

June 5, 2023

Ohio House Civil Justice Committee
Opponent Testimony

Re: H.B. 64

Thank you for the opportunity to submit this statement on behalf of Five Rivers MetroParks, a metropolitan park district established under Chapter 1545 of the Ohio Revised Code to serve the residents of Montgomery County. During my tenure as legal counsel to Five Rivers (more than 40 years), the park district has evolved from the holder of isolated park lands in mostly suburban areas to one that administers an integrated network of parks, both urban and rural, connected by rivers, waterways and recreational trails that form transportation corridors not only for residents but also for wildlife.

In recent years, the importance of recreational trails has expanded exponentially. In Montgomery County, the trail was blazed in the 1970's when Horace Huffman, of the Huff bicycle company, spearheaded an initiative to place bikeways along the major river corridors running through Dayton. Over time, the local bikeway network was expanded east to Greene County to connect with the hub located in Xenia; north along the Great Miami River to Piqua; south along the Great Miami to Middletown; and, via Xenia, south to Cincinnati and north through Springfield to Urbana. The route through Xenia connects to Columbus and beyond. At present, the Dayton area is the center of approximately 350 miles of connected, paved bikeways, the largest such concentration in the U.S. Five Rivers administers approximately 52 miles of the network. The bikeway network is a point of pride for Miami Valley residents. Moreover, when Montgomery County residents are surveyed about the amenities they want their park district to provide, recreational trails invariably emerge as number one on the list.

Recreational trails provide a variety of benefits to the community. As pointed out in studies issued by the Miami Valley Regional Planning Commission as recently as 2021, the trails provide health benefits as well as economic benefits. In addition, the trails are used not only for recreation but also for transportation. They allow people to bike to work in a safe, separate corridor without having to contend with automotive traffic. The MVRPC has estimated that 45% of regional jobs are within a half mile of the trails. And, of course, walking or using bicycles is an environmentally friendly alternative to automobile transportation.

The 2021 MVRPC study highlighted some of the economic benefits:

Economic Benefits of the trail

- 5% of trail users are from outside the Miami Valley and spend locally
- The trails generate between \$11.5 million and \$15 million in annual economic activity
- 74% of trail users purchased hard goods related to their trail use and spent an average of \$694
- 44% of trail users purchased soft goods related to their trail use and spent an average of \$14
- The average trail visitor's stay is 2.9 nights and spends \$120 per night

These figures would have only increased since 2021.

As the economic factors indicate, recreational trails are much more than a pleasant source of physical activity; they are an extension of a park system that is an economic driver for the area; a source of tourism; an amenity that enhances property values; and an attraction for employee recruitment and retention. These benefits are not unique to Dayton. Throughout Ohio and the United States, communities are recognizing the value created by recreational trails and are rising to meet the demand. In fact, Ohio's progress in this area places it among the best in the nation.

To an ever-increasing degree, recreational trails provide an important public benefit, on an equal footing with parks generally. The proposition set forth in H.B. 64 that recreational trails should not be considered a "public use" – for whatever reason – defies logic and common sense.

H.B. 64 singles out recreational trails by prohibiting the use of eminent domain for that purpose. To be sure, eminent domain is a power to be used sparingly. Five Rivers has been successful in acquiring all of its trail areas without the use of eminent domain, mainly by being patient and persistent; Five Rivers identifies future park and recreation areas through careful planning and acquires the necessary properties from willing sellers. Nevertheless, having eminent domain as a tool in the toolbox is an absolute necessity. For example:

- The proposed legislation applies to both urban and rural areas. Any extension of a road or trail through an urban area entails a potentially large number of owners and any number of complications that may include properties that are in foreclosure, estates, out of state ownership, family disputes, and so on. Every metropolitan area has abandoned properties in which owners are intentionally difficult if not impossible to find. Any one owner might be in a position to scuttle a project with a major public benefit. It is for that very reason that the power of eminent domain exists.
- Title to railroad lands is notoriously complicated. For the most part, courts have been supportive of rails to trails projects that preserve the right-of-way as a route for transportation. If this were not the case, eminent domain may be the only means available to preserve the integrity of the trail.
- Infrastructure funding may allow for the fast-tracking of projects that are planned but not yet funded. If the project requires the public use of private land, and eminent domain is not available, the project may lose its best opportunity for funding.
- If major employers like Intel want to provide bikeway connections from their main campus to local trails, and the only way to do so is through eminent domain, would the Ohio legislature deny its use?

The other elements of H.B. 64 seem to have the overriding goal of making eminent domain more expensive and difficult to achieve. Comments on a few of those items:

- The requirement that the governmental agency pay the attorney fees of the landowner would run contrary to long-standing Ohio law. Governmental agencies in Ohio are required to attach a

fiscal officer's certificate to any contract indicating that the agency has sufficient funds to pay the amounts due under the contract. Of course, a landowner's attorney's fees are an unknown, and for that reason a fiscal officer would not be in a position to issue a certificate. The Ohio Attorney General has advised that governmental agencies lack the power to indemnify third parties (see, for example, Opinions 96-060 and 2005-007), and payment of attorney's fees falls under that category.

- Requiring appropriation based on clear and convincing evidence, as opposed to a preponderance of the evidence, and removing the rebuttable presumption in favor of the agency's determination of necessity, simply opens the door for more lawsuits and places the decision-making in the hands of the judiciary rather than the public agency. In almost any public project, designers and engineers explore multiple alternatives and make recommendations based on a variety of factors, including functionality and cost. An owner may very well argue that one of the alternative routes (not crossing the owner's land) should have been selected. This decision is best made by the agency.
- The concept that a taking by eminent domain may be voided if the proper procedures were not followed places an enormous risk on the title companies that insure the titles to the properties being acquired. The Ohio Supreme Court has made decisions in other contexts – for example, ruling that titles that were conveyed through faulty foreclosure actions would be void – that it later found necessary to limit. Once title has been conveyed and the opportunity to appeal has expired, there needs to be finality.

In conclusion, the changes sought by H.B. 64 are contrary to sound public policy. With regard to recreational trails, Ohio has become a national leader in building a trail network that other states are attempting to emulate. This change in the law would hinder development in Ohio and erode the advantage it has built over a period of many years. The other proposed changes in the eminent law are not geared toward creating a balance of power; rather, the obvious goal is to discourage the use of eminent domain in public projects. Ironically, this comes at a time when federal infrastructure funds are becoming available at a level that has not occurred in decades. Will Ohio miss the boat because it cannot get its projects off the ground? And most importantly, of course, Five Rivers feels strongly that recreational trails provide a tremendous public benefit and should not be treated differently than other public amenities.

Thank you again for the opportunity to offer these comments on behalf of Five Rivers MetroParks.

Sincerely,



Robert M. Curry