

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. GERALD O.E.
NICKOLI AND ROBIN L.B. NICKOLI,
et al.,

Relators,

v.

ERIE METROPARKS, et al.,

Respondents.

Case No. 2009-0026

Original Action in Mandamus

**RELATORS' MOTION FOR LEAVE TO FILE SUPPLEMENT TO
PRESENTATION OF EVIDENCE**

Bruce L. Ingram (0018008)
(Counsel of Record)
Joseph R. Miller (0068463)
Thomas H. Fusonie (0074201)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
Tel.: (614) 464-6480
Fax: (614) 719-4775
blingram@vorys.com
jrmiller@vorys.com
thfusonie@vorys.com

Attorneys for Relators

Thomas A. Young (0023070)
(Counsel of Record)
Porter, Wright, Morris & Arthur LLP
41 South High Street
Columbus, Ohio 43215
Tel.: (614) 227-2137
Fax: (614) 227-2100
tyoung@porterwright.com

John D. Latchney (0046539)
Tomino & Latchney, LPA
803 East Washington Street, Suite 200
Medina, Ohio 44256
Tel.: (330) 723-4656
Fax: (330) 723-5445
jlatchney@brightdsl.net

*Attorneys for Respondents Erie MetroParks
and Board of Park Commissioners, Erie
MetroParks*

FILED
MAY 28 2009
CLERK OF COURT
SUPREME COURT OF OHIO

**RELATORS' MOTION FOR LEAVE TO FILE SUPPLEMENT TO
PRESENTATION OF EVIDENCE**

Pursuant to S. Ct. Prac. R. XIV, Sec. 4, Relators, by and through their counsel, respectfully move this Court for leave to file a supplement to their presentation of evidence. No prejudice to Respondents will result from this Court permitting the Relators to file the requested supplement.

Relators seek a Writ of Mandamus to compel the Respondents to commence appropriation actions to compensate the Relators for the physical invasion and occupation of land owned by them. Pursuant to this Court's April 8, 2009 Order and the April 17, 2009 Stipulation of the parties, Relators filed their Presentation of Evidence on May 18, 2009. The Relators' Merit Brief is scheduled to be filed on May 28, 2009.

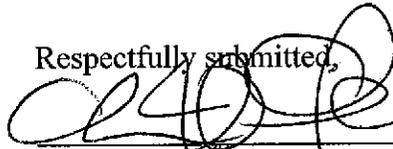
In support of this Motion, Relators state that in preparing Relators' Brief, counsel realized that a map and corresponding testimony about the map should have been included as part of the Affidavit of Daniel Hartung, P.S., P.E., (Exhibit 20 of Relators' Presentation of Evidence). The map is an August, 1996 map of the J. Forbes Tract in Milan Township prepared by Mr. Hartung. The tract encompasses the land of several Relators. Thus, Relators propose to add as evidence the Second Affidavit of Daniel Hartung with two exhibits: (1) the August 1996 map and (2) an additional copy of railroad maps already attached to Mr. Hartung's first affidavit as pages 5-7 to Exhibit D. The sole purpose of providing an additional copy of the railroad maps is to confirm Mr. Hartung's statements in his Second Affidavit about the August 1996 map. Mr. Hartung's Second Affidavit with Exhibits is attached hereto as Exhibit 1.

The granting of this Motion will not prejudice the Respondents as they have not filed their Response Brief, which is not due for twenty days (June 17, 2009). Contemporaneously

with filing this Motion, Relators have e-mailed a copy of it to Respondents' counsel. Moreover, Respondents cannot be prejudiced by the inclusion of a 13-year old map prepared by Mr. Hartung and his explanation of what it reflects. The map is not recently generated, but has existed for more than a decade. Moreover, the very evidence Respondents submitted as part of their Presentation of Evidence (*see* Exhibit 1 to Affidavit of Thomas A. Simon) -- identical railroad valuation maps as those attached to the first Affidavit of Mr. Hartung -- supports presenting the map as evidence in this action. Finally, Respondents cannot claim prejudice when they waited until April 9, 2009, only 19 days before the original deadline for Relators' Presentation of Evidence (and before the parties stipulated to an extension), before seeking leave to amend their Answer. Respondents waited more than 45 days after filing their original Answer to seek leave to amend it. In contrast, only ten days have passed between Relators' submission of their Presentation of Evidence and this Motion.

Therefore, Relators respectfully request that this Court grant the foregoing Motion to allow the filing of a supplement to their presentation of evidence.

Respectfully submitted,



Bruce L. Ingram (0018008)

(Counsel of Record)

Joseph R. Miller (0068463)

Thomas H. Fusonie (0074201)

Vorys, Sater, Seymour & Pease LLP

52 East Gay Street, P.O. Box 1008

Columbus, OH 43216-1008

Tel.: (614) 464-6480

Fax: (614) 719-4775

blingram@vorys.com;

jrmiller@vorys.com; thfusonie@vorys.com

Attorneys for Relators

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served this 28 day of May, 2009 via electronic mail, upon Thomas A. Young, Porter, Wright, Morris & Arthur LLP, 41 South High Street, Columbus, Ohio 43215 and John D. Latchney, Tomino & Latchney, LPA, 803 East Washington Street, Suite 200, Medina, Ohio 44256, counsel for Respondents Erie MetroParks and Board of Park Commissioners, Erie MetroParks.



Thomas H. Fusome (0074201)

IN THE SUPREME COURT OF OHIO

STATE EX REL. GERALD O.E. :
NICKOLI AND ROBIN L.B. NICKOLI, :
et al., :

Relators, :

v. :

ERIE METROPARKS, et al., :

Respondents. :

Case No. 2009-0026

Original Action in Mandamus

SECOND AFFIDAVIT OF DANIEL E. HARTUNG, JR., P.E., P.S.

STATE OF OHIO)
) ss:
COUNTY OF ERIE)

My name is Daniel E. Hartung, Jr. I am over the age of 21, and I am competent to make this affidavit. The facts stated herein are within my personal knowledge and are true and correct.

I state as follows:

1. I am a Registered Professional Engineer (P.E.) and Professional Land Surveyor (P.S.) in the State of Ohio, Nos. 49747 and 5667 respectively.
2. As a professional engineer and a professional surveyor, I form expert professional opinions, and in doing so, I rely on documents, records, and other materials which are regularly relied upon by persons in my profession, including records on file at county recorders' offices, courts, county administrative offices, as well as ancient and modern survey maps, and railroad records such as the Interstate Commerce Commission railroad valuation maps housed at the National Archives and Records Administration ("NARA").
3. I prepared a map of the J. Forbes Tract, Milan Township in August, 1996 based

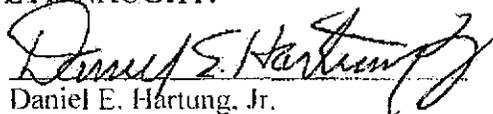


upon existing deed records and railroad valuation maps housed at the NARA. A true and accurate copy of the map is attached as Exhibit A. This survey includes property for Relators Gary and Virginia Steiner, Michael Meyer, Cheryl Lyons, Donna Rasnick, Maria Sperling and Richard and Carol Rinella.

4. That map establishes the centerline of the former Wheeling & Lake Erie Railroad as approximately 50 feet from the east bank of the Huron River for all property identified in the map.

5. My map is consistent with Interstate Commerce Commission railroad valuation maps housed at the NARA that cover the property of Relators Gary and Virginia Steiner, Michael Meyer, Cheryl Lyons, Donna Rasnick, Maria Sperling and Richard and Carol Rinella that I identified on the map I prepared in 1996, a true and accurate copy of those maps are both attached hereto as Exhibit B and attached as pages 5 and 7 to Exhibit D to my May 18, 2009 Affidavit.

FURTHER AFFIANT SAYETH NAUGHT.

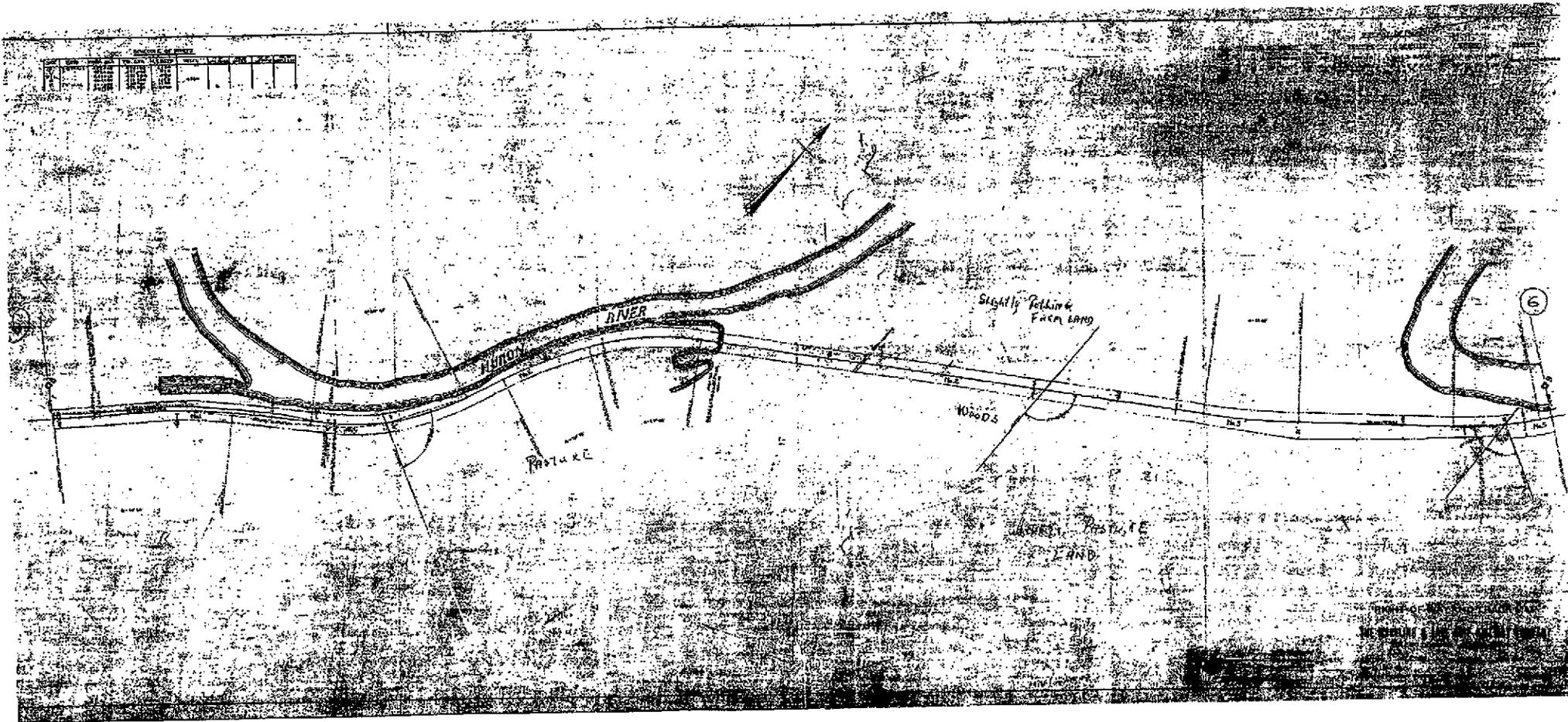

Daniel E. Hartung, Jr.

Sworn in my presence and subscribed before me this 27th day of May, 2009.


Notary Public



BEVERLY J. JOHNSON
NOTARY PUBLIC
STATE OF OHIO
My Comm. Exp. 12-15-2009



tabbles[®]

EXHIBIT

B

RIGHT-OF-WAY AND TRACK MAP

THE WHEELING & LAKE ERIE RAILWAY COMPANY

TOLEDO DIVISION - HURON BRANCH

STATION.....*475+20*..... TO STATION.....*528+00*.....

SCALE: 1 IN. = 100 FT.

JUNE 30, 1918

OFFICE OF VALUATION ENGINEER,

CLEVELAND, O.



88-1(x) WOODBOX-2216

275+20

D9

TRAIL 2881

480

480+79.42 R.C. 3°14' L.

FT

No. 1

HURON

Δ 19°37'

M.P. LOCATED
484+53

486+82.12 R.T.

