 has not overcome that hurdle. Third and finally, the statutes not only vest discretion in ODOT's director, but equally important, the statutes impose *procedural* duties on ODOT's director, and New 52 has not adequately explained how those procedural steps can be satisfied if the entire statutory process is sidestepped by a court action.

- 1. Claims such as New 52's would have failed even under common law, as pre-statutory cases required more than an allegation of twenty-one years of non-use of a highway; a purportedly adverse owner had to show that he used the easement in a way that precluded any future public use.**

New 52 relies on two nineteenth-century cases for its argument that common law abandonment based on non-use was possible, but its reliance is mistaken, because neither case applied abandonment doctrine. See New 52 Br. at 2 (citing *Fox v. Hart* (1842), 11 Ohio 414, and *Nail & Iron Co. v. Furnace Co.* (1889), 46 Ohio St. 544).

In *Fox*, the Court first explained that the issue of abandonment for twenty-one years was not before it, so that any comment on that issue was dicta. *Fox*, 11 Ohio at 416. Specifically, the Court noted that the "case was supposed to present the question, whether the public right to a road is lost, by the encroachments of an adjacent owner for the period of twenty-one years," but

the facts were such that the case could be “be disposed of without deciding that point.” *Id.* The Court noted that the question “should be left to be determined when, by a proper case, it is required.” *Id.*

The question was not raised because the purported adverse possession was both too short in time and not adverse enough in nature. In *Fox*, an abutting owner’s fence had encroached on part of a highway for eighteen years, so it fell short of the twenty-one year period that would be required even if the action could otherwise proceed. See *id.* Further, the owner’s use was not fully adverse to the public’s right-of-way, as part of the road was still left open for public travel. Thus, the highway supervisor could widen and re-open even the fenced-off part whenever the public use would again require it: “there is nothing to authorize the presumption, that any portion of it had been abandoned or would not be occupied as soon as the public convenience should require.” *Id.* Consequently, *Fox* does not support the idea that the Court had allowed common-law abandonment to be used against the state, but only that the Court deferred the question.

Similarly, in *Nail & Iron Company*, the Court again found that the time for adverse possession would not have run, because only eleven years had passed since public travel was diverted from one road to another. 46 Ohio St. at 547. A new road had been opened, and a landowner claimed that the diversion of traffic to a new road showed that the public meant to abandon the old road, even though twenty-one years had not passed. *Id.* at 545. And, although a statutory road-vacating process existed, the Nail & Iron Company contended that abandonment was shown so clearly by the “acts and conduct of the public” that it would be a “vain thing” to require adherence to the statute. *Id.* at 546. But the Court disagreed, holding that the facts were “not sufficient to show abandonment by the public.” *Id.*, syllabus. The Court again explained

that even “[i]f non-use[] of such road may work an abandonment of it, the non-use[] must be shown to have extended over a period of twenty-one years.” *Id.* And while the Court still seemed to leave open the *possibility* that a court action could exist in some other cases, it also noted that “no good reason exists why the statutory remedy may not be resorted to in” cases such as *Nail & Iron Company’s*. *Id.* at 549. Thus, *Nail & Iron Company* does not establish that the Court allowed causes of action of the type New 52 seeks; it shows only that the possibility was left open while parties continued to plead claims that fell short.

In other cases, though, the Court did squarely face the issue, and it firmly rejected New 52’s view, even before the modern statutes fully displaced common-law actions. When the Court was presented with facts showing twenty-one years of non-use, it repeatedly rejected the argument that non-use—i.e., what New 52 alleges here—could cause abandonment of a public highway. In *Lane v. Kennedy*, 13 Ohio St. 42, 46 (1861), an abutting owner asserted title to a part of a highway that he had fenced in for twenty-one years. Denying the owner’s claim, the Court explained that “such partial encroachment upon the side of a surveyed and traveled highway, was not *necessarily adverse* to the public, nor *inconsistent* with its easement, and therefore constituted no bar to its reclamation by the supervisor, when required for public travel.” 13 Ohio St. 42, syllabus (emphasis in original); see also *McClelland v. Miller* (1876), 28 Ohio St. 488, 502 (following *Lane*). In *McClelland*, the Court relied on *Lane* and similarly rejected a claim even where an owner put a fence partly in the public way, saying again that a partial encroachment was not inconsistent with public use.

Finally, in *Heddleston v. Hendricks* (1895), 52 Ohio St. 460, the Court took the next step and concluded that “a portion of a public highway, cannot be acquired by adverse possession, however long continued.” 52 Ohio St. 460 at syllabus ¶ 3. *Heddleston* described that principle

as flowing from *Lane* and *McClelland*, which it viewed as “the settled law on the subject.” *Id.* at 467. Instead of treating a private owner’s encroachment as a step toward adverse possession, *Heddleston* treated such encroachment on a highway as a nuisance, and a nuisance could never defeat the public’s right. *Id.* at 467-68. And notably, *Heddleston* came after *Nail & Iron Company*, and while it did not cite that case, that is understandable in light of the fact that *Nail & Iron*, like *Fox* before it, was more easily resolved on the simple point that twenty-one years had not passed.

Taken together, these cases show that the Court never allowed claims such as New 52’s to succeed. When the time was too short, it resolved cases easily on that ground, and when the time element was satisfied, the Court explained that only a private use that was completely inconsistent with public use, not mere public non-use or purported “abandonment,” was enough. In addition, in all these cases, the Court’s analysis was unaffected by whether the public held the highway by easement or fee title, and notably, *Lane* and *McClelland* involved highway easements. If the common law allowed abandonment claims based on non-use of an easement, those owners should have won—but they did not.

Finally, and most important, courts today have no jurisdiction to hear such a common law claim, even if such a claim ever existed, because the General Assembly gave the Director of Transportation exclusive, discretionary power to dispose of state highway right-of-way.

- 2. By enacting laws to specify how the Director of Transportation may express the State’s intent to relinquish a highway easement, the General Assembly ensured that highway property would not be lost through inadvertence.**

As ODOT’s opening brief explained, the comprehensive statutory scheme for abandoning or vacating highways leaves no room for a common-law action as an alternative path. New 52 says that the statutes do not displace common law here because easements are different, but

virtually all highways were built on easements when the statutes were enacted, and the older cases reflect no distinction between easements and fee titles.

Other than that failed distinction, New 52 offers little to explain why the statutes do not apply here. For example, New 52's statutory discussion includes the argument that "the policy considerations suggested by ODOT," i.e., ODOT's explanation that the Assembly did not want public rights lost by inadvertence, do not apply here. New 52 Br. at 4. But the Court has never adopted the principle that a statute does not apply merely because the reasons for its adoption do not apply in a particular case. If the General Assembly enacts a statute to govern a class of cases, then that statute governs all cases covered by its terms, regardless of whether the policy that motivated the statute's enactment is satisfied in each case.

Equally important, the policy behind that statute—a concern that public rights should not be lost by inadvertence, as opposed to an express choice as shown by an administrative process—is at stake here. As explained above, even before the statutes displaced the common law, the Court never held that the public's interest in an easement was lost by non-use. More recent cases explain that, even in contexts where abandonment might be available, a party must show an intent to terminate the easement, and acts by which that intent is put into effect. See, e.g., *West Park Shopping Ctr., Inc. v. Masheter* (1966), 6 Ohio St. 2d 142, 144. And as the Court recognized in *Heddleston*, the public does not manage its property as a private owner does: "the same active vigilance cannot be expected of it, as is known to characterize that of a private person, always jealous of his rights and prompt to repel any invasion of them." 52 Ohio St. at 465.

New 52 is wrong when it dismisses the ongoing relevance of this issue. New 52 says the possibility that "ODOT might lose property by inadvertence is fanciful" because the twenty-one

year period makes it “unlikely that ODOT would fall prey to a moment’s inattention and lose a valuable piece of property.” New 52 Br. at 4. But the Court reiterated this “fanciful” concern just last year, citing *Heddleston*, when it rejected an attempt to apply adverse possession against a park district. *Houck v. Bd. of Park Comm’rs*, 116 Ohio St. 3d 148, 2007-Ohio-5586, ¶¶ 17-26. The Court not only noted that a “government entity should not be expected to be as vigilant in monitoring its property for trespassers as a private property owner,” *id.* at ¶ 26, but it also explained that a “reason for precluding adverse possession of *roads, streets, or highways* is that it interferes with the public use of the property in question,” *id.* at ¶ 24 (emphasis added). Surely the Court’s concern in *Houck*, namely, that the government might not notice an outright adverse use, applies with even greater force when the issue is not an adverse use by another party, but a mere non-use by the government.

Consequently, the General Assembly’s decision to mandate a statutory process for abandoning or vacating highways can only mean that the Assembly meant to ensure that state highway property could not be lost through inadvertence. The Vacating Law requires, among other things, a formal finding and a description of the property to be vacated. Strict compliance with these steps leaves no doubt as to the public’s intent to relinquish its highway easement, and anything other than strict compliance cannot result in forfeiture of an easement, no matter how complete and compelling the claimed acts of abandonment may appear.

Indeed, after the modern statutes were enacted, an appeals court expressly held that the new statutes were now the exclusive means to abandon or vacate a highway, leaving no room for further development of any common-law theories. *Rex v. Stoltz* (2d Dist. 1937), 24 Ohio Law. Abs. 564, 568. In *Rex*, the court explained that the older statutes had allowed for an abandonment to be effected automatically, when certain facts occurred. *Id.* But, said the court,

those statutes had been repealed, and the new statutory scheme did not include any such provision. To the contrary, the new scheme left no room for parties to ask a court to find that a road had been vacated or that an easement had been forfeited:

We are of the view that the Highway Department has no inherent right by any acts or procedure, other than a strict compliance with the statute, to work a vacation of a roadway or a forfeiture of an easement over a road which may have become of little use by virtue of the shifting of a highway. The statute provides the exclusive method. This view relieves us of weighing the evidence in this case.

Rex v. Stoltz (1937), 24 Ohio Law. Abs. 564, 568. The court in *Rex* was right to conclude that the new statutes provided an “exclusive method,” leaving no room for a common law civil action.

At most, perhaps, if the Director abused his discretion in deciding not to relinquish an easement, mandamus might be an appropriate remedy to correct that abuse of discretion. See, e.g., *State ex rel. Grein v. Ohio State Hwy. Patrol Ret. Sys.*, 116 Ohio St. 3d 344, 2007-Ohio-6667, ¶ 7. If that is possible as a theoretical vehicle—and ODOT does not concede it is—such a mandamus case would be difficult to win, as the Director’s discretion is so broad that it is hard to see how it could be abused. But even if mandamus can be used to challenge the Director’s exercise of his discretion, the more important point is that the Vacating Law lodges this discretion with the Director, not the courts, in the first instance.

3. The General Assembly’s intent to keep the statutory process exclusive is confirmed by the inclusion of detailed statutory procedures that ODOT’s Director must follow when he decides to abandon or vacate a highway.

As explained above, the General Assembly vested discretion in ODOT’s Director to decide whether to abandon or vacate a highway, and that vesting alone is enough to displace any alternate common-law actions. Equally important, though, is that the Assembly did more than entrust the Director with discretion; it also detailed a process that he must follow. This

mandatory process confirms that the statutory process must be exclusive, as a court action would sidestep not only his discretion, but would also sidestep that process.

The General Assembly's deliberate decision to make this process mandatory, and to exclude court actions, is further confirmed by comparing it to what came before. At one time, the old route of a relocated state or county road was automatically vacated by operation of law. 52 Ohio Laws 26 (1854). That law was repealed, however, when the General Assembly created the state highway department and enacted "a system of highway laws for the state of Ohio." 1915 Am. S.B. No. 125, 106 Ohio Laws 574, 623, 664.

At first, the highway department could only add existing roads to or drop them from the state system. 1919 H.B. No. 162, 108 Ohio Laws 478, 482-83. Soon afterward, the General Assembly gave the director of highways power to alter or relocate roads and to acquire property for that purpose "by easement deed." 1927 H.B. No. 67, 112 Ohio Laws 430, 440. But since altering or relocating a state highway might result in surplus land, the Assembly also gave the director discretion to vacate or abandon "any portion of the existing road or highway which he deems not needed for highway purposes." *Id.*

The present-day statutes, codified at R.C. 5511.01 and R.C. 5511.07, create an even more comprehensive scheme for ODOT to relinquish its property interests in highways. These laws provide for notice and public involvement before any final action by ODOT's Director—features that are incompatible with common law abandonment. Furthermore, because the Director of Natural Resources has the discretionary power to preserve old highway land for use as a recreational trail, the Vacating Law requires ODOT to notify ODNR before vacating a highway easement to the owner of the underlying fee. The history of that notification requirement strongly reinforces the conclusion that the statutes are exclusive.

At one time, an abutting landowner could petition the board of county commissioners to vacate an unused township road, and if the commissioners found the road had “been abandoned and not used for a period of twenty-one years” it had to order the township road vacated. Similarly, if a county road had not been improved with public funds and was “enclosed by bars or gate” for twenty-one years, and if the owner had not given an easement, then the road would be “deemed vacated” when the owner filed a sworn statement with the commissioners reciting those facts. But the Assembly amended those laws to give the commissioners discretion to vacate the roads or keep them under public control even if they had not been used for twenty-one years. 1971 H.B. No. 714, 134 Ohio Laws 2169; 1972 Am. Sub. S.B. No. 247; 134 Ohio Laws 465, 479 (the “Trails Law”).

The Trails Law provided “for a state system of recreational trails” that would use “existing canals, abandoned roads, and rights of way wherever practicable” and authorized the Director of Natural Resources to create that system. 134 Ohio Laws at 465-470. To that end, it gave the boards of county commissioners discretion to vacate part of an unused county or township road but subject the rest to a trail right-of-way and then notify ODNR of its action. 134 Ohio Laws at 477-79. The Trails Law also amended the Vacating Law to require ODOT to notify ODNR before vacating any state highway right-of-way. *Id.* at 475. The Trails Law was designed to preserve unused public rights-of-way for trail use. If a state highway easement might automatically be lost by twenty-one years of non-use, then the Assembly would have amended the Vacating Law to prevent that loss from happening, just as it did with the county and township road-vacating statutes. It did not, and that implies that the Assembly understood that ODOT’s Director already had the discretion to keep public control of a state highway easement, no matter how long it had been unused.

New 52 admits that common law abandonment conflicts with the Trails Law, but it says that 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.” New 52 Br. at 4. The General Assembly, however, has entrusted that decision to the Director of Natural Resources, not to New 52 or a court. New 52 also admits that common law abandonment is incompatible with the Vacating Law’s provisions requiring ODOT to hear claims for compensation or damages, but says that damages are unlikely in this case. *Id.* Yet New 52 fails to recognize that the broad forfeiture rule it advocates would apply not just to this case but to any state highway easement, making it impossible to discount so tidily the rule’s negative ramifications.

This is not a case in which a well-established principle of common law and a marginally applicable statute overlap. The Vacating Law allows ODOT’s Director and highway engineers, not the courts, to decide when an easement “is no longer necessary for the purposes of a public highway.” Its procedures include steps to preserve the property for use by public utilities or for recreational purposes, neither of which could happen in a common-law abandonment case. And while courts will, if possible, construe legislation to complement a “settled” common-law rule, *Danziger v. Luse*, 103 Ohio St. 337, 2004-Ohio-5227, ¶ 11, there was no settled rule allowing common law abandonment of state highway easements. As explained above in Part A-1, dicta in some early opinions allowed for the possibility of abandonment claims, but when the question was squarely presented, the Court rejected abandonment claims. Thus, common law did not support a claim such as New 52’s, and more important, any claims that might have existed, whether under pure common law or under the earliest versions of the statutes, have long since been supplanted by the modern statutory scheme. The Court should conclude that R.C. Title 55 gives ODOT’s Director exclusive authority to abandon or vacate state highway easements.

B. *Bigler* confirms that court actions are inconsistent with statutes that vest discretion in the executive branch regarding potential abandonment of roads, and New 52's attempt to distinguish *Bigler* is unpersuasive.

As ODOT's opening brief explained, the Court has already decided the issue here—namely, that private actions for highway abandonment are precluded when a statute vests discretion in the executive—in the township road context. This principle applies with equal or greater force in the State highway context. New 52's attempts to sidestep *Bigler* are unavailing.

As the Court explained in *Bigler*, the decision to vacate a road “involves the careful weighing of widely diverse interests and public-policy considerations.” *Bigler v. Township of York* (1993), 66 Ohio St. 3d 98, 100. It “requires the decision maker to balance the interests of the abutting landowners with the public interests” in a way that is “not possible in a quiet title action.” *Id.* The discretionary language in the township road statute, R.C. 5553.042, “reinforces the broad public-policy nature of the decision to vacate a township road.” *Id.* But this weighing and balancing of diverse public and private interests would be impossible if an abutting landowner could bypass the administrative decision-maker by filing a quiet title action, for “the common pleas court would be obliged to grant landowners' requests, as soon as the court determined that the property had been abandoned and not used by the public for a period of twenty-one years.” *Id.* at 101. Accordingly, *Bigler* held that a court of common pleas does not have jurisdiction to quiet the title to a township road. *Id.*, syllabus 2.

No less than a township road, the decision to relinquish the right-of-way of a state highway also implicates broad public policy considerations. The General Assembly has specified some of these and laid out steps for the decision-maker to follow in addressing them. Even if the state highway right-of-way is simply being transferred to county or township control, the Abandonment Law requires notice, an opportunity for public involvement and comment, and a report documenting the action. R.C. 5511.01. A transfer into private hands brings up still other

considerations. For example, even if the right-of-way is not needed for road purposes, the public might choose to retain it for use as a recreational trail. The Vacating Law, and the statutes dealing with county and township roads, each include procedures to make that possible. R.C. 5511.07; R.C. 5553.042 (township roads); R.C. 5553.23 (county roads). Or a public utility might have put its facilities in the right-of-way. The Vacating Law and the county and township road statutes each provide for the accommodation of utilities even if the right-of-way is vacated. R.C. 5511.07; R.C. 5553.042 (township roads); R.C. 5553.04 (county roads). A court hearing on a quiet title action could not address any of these matters, whether they arise in conjunction with state highway or township road right-of-way. So *Bigler*'s reasoning necessarily applies to the decision to vacate any public right-of-way.

New 52 says the township road statute discussed in *Bigler* differs from the Vacating Law because it deals with twenty-one years of abandonment and requires submission of the issue to a "disinterested fact-finder," New 52 Br. at 6-7, but these distinctions fail. True, at one time the board of county commissioners did act as a fact-finder, and it was then required by statute to vacate a township road upon petition if the facts showed it had been abandoned and not used for twenty-one years. But the General Assembly changed the law to make the decision *entirely discretionary*. 1971 H.B. No. 714, 134 Ohio Laws 2169. So even if a township road *were* abandoned and unused for twenty-one years, the board of county commissioners might still decide to keep it under public control. *Bigler* concerned the discretionary-power statute in which the board acted as policy-makers, not merely fact-finders.

And the commissioners' discretionary power—not just a factfinding role—was at the heart of *Bigler*. The Court explained that such discretion would be meaningless if common law abandonment also applied, for "the common pleas court would be obliged to grant landowners'

requests, as soon as the court determined that the property had been abandoned and not used by the public for a period of twenty-one years.” *Bigler*, 66 Ohio St. 3d at 101. Here, similarly, bypassing the Director would negate his discretionary power and the public interests he must consider.

Further, New 52’s assertion that the county-road statute provided a “disinterested” fact-finder is unexplained, and the purported distinction between the county commissioners and the ODOT Director is nonexistent. Perhaps New 52 means to suggest that the ODOT Director would naturally be disinclined to abandon land under his “control” or “ownership,” although, of course, that control is a public trust, not a personal benefit. But whatever the nature of ODOT’s interest in the highways it manages, it is hard to see how that is different at the county level as compared to the State: both decisionmakers are government officers entrusted to care for roads for the public.

Aside from the county/state difference, New 52 seems to suggest that abandonment of a highway laid out on easements, as opposed to a highway on land owned in fee simple, is distinct—such that easements alone can be eliminated by common-law actions—but that distinction fails. New 52’s argument assumes that public property held by easement is somehow less important, or deserves less protection, than property held in fee. But as shown above, the Court did not distinguish between easements and fee title when it analyzed abandonment claims in the era before creation of the state highway department. Further, the relevant statutes were enacted during the 1920s, in an era when virtually all state highways were built on land for which the State acquired easements. Fee simple ownership was almost unheard of until the 1950s. Thus, the General Assembly could not have meant for the Abandoning or Vacating Laws to apply solely to fee simple land, and not to easements, when the former did not exist.

Recently, the Court rejected a similar argument about lesser or inferior property rights in *Houck*, in which a private party argued (in the context of seeking to use adverse possession against a park district) that the park district's interest in an abandoned railroad bed was less significant than a public road. 116 Ohio St. 3d at ¶ 23. But the Court disagreed, noting that "the nature of the property in question is not critical to our analysis." *Id.* The critical part, as the Court explained, lay in "the general policies underpinning" the decisions against adverse claimants, which "justify continued support of the rule that adverse possession does not apply" against public property. *Id.* at ¶ 23.

One of those policies, as *Houck* described, was to preclude the interference with public use that adverse possession would entail. *Id.* at ¶ 24. As the Court noted, the very purpose of a park district was to protect and preserve park land. *Id.* ODOT's Director, too, is obliged to preserve the roads and highways in the state system, and to ensure that any land he deems to be unneeded for highway purposes is made available to ODNR for recreational use. R.C. 5501.31; R.C. 5501.45; R.C. 5511.07. Forced abandonment of a public easement is no less an interference with public use than adverse possession of public land owned in fee.

Houck also noted the differences between private and public owners in their ability to monitor property to guard against adverse claimants. 116 Ohio St. 3d at ¶¶ 26-27. *Houck* explained that it was unreasonable to expect a park district to monitor 5,170 acres of property and a section of a 65-mile recreational trail to ensure that trespassers' encroachments did not ripen into adverse possession. The task faced by ODOT is even more daunting. The state highway system includes about 19,000 miles of roadway, 85% of which is in rural areas, where much of the right-of-way is held by easement. The Department should not be expected to monitor each easement parcel along thousands of miles of roadway to avert abandonment claims,

nor should it have to explain and justify what it is doing with the untraveled parts in order to preserve its rights. As the Court long ago recognized, common law abandonment by non-use does not apply to public right-of-way because all of the “ground within the surveyed lines of the highway,” even the parts “not then used or required for public travel,” might be used by the public in the future. *Lane v. Kennedy* (1861), 12 Ohio St. 42, syllabus. *Houck* echoed this point, noting that “setting aside of land for future public use” is, by itself, “a valuable use of land resources” and the public should not be deprived of the future use of that land by operation of the statute of limitations. 116 Ohio St. 3d 148, ¶ 26 (internal citation omitted).

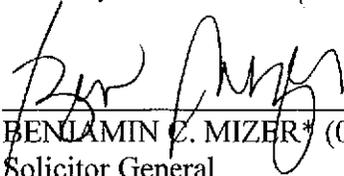
In sum, the Court’s reasoning in *Bigler* controls here, and indeed, that reasoning is even stronger here than in *Bigler*. The public policy considerations involved in vacating a state highway easement are no less weighty than those of a township road. Neither New 52’s purported distinctions, nor the appeals court’s, are persuasive. The trial court correctly applied *Bigler* when it held that no common law claim exists here, and its judgment should be reinstated.

CONCLUSION

For the above reasons, the Court should reverse the decision below and reinstate the trial court's judgment dismissing New 52's claim.

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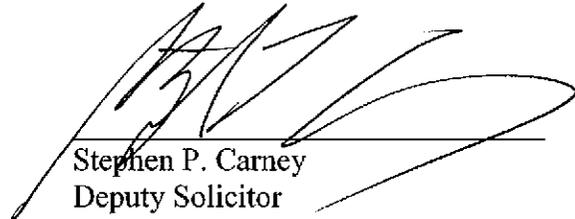
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Defendant-Appellant Director, Ohio Department of Transportation, was served by U.S. mail this 28th day of October, 2008 upon the following counsel:

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