In the
Supreme Court of Ohio

STATE EX REL. OHIO HISTORY CONNECTION,	:	Case No. 2020-0191
	:	
	:	On Appeal from the
Plaintiff-Appellee,	:	Licking County
	:	Court of Appeals,
v.	:	Fifth Appellate District
	:	
THE MOUNDBUILDERS COUNTRY CLUB COMPANY,	:	Court of Appeals
	:	Case No. 18 BE 0042
Defendant-Appellant,	:	
	:	
and	:	
	:	
PARK NATIONAL BANK,	:	
	:	
Defendant-Appellee.	:	

BRIEF OF APPELLEE OHIO HISTORY CONNECTION

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INTRODUCTION

The Octagon Earthworks, located in Newark, Ohio, are a marvel of ancient engineering. The Earthworks, which Native Americans constructed nearly 2,000 years ago, are laid out in a way that corresponds to lunar movements and precisely aligns with key points at which the moon rises and sets over the course of the 18.6-year lunar cycle. Tr.67, 82, 151. They are considered to be one of the best-preserved examples of geometric earthworks anywhere in the world. Tr.154, 209, 224, 231.

The Ohio History Connection owns the Octagon Earthworks. Despite that fact, and despite the fact that the Earthworks have been designated as Ohio's official state prehistoric monument, R.C. 5.073, most Ohioans have had few opportunities to visit them. That is because, for most of the year, they lie hidden behind the private gates of the Moundbuilders Country Club, to whom the History Connection has leased the property on which the Earthworks sit. In an effort to make the Octagon Earthworks more accessible to the general public, the History Connection wishes to transform what is now a private golf course into a public park. In addition to providing greater access to the Octagon Earthworks, the creation of a public park would make the Earthworks site eligible for designation as a World Heritage Site. That would make it the first site in Ohio to be so designated and only the twenty-fifth site in all of the United States.

Although the History Connection offered to purchase the remaining term of the Country Club's lease, the Country Club declined to sell. The History Connection

therefore sought to acquire the lease using the power of eminent domain—a power granted to it by R.C. 1743.07. The Country Club has resisted the effort to acquire its lease. In this appeal, it challenges the History Connection's acquisition attempt for two reasons.

First, the Country Club argues that the History Connection failed to make a statutorily required good-faith offer before commencing appropriation proceedings. The Court should reject this argument. By statute, a "good faith offer" is one supported by an appraisal from a qualified appraiser. *See* R.C. 163.01(J); R.C. 163.04(C). Here, it is undisputed that the History Connection *did* support its original offer with an appraisal from an independent, qualified appraiser. That ought to end the inquiry. But the Country Club says otherwise: it argues that the History Connection failed to make a good-faith offer because it did not provide a copy of a second appraisal that the History Connection obtained and that the Country Club asserts had a higher value. According to the Country Club, a good-faith offer must be reasoned and informed. And, according to the Country Club, no offer is "reasoned and informed" if it includes one appraisal while omitting another, higher-value appraisal. *See* Country Club. Br.15–18. That argument ignores the statutory text, however, which defines a good-faith offer to include *any* offer supported by an appraisal from a qualified appraiser; it includes no duty to provide *all* appraisals previously obtained. *See* R.C. 163.01(J); R.C. 163.04(C). The offer here came with an appraisal from an independent appraiser. The statute required nothing more. If

the Country Club believed the appraisal was too low, it was free to do exactly what it did: reject the offer and prepare to prove to a jury the value of the rights appropriated.

Second, the Country Club argues that acquisition of the property is not necessary to advance a public use, *see* Country Club Br.23–24, as it must be for the taking to be permissible, *see City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, ¶41. This argument, like the first one, founders on the statutory text; for two reasons, the taking is "necessary" for a "public use" as a matter of law. First, under R.C. 163.01, certain uses of property are presumed to be public uses. Relevant here, public parks like the one the History Connection plans to establish at the Octagon Earthworks site are *per se* public uses for which necessity is assumed. R.C. 163.01(H)(2). Second, Ohio's eminent domain statutes say that "[a] resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation creates a rebuttable presumption of the necessity for [an] appropriation." R.C. 163.09(B)(1)(a). The History Connection's Board of Trustees adopted such a resolution. *See* Ohio History Connection Board of Trustees Resolution, Hearing Ex.11 at 2–3. And the Country Club introduced no evidence sufficient to rebut the presumption of necessity. To the contrary, the Country Club admitted in its answer that the presence of the golf course on the Octagon Earthworks site was incompatible with the use of the site as a public park. Country Club Answer and Counterclaim, ¶¶47 and 55; R.8; Petition, ¶¶46 and 54, R.1. And, if that were not enough, the courts below found that there was ample evidence that the History

Connection's acquisition of the property was necessary to serve a public purpose. *State ex rel. Ohio History Connection v. The Moundbuilders Country Club Co.*, 2020-Ohio-276, ¶43 (5th Dist.); *State ex rel. Ohio History Connection v. The Moundbuilders Country Club*, No. 18 CV 1284, p.10 n.13 (Licking C.P. May 10, 2019). This Court has no basis for disrupting those factual determinations on appeal. *See Kalain v. Smith*, 25 Ohio St. 3d 157, 159 (1986).

The Fifth District correctly rejected the Country Club's arguments. This Court should affirm.

STATEMENT OF CASE AND FACTS

1. Newark, Ohio is home to ancient Native American earthworks, built approximately 2,000 years ago by Native Americans that archeologists refer to as the Hopewell culture. Tr.67. As originally constructed, the Newark Earthworks were a four-and-a-half square mile complex of interconnected geometric earthworks. Tr.65. In their original form, the Newark Earthworks were the largest earthworks anywhere in the world. Tr.65. And, to this day, they remain the largest, and best-preserved, examples of geometric earthworks. Tr.154, 209, 224, 231.

The Octagon Earthworks make up one part of the Newark Earthworks and are, by themselves, noteworthy for both their size and their technical sophistication. The Octagon, from which the Earthworks derive their name, is so large that the Great Pyramid of Giza could be placed inside of the Octagon without touching its walls. It would also be possible to fit four copies of the Roman Colosseum inside of the Octagon—without any

of the four touching the Octagon's walls. Tr.86. In addition to its sheer size, the Octagon Earthworks display an advanced understanding of geometry and astronomy. Tr.82–83. The layout of the Earthworks corresponds to lunar movements and, among other things, precisely matches the rising of the moon at its most northern point every 18.6 years. Tr.82, 151, 209. The technical sophistication of the Octagon Earthworks is particularly striking because Hopewell society lacked many of the features that were common to other societies that accomplished similar feats of engineering. Tr.239. Hopewell culture, for example, did not have hereditary leadership or a hierarchical society, displayed no commitment to agriculture, and had no large cities. Tr.239.

Portions of the Newark Earthworks were lost in the mid-1800s as Ohio grew and as Ohioans developed the land. Tr.94. The construction of railroads, canals, and roadways displaced or damaged some parts of the Earthworks. *Id.* Other parts were completely or partially plowed under. Tr.114, 230.

The Octagon Earthworks were preserved thanks to the foresight of the citizens of Licking County. Inspired by efforts to protect the Yosemite Valley in California, Tr.96–98, Licking County voters almost unanimously agreed in 1892 to raise their own taxes so that they could purchase what was left of the Newark Earthworks. Tr.95–98, 166–67; Hearing Ex.38 at OHC020110.

Initially owned by the Newark Board of Trade, the Octagon Earthworks were transferred to the Ohio History Connection in 1933. Tr.98; *see also* Deed, Hearing Ex.1.

(The History Connection was known at that time as The Ohio State Archaeological and Historical Society.) At approximately the same time that it acquired the Octagon Earthworks, the History Connection also acquired another significant part of the Newark Earthworks, the Great Circle Earthworks, which had been owned by the bankrupt Licking County Agricultural Society. Tr.98.

The History Connection's acquisition of the Newark Earthworks was consistent with its statutory responsibilities. The General Assembly designated the History Connection as a non-profit corporation for the purpose of "perform[ing] public functions as prescribed by law." R.C. 149.30. Those public functions include creating and maintaining state memorials, R.C. 149.30(A), acquiring historic or archaeological sites, R.C. 149.30(N), and "reconstructing, protecting, or restoring" earthworks and other sites that it owns, R.C. 149.30(B). To help accomplish that task, the General Assembly authorized the History Connection to exercise the power of eminent domain, giving it the power to acquire property containing "earth works" and "any historic or prehistoric mound." R.C. 1743.07; *see also* G.C. 10198-1.

Today, the History Connection remains responsible for preserving the history of the State of Ohio. It maintains the state archives that contain the State's paper records, it operates the state museum, it administers the State's historic-perseveration office, and it conducts outreach and education to inform Ohioans and to connect them to their history.

Tr.452–53. Most relevant here, the History Connection also manages Ohio's historic-site system, Tr.452–53, which includes the Octagon Earthworks site, Tr.456.

The Octagon Earthworks had already been developed into a golf course by the time the History Connection took ownership of them. The Country Club had leased the Octagon Earthworks from the Newark Board of Trade in 1910 and opened the golf course a year later, in 1911. Tr.219. For many years, public access to the Earthworks was governed by an informal arrangement between the History Connection and the Country Club. *See* Tr.115. In 2003, however, various parties who had an interest in the Earthworks worked to develop an agreement that would explicitly address how and when the public could access them. Hearing Ex.41. Under that agreement, the public has full, unfettered, access to the site on only four days per year. Tr.71. The public was also given access to the Earthworks during daylight hours on Mondays from November 1 through March 31, and on Monday *mornings* during the remainder of the year—as long as the Country Club had not scheduled golf activities for those days. Tr.299–300; Hearing Ex.41, App'x V. The public was also given access to the site when poor course conditions prevented golf from being played. *Id.* During the remainder of the year the public has access to a visitation area and viewing platform, which provides a view of only a fragment of the Octagon. Tr.287.

2. It eventually became clear to the History Connection that the 2003 agreement provides insufficient access to the public. Although the History Connection anticipated

that the agreement would give the public access to the Earthworks on Monday mornings, the Country Club frequently scheduled golf outings on those days. Tr.525–31, 536–37; Hearing Ex.47. Even when golf was not scheduled, visitors were sometimes told to leave the property during public-access hours. Tr.118; *see also* Tr.130–31. On other days, the Country Club would conduct maintenance activities that were incompatible with public use of the site—including the spraying of pesticides and herbicides. Tr.131–32.

The Country Club also became generally less accommodating to visitors after the 2003 agreement went into effect. Frequent visitors to the Earthworks faced increased hostility and resistance and experienced greater difficulty in arranging group visits. Tr.110. While the Country Club had typically granted permission for group visits prior to 2003, it rarely did so after the access agreement took effect; the Club insisted that such visits be limited to the small public area or that they occur only on one of the four open-house days. Tr.117; *see also* Tr.123 and 136.

Finally, the 2003 agreement limited the ability of the History Connection and others to conduct research on the Earthworks site. Archeological research frequently requires continuous access to a site over several weeks, ideally during warm weather. Tr.193–95, 261–62. The limited public access hours therefore imposed significant limitations on the type and scope of research that could be done. *See id.* But even on days when researchers had access to the site, the environment was not conducive to conducting research. Like other public visitors, researchers experienced conflicts with golfers when

visiting the site on Mondays. Tr.191–92. At times, they were forced to leave because they feared that they might be hit with golf balls. Tr.264–65. The Country Club's spraying of chemicals also interfered with research activities. Tr.262–63. And, on at least one occasion, the Country Club actively thwarted researchers' efforts to study the site. *See* Tr.242–43, Tr.260–61.

In light of all this, the History Connection determined that the public would be best served by transforming the Octagon Earthworks into a public park. Tr.465; *see also* Notice of Intent to Acquire and Good Faith Offer, Hearing Ex.12 at 1. Having unfettered access to the entirety of the Earthworks, it determined, would provide a better experience for visitors. Tr.79–80, 215–16. Among other things, it would be possible to conduct longer and more complete tours, Tr.199, open a visitor center, and provide improved signage throughout the Earthworks site, Tr.202–03. The creation of a park would also enable the History Connection and others to conduct research on the site on their own schedule, which would, in turn, allow the History Connection to better educate Ohioans (and the world) about the Earthworks and their historical importance. Tr.465.

The creation of a public park would also allow the History Connection to restore the Octagon Earthworks, with the goal of more closely approximating the way that Native Americans would have experienced the Earthworks over 2,000 years ago. Tr.172–73, 467. The Country Club had damaged the Earthworks when it constructed its clubhouse, for example, and the creation of a public park would permit the History Connection to

repair that damage. Tr.175, 222–23. The removal of the golf course would also allow the History Connection to manage the vegetation on the Earthworks site in a more authentic way. Tr.293–94. The Native Americans who built the site, after all, were not golfers.

The creation of a public park on the Octagon Earthworks site would have the added benefit of making that site, and the seven other sites that compose the larger Hopewell Ceremonial Earthworks complex, eligible for inclusion on the World Heritage Site list. Tr.363–64. The World Heritage List identifies locations that transcend natural boundaries and that should be considered the shared heritage of all humanity. Tr.338. The purpose of the list is to identify, preserve, and promote world's most significant cultural and natural heritage sites. Tr.337–38. The World Heritage designation, and the corresponding World Heritage List, were created by a treaty that the United States signed and ratified decades ago. Tr.273, Tr.336–37.

The Federal Government, in 2018, formally invited the History Connection and National Park Service to jointly apply for a World Heritage Designation for the Hopewell Ceremonial Earthworks. *See* Hearing Ex.10; U.S Nomination to the World Heritage List: Hopewell Ceremonial Earthworks, 83 Fed. Reg. 24,337. The Hopewell Ceremonial Earthworks include eight of the best-preserved earthworks sites in Ohio—including the two sites that compose the Newark Earthworks: the Great Circle and the Octagon Earthworks. Tr.274. If accepted, the Hopewell Ceremonial Earthworks would be the first World Heritage site in Ohio, Tr.338–39, and only the twenty-fifth site in the country,

Tr.309, 338. The General Assembly has supported the World Heritage designation effort. Both houses have adopted a Concurrent Resolution supporting the designation application. 131 H.C.R. 33 (2016); Petition, Ex.I, R.1 and 131 S.C.R. 16 (2016); Petition, Ex.J, R.1; *see also* Ohio History Connection Board of Trustees Resolution, Hearing Ex.11 at 3.

There is a catch, however. The nomination of the larger Hopewell Ceremonial Earthworks will not be possible unless the Octagon Earthworks are included. Tr.297; *see also* Tr.365. And the inclusion of the Octagon Earthworks is itself not possible so long as the Country Club and its golf course remain on the site. Tr.211, 214, 364–65, 376–77, 478; *see also* U.S. Dept. of the Interior Letter, Hearing Ex.28.

3. The History Connection attempted to negotiate a release of the remaining term of the County Club's lease, but its efforts proved unsuccessful. Tr.495; *see also* Ohio History Connection Board of Trustees Resolution, Hearing Ex.11 at 4. The History Connection therefore decided to acquire the remaining term of the Country Club's lease by exercising the eminent domain power granted to it by R.C. 1743.07. The History Connection's Board of Trustees adopted a resolution stating that it intended to acquire the Country Club's leasehold estate so that it could "open the restored Octagon Earthworks for public use and benefit," "preserve the original religious, ceremonial, and cultural significance of the site," and "nominate the Hopewell Ceremonial Earthworks to the World Heritage list." Ohio History Connection Board of Trustees Resolution, Hearing Ex.11 at 4.

As required by R.C. 163.04, the History Connection obtained an appraisal of the property that it sought to acquire. Tr.438. The History Connection in fact obtained two appraisals, even though the statute requires only one. *See* R.C. 163.04(C); *see also* Tr.438. The Robert Weiler Company performed one appraisal. Tr.439; Hearing Ex.44. That appraisal valued the fee simple estate and the leased fee—that is, it valued the Octagon Earthworks property both as encumbered by the lease and free from encumbrances. Sam D. Koon & Associates performed the other appraisal, determining the value of the Country Club's leasehold estate. Tr.439–40; Hearing Ex.12.

After reviewing the two appraisals, the History Connection provided the Country Club with a notice of its intent to acquire the leasehold estate, along with a good-faith offer to purchase that property interest. *See* Notice of Intent to Acquire and Good Faith Offer, Hearing Ex.12. Relying on the Koon appraisal, the History Connection offered to pay the Country Club $800,000 for the remaining term of the lease. *Id.* at 4. As required by R.C. 163.04, the History Connection attached a copy of the Koon appraisal to its offer. Tr.441–42; *see also* Notice of Intent to Acquire and Good Faith Offer, Hearing Ex.12 at 6–229.

The History Connection did not provide a copy of the Weiler appraisal. Burt Logan, the Executive Director and CEO of the History Connection, interpreted that appraisal as valuing the leasehold estate at only $500,000. Tr.443. Believing that the Koon appraisal provided the higher value, the History Connection chose not to rely on the

Weiler appraisal when making its offer. Logan believed that offering the higher of the two appraised values was the honorable thing to do. Tr.442. And because the History Connection saw no reason to provide an appraisal that did not form the basis for its offer, it did not provide the Country Club with a copy of the Weiler appraisal. Tr.485.

It was only after the History Connection had made its good-faith offer that anyone realized that it had misread the Weiler report. The $500,000 that Logan had interpreted as the appraised value of the leasehold estate was, in fact, the value of the leased fee. Tr.445–46; *see also* Weiler Appraisal, Hearing Ex.46. The Weiler appraisal never provided an appraised value of the lease; that value could only be approximated by subtracting the leased fee value from the fee simple value. Calculated in that fashion, the actual value of the leasehold estate under the Weiler appraisal was closer to $1.75 million. Tr.446.

4. The History Connection waited for the Country Club to respond to its offer. After waiting ninety days without a response, the History Connection filed a Petition to Appropriate Property in the Licking County Court of Common Pleas. *See* Petition to Appropriate Property; R.1. It filed the petition against the Country Club and against Park National Bank, which held a mortgage on the property. *See id.* at 6. Park National Bank eventually excused itself from the case because its interest was limited to the mortgage. *See* Tr.9.

The Country Club requested a hearing pursuant to R.C. 163.09(B)(1) so that it could challenge the basis for the appropriation proceeding. *See* Country Club Answer

and Counterclaim at p.13; R.8. Among other things, the Club asserted that the History Connection was not entitled to acquire the property through the use of eminent domain, *id.* at ¶82, that the History Connection had offered less than fair-market value for the leasehold estate, *id.* at ¶92, and that the appropriation was not necessary, *id.* at ¶88. With respect to necessity, the Country Club admitted that the History Connection intended to convert the Octagon Earthworks into a public park *and* that the continued presence of the private country club and golf course were incompatible with the property's use as a park. *See* Petition, ¶¶46 and 54, R.1; Country Club Answer and Counterclaim, ¶¶47 and 55, R.8.

The trial court held the hearing as requested by the Country Club. The hearing "took place over four days and involved numerous witnesses and documents." *State ex rel. Ohio History Connection v. The Moundbuilders Country Club*, No. 18 CV 1284 (Licking C.P. May 10, 2019) at 2. ("Tr.Ct.Op."). At its conclusion, the trial court entered judgment in favor of the History Connection. *See id.* A few of its conclusions are worth exploring in some depth.

First, the trial court held that the History Connection had the authority to appropriate the leasehold estate. Tr.Ct.Op.7–9. It noted that, although the Country Club in its answer denied that the History Connection had the authority to appropriate the property, the Country Club presented no argument or authority to support its position. Tr.Ct.Op.7 n.9. It further noted that the General Assembly specifically authorized the History

Connection to use the power of eminent domain to acquire "historic or prehistoric mounds or earthworks." Tr.Ct.Op.8 (citing R.C. 1743.07).

Second, the trial court held that the appropriation was "necessary" to achieve a public purpose. Tr.Ct.Op.9–10. That determination mattered a great deal; the State cannot exercise its eminent-domain authority except where doing so is "necessary." But "necessary," the trial court determined, means only "'reasonably necessary to secure the end in view.'" Tr.Ct.Op.9. Here, the end in view was the creation of a public park. And the appropriation was necessary to do that. Indeed, the Country Club admitted in its answer that History Connection's "plan to restore full public access" to the Octagon Earthworks was "incompatible with the operation of a country club and golf course on the premises." *Id.* (citing Country Club Answer and Counterclaim, ¶47).

Finally, the trial court determined that the History Connection satisfied its duty, under R.C. 163.04(B), to "provide" the Country Club "with a written good faith offer to purchase" the lease before beginning appropriation proceedings. Tr.Ct.Op.9. The trial court determined that History Connection satisfied the good-faith offer requirement by offering to purchase the lease for $800,000 based on the Koon appraisal. *Id.* It rejected the Country Club's claim that the History Connection had intentionally concealed the Weiler appraisal or otherwise acted in bad faith. Tr.Ct.Op.11–13. The trial court credited Logan's testimony that he had mistakenly interpreted the Weiler appraisal as offering a lower appraised value than did the Koon appraisal. Tr.Ct.Op.12. Having reviewed the

Weiler appraisal first hand, the trial court noted that Logan's mistake with respect to its valuation of the leasehold estate was "completely reasonable." *Id.* But regardless, the trial court held that the mere existence of a higher appraisal would not have been sufficient to establish that the History Connection acted in bad faith by relying on the Koon appraisal when it offered to purchase the remaining term of the Country Club's leasehold estate. *Id*.

The trial court emphasized that its decision represented the beginning of the eminent-domain proceedings, not the end. Its decision simply allowed the appropriation action to proceed to the valuation stage, at which point the History Connection and the Country Club would each have the opportunity to present evidence of the value of the leasehold estate. Tr.Ct.Op.12–13. In the end, a jury would be responsible for weighing that evidence and determining the value of the leasehold estate and the amount of compensation owed to the Country Club. *See* R.C. 163.09(A); R.C. 163.14; *see also* Ohio Const. Art. I, §19.

5. Before that valuation proceeding could begin, the Country Club appealed the trial court's decision to the Fifth District Court of Appeals. The Court of Appeals affirmed. *State ex rel. Ohio History Connection v. The Moundbuilders Country Club Co.*, 2020-Ohio-276 (5th Dist.) ("App.Op."). It held both that the History Connection had provided the Country Club with a good-faith offer for the leasehold estate and that the appropriation was necessary. The question of good faith, the appellate court held, was primarily a

factual question and the trial court's determination that the History Connection's offer to purchase the leasehold estate for $800,000 was made in good faith was supported by competent and credible evidence. App.Op.¶¶25–27.

As for the question of necessity, the Fifth District noted that, under R.C. 163.09(B)(1)(a), "[a] resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for [an] appropriation creates a rebuttable presumption of the necessity for the appropriation" so long as the agency "is not appropriating the property because it is a blighted parcel or part of a blighted area or slum." App.Op.¶39. Further, under R.C. 163.01(H)(2), a "public park" is presumed to be a public use. *Id.* Because the History Connection's Board of Trustees had adopted a resolution declaring the necessity of the taking, *see* Ohio History Connection Board of Trustees Resolution, Hearing Ex.11, and because the History Connection was acquiring the Country Club's lease to create a public park, the Fifth District held that the requirements of R.C. 163.021(A) were satisfied, *see* App.Op.¶39. The trial court, it held, had before it "extensive evidence and testimony to adequately support its conclusion" that the History Connection's acquisition of the leasehold estate was necessary so that it might provide "full public access to [the] geographic remnants left by the prehistoric Native American inhabitants of [Ohio]." App.Op.¶43. In so holding, the appellate court rejected the Country Club's argument that necessity should be measured by comparing the value to the public of competing uses of a property. *See* App.Op.¶¶40–42.

6. The Country Club appealed to this Court raising two propositions of law. The first claimed that the History Connection had not made a good-faith offer for the leasehold estate. The second challenged the necessity of the taking. The Court accepted the appeal on both propositions of law. *State ex rel. Ohio History Connection v. Moundbuilders Country Club Co.*, ___ Ohio St. ___, 2020-Ohio-3634.

ARGUMENT

Appellee's Proposition of Law No. 1:

> *An appropriating agency makes a good-faith offer when it offers to purchase property for the fair-market value as determined by a qualified, independent, and impartial appraiser.*

The History Connection did everything that the Revised Code required to provide the Country Club with a good-faith offer. It offered to purchase the Country Club's leasehold estate. It supported its offer with an appraisal conducted by Sam D. Koon and Associates—an independent, qualified appraiser—and provided that appraisal, along with its offer, to the Country Club. That was all the History Connection needed to do for its offer to purchase the lease to qualify as a "good faith offer." R.C. 163.04(B).

A. The Ohio History Connection made a "good faith offer" to purchase the Country Club's leasehold estate when it made an offer based on an appraisal conducted by a qualified independent appraiser.

1. In Ohio, a government agency that wishes to acquire property through eminent domain must first provide the property's owner with "a written good faith offer to purchase the property." R.C. 163.04(B). Good faith "is an elusive idea, taking on different meanings and emphases as we move from one context to another." Black's Law

Dictionary 836 (11th ed. 2019) (quotation omitted). But in the context of eminent domain, the General Assembly has defined a "good faith offer" as the "written offer that an agency that is appropriating property must make to the owner of the property pursuant to [R.C. 163.04(B)] before commencing an appropriation proceeding." R.C. 163.01(J). The cited statute, in turn, imposes at least two relevant requirements on an acquiring agency. It requires the agency to provide the property owner with a "written good faith offer to purchase the property." R.C. 163.04(B). And it requires that the written offer be accompanied by an appraisal of the property at issue. R.C. 163.04(C).

The existence of these two requirements is confirmed by R.C. 163.041, which sets out the form that a written offer must take. Paragraph six of the required notice describes the legal requirements applicable to an offer to purchase property, and it lists only two. First, it states that the agency must provide a landowner with a "written offer." And second, it states that the agency must provide "the appraisal or summary appraisal on which [the agency] base[d] that offer." R.C. 163.041. From context, it is apparent that the "appraisal" must be genuine, not a sham. That is, it must be issued by an independent and qualified appraiser. This requirement is implicit in the text because a valuation determined by a partial or unqualified appraiser is plainly not the sort of "appraisal" that Ohio law, which is designed to assure an offer based on something approximating fair market value, has in mind. But the statute requires nothing more; it requires *only* a written offer along with the genuine appraisal *on which the offer is based*. It does not require

the acquiring agency to offer any other appraisal or any other information that the offeree might like to know. Indeed, there is no way to impose any additional requirements except by rewriting the statutory text. And rewriting the statutory text is a job for the General Assembly, not the courts. *See In re Adoption of P.L.H.*, 151 Ohio St. 3d 554, 2017-Ohio-5824, ¶27.

The fact that R.C. 163.01(J) defines a "good faith offer" as the "written good faith offer" required by R.C. 163.04(B) is not the circular definition that it might seem to be. By defining a "good faith offer" as an offer that complies with R.C. 163.04(B), the General Assembly made clear that R.C. 163.04's statutory requirements, *and only those requirements*, provide the standard against which courts are to judge whether an acquiring agency acted in good faith.

That the General Assembly would want to limit the scope of any inquiry into whether an agency made a good-faith offer makes sense in light of the limited role that such an offer plays in the eminent-domain process. The good-faith offer is simply the beginning of that process. It sets in motion a series of events that, if the parties cannot agree to a sale, culminates in a jury trial. The jury is ultimately responsible for weighing competing valuation evidence and for determining the amount of compensation that a landowner is due for property that was taken. *See* R.C. 163.09(B)(2) and (C); *see also* Ohio Const. Art. I, §19. The fact that a jury will ultimately decide how much a property is

worth means that there is no need for a court to conduct a searching inquiry into whether an agency accurately valued the property when it made its initial offer.

That is perhaps one reason why courts have determined that R.C. 163.04(B)'s good-faith offer requirement is satisfied "by an appropriating agency's offer of a fair market valuation for the property" at issue, and that such an offer "constitutes a valid attempt to reach agreement with the landowners." *City of Wadsworth v. Yannerilla*, 170 Ohio App. 3d 264, 2006-Ohio-6477, ¶19 (9th Dist.). It is perhaps also why courts have held that, for purposes of that offer, the fair market value is the value of the property as determined by an appraisal performed by an independent appraiser. *See Bd. of Henry Cty. Comm'rs v. Rettig*, 2020-Ohio-2787, ¶36 (3d Dist.); *Lawnfield Props., LLC v. City of Mentor*, 2018-Ohio-2447, ¶29 (11th Dist.). The inquiry is thus objective, not subjective: if the offer is supported by an appraisal performed by an independent, qualified appraiser, it qualifies as a good-faith offer.

Treating the question of good faith under R.C. 163.04(B) as an objective question is consistent with the Court's approach to determining what constitutes good faith in other contexts. In the commercial context, for example, the Court has held that the question whether a party acted in good faith is an objective one. *Casserlie v. Shell Oil Co.*, 121 Ohio St. 3d 55, 2009-Ohio-3, syl. But even if it declines to adopt an objective standard here, the Court should, at minimum, hold that an agency is entitled to a presumption of good faith when the agency makes an offer to acquire property based on the fair market

value of that property as determined by a qualified appraiser. If an agency makes an offer based on such an appraisal, then it is incumbent on the party alleging the absence of good faith to introduce sufficient evidence to effectively rebut that presumption.

2. Whether the Court applies an objective standard or a subjective one, this case comes out the same way. Under either standard, the History Connection's offer to purchase the Country Club's leasehold estate was made in good faith.

Objectively, no one disputes that the History Connection complied with the requirements of R.C. 163.04. It obtained an appraisal of the Country Club's leasehold estate. *See* Notice of Intent to Acquire and Good Faith Offer, Hearing Ex.12. It provided the Country Club with a written offer to purchase that estate based on the appraisal, and it attached that appraisal to its offer. *Id.* So, looking only at what happened and not at any one actor's intentions, the offer here was made in good faith.

Subjectively, the result is the same. All of the available evidence shows that the History Connection acted in good faith—however one defines the term—when it offered to purchase the Country Club's lease. As the courts below found, "[t]here was no evidence to demonstrate that [the History Connection] acted with dishonest purpose, moral obliquity, or conscious wrongdoing, or that it had an ulterior motive, ill will, or actual intent to mislead or deceive the [Country] Club." Tr.Ct.Op.12; App.Op.¶27. That is a factual determination to which the Fifth District properly deferred, and to which this Court must defer as well. *See Kalain v. Smith*, 25 Ohio St. 3d 157, 159 (1986) (whether

"settlement efforts indicate good faith is generally within the sound discretion of the trial court"); *see also State v. Jackson*, 57 Ohio St. 3d 29, 35 (1991); *Gembarski v. PartsSource, Inc.*, 157 Ohio St. 3d 255, 2019-Ohio-3231, ¶26.

B. The Court should reject the Country Club's arguments for reversal.

The Country Club offers several reasons for concluding that the History Connection failed to make a good-faith offer to purchase the leasehold estate. None has merit.

1. The Country Club does not draw a meaningful distinction between "good faith" and the absence of bad faith.

The Country Club first insists that the History Connection proved, at most, the absence of bad faith rather than the presence of good faith. *See* Country Club Br.15. This argument fails. For one thing, it ignores the fact that the Revised Code *defines* a "good-faith offer" to mean an offer supported by the appraisal of a qualified, independent appraiser. *See above* 19–21. Philosophers might reasonably ponder a tripartite distinction between acts that are moral (helping a neighbor), immoral (killing a neighbor), and amoral (seeing the neighbor in his yard). But the Revised Code does not presume to divine moral truths; it aims only to direct the nature of appropriation proceedings. And in that context, the courts must be content to live with the statutory definition of "good faith."

Regardless, the Country Club's own argument ultimately fails to observe the distinction between good faith and the absence of bad faith. The Country Club implies that the History Connection sought a second appraisal because it was dissatisfied with the

first, and that it concealed the earlier Weiler appraisal because that appraisal assigned a significantly higher value to the Country Club's leasehold estate. *See* Country Club Br.22. That is effectively the same as alleging that the History Connection acted in *bad* faith, as opposed to alleging that the History Connection failed to act in *good* faith.

It is also an allegation that is entirely without merit for two reasons. The first is legal: as explained above, an offer that meets the statutory requirements for a good-faith offer—a written offer supported by an independent and qualified appraiser—is a good-faith offer as a matter of law. The second problem with the Country Club's allegations of bad faith is factual: the allegations are demonstrably false. Burt Logan testified that the History Connection requested the second appraisal *before* the first was completed. *See* Tr.441. That testimony is confirmed by the dates of the appraisals. The Koon appraisers visited the Earthworks site on December 29, 2017, and provided an appraised value for the property as of that date. *See* Koon Appraisal, Notice of Intent to Acquire and Good Faith Offer, Hearing Ex.12 at 6 and 13. The History Connection did not receive the Weiler appraisal, however, until January 26, 2018, nearly a month later. *See* Weiler Appraisal, Hearing Ex.44 at 2.

The Courts below also definitively rejected the Country Club's suggestion that the History Connection concealed the Weiler appraisal or obtained the lower Koon appraisal because it was dissatisfied with that appraisal. Tr.Ct.Op.12; App.Op.¶27. Both courts instead determined that the History Connection's choice of appraisals was based solely

on a reasonable misunderstanding about what the Weiler appraisal said. Tr.Ct.Op.12 ("Mr. Logan's explanation for his misinterpretation [was] completely reasonable after evaluating the [Weiler] report firsthand."); App.Op.¶27 ("[The History Connection's] CEO, who is not an attorney, misunderstood the particulars of the Weiler appraisal."). Those factual findings cannot be disturbed on appeal unless this Court determines they were clearly erroneous, *see Kalain*, 25 Ohio St. 3d at 159—and the Country Club has given the Court no basis for reaching such a conclusion.

Even if the History Connection *had* read the Weiler appraisal correctly, it still would have had a reasonable basis for disregarding it. That is because the Weiler appraisal did not actually value the Country Club's lease. Hearing Ex.44. It valued the fee simple (the land if it were not encumbered by the lease) and the leased fee (the value of the property while still encumbered with the lease). *Id*. at 2. While it is possible to derive an approximate value of the lease from those two numbers, the appraisal never assessed the value of the lease by itself. Thus, to the extent that the History Connection chose to rely on the Koon appraisal when making its offer, it relied on the only appraisal that actually valued the property interest that History Connection sought to acquire.

In sum, the Country Club's argument rests on an imagined distinction between good-faith offers, bad-faith offers, and regular-faith offers—a distinction that is legally irrelevant and factually flawed. This Court should reject the argument.

2. The History Connection made a reasoned and informed offer to purchase the Country Club's lease.

The Country Club next points to two cases it says stand for the proposition that a good-faith offer to acquire property under R.C. 163.04(B) may not be speculative or uninformed. *See* Country Club Br.15–18 (citing *Worth v. Huntington Bancshares*, 43 Ohio St. 3d 192 (1989) and *Kalain*, 25 Ohio St. 3d 157). If that is what those cases had held, then the History Connection's good-faith offer would easily satisfy their test. Its offer was supported by an independent appraisal conducted by a qualified appraiser, *see* above 12–13, and that alone conclusively demonstrates that the offer was neither speculative nor uninformed. The appraisal provided a "reasonable justification" for the History Connection's offer. *Cf. Zoppo v. Homestead Ins. Co.*, 71 Ohio St. 3d 552, syl.1 (1994) (good-faith processing of an insurance claim requires a reasonable justification for the decision about whether to pay).

Regardless, the cases on which the Country Club relies do not support its argument. Neither *Worth* nor *Kalain* involved appropriation proceedings or analyzed what constitutes a good-faith offer in the context of eminent domain. *Worth*, for example, involved a golden-parachute provision that guaranteed a bank executive certain compensation if he resigned based on a good-faith belief that his responsibilities had diminished. *Worth*, 43 Ohio St. 3d at 192–93. The executive resigned and, invoking that provision, demanded the compensation for which it provided. The Court was asked to decide whether the executive's *subjective* belief that his status and responsibilities had

diminished could be rebutted with *objective* evidence that showed no such diminution. *Id.* at 197–98. The Court held that the executive's subjective belief was not enough; courts were not required "to ignore [the] evidence which conflict[ed] with Worth's claimed reasoning." *Id*. *Worth* is therefore of little relevance here. The History Connection's offer was *not* subjective. It was based on an objective, independent, appraisal. *See* Notice of Intent to Acquire and Good Faith Offer, Hearing Ex.12. Not only that, *Worth* also contradicts the Country Club's argument that good faith must always mean something other than the absence of bad faith. The Court in *Worth* acknowledged that, in many situations, good faith is synonymous with the absence of bad faith and that courts treat the two as interchangeable in part because bad faith is "a term more frequently defined." 43 Ohio St. 3d at 198.

Kalain is no more relevant than *Worth*. That case asked whether a prevailing party was entitled to pre-judgment interest because the opposing party had not made a good-faith effort to settle the case. 25 Ohio St. 3d at 159. The Court held that R.C. 1343.03, the pre-judgment interest statute, did not require a party to affirmatively act in bad faith before that party would be required to pay interest. That statute requires a good-faith *effort* to settle a case. R.C. 1343.03. And an effort requires affirmative action. *See Mills v. City of Dayton*, 21 Ohio App. 3d 208, 209–10 (2d Dist. 1985); *Dailey v. Nationwide Demolition Derby*, 18 Ohio App. 3d 39, 41 (5th Dist. 1984). Inaction means that no effort was ever made—good faith or otherwise. *Id.*; *see also Kalain*, 25 Ohio St. 3d at 159 (approving of the

reasoning in *Mills* and *Daily*). In other words, the Court in *Kalain* held that parties could owe pre-judgment interest under R.C. 1343.03 if they failed altogether to act; not only if they affirmatively acted with a "dishonest purpose" or with "conscious wrongdoing." 25 Ohio St. 3d at 159 n.1.

The Country Club acknowledges that *Kalain* is largely irrelevant here. The four-part test that the Court established in that case is of little use outside the narrow context of settlement discussions. *See* Country Club Br.16. But even if that decision were relevant, it would not support the Country Club's argument that the History Connection failed to make a good-faith offer. That is because, in this case, it was *the Country Club* that took no action once the History Connection made its good-faith offer under R.C. 163.04. Thus, if *Kalain* did apply here, all it would mean is that the Country Club, and not the History Connection, failed to act in good faith.

3. An agency's failure to comply with R.C. 163.59 has no effect on the validity of eminent-domain proceedings.

Next, the Country Club argues that the History Connection's offer was invalid because the History Connection did not give the Country Club an opportunity to accompany the appraisers hired to value the lease. This argument rests on a statute that requires giving the owners of to-be-acquired property "a reasonable opportunity to accompany [an] appraiser during the appraiser's inspection of the property." R.C. 163.59. What the Country Club omits is a second statutory provision making clear that the acquiring agency is to suffer no adverse consequences from failing to allow such inspection: "The

failure of an acquiring agency to satisfy a requirement of section 163.59 of the Revised Code does not affect the validity of any property acquisition by purchase or condemnation." R.C. 163.52; *see also Wadsworth*, 170 Ohio App.3d 264, ¶23. The plain language of R.C. 163.52 therefore dooms the Country Club's claim. The Fifth District rejected the Country Club's argument for that very reason. App.Op.¶29. The Country Club appears to acknowledge that it was right to do so. *See* Country Club Br.21. But it repeats the argument anyway.

4. Any errors that the History Connection made in evaluating the appraisals it received were harmless and have since been rendered moot by the History Connection's subsequent higher offer.

Finally, it is unclear how the Country Club was harmed or what relief it is now seeking. If the Court were to hold that the History Connection's offer to purchase the leasehold estate was not made in good faith, its decision would not prevent the History Connection from using its power of eminent domain to acquire the Country Club's lease. At most, it would require the History Connection to make a new offer to purchase that lease. But the History Connection has already done so. *See* Michaela Sumner, *OHC offers Moundbuilders Country Club $1.6M for lease amid Hopewell site legal battle*, Newark Advocate (May 19, 2020), https://perma.cc/DG55-BSLT. It commissioned a new appraisal from the Robert Weiler Company and, based on that appraisal, offered to purchase the Country Club's lease for $1.66 million. *Id.* The Country Club said no. *Id.*

The fact that the History Connection has made a second offer to purchase the Country Club's leasehold would seem to moot this case with respect to the first proposition of law. But even if it does not, the Country Club's refusal to accept that second, higher offer shows that any error that the History Connection made with respect to its initial offer was harmless. R.C. 163.04's good-faith-offer requirement exists to provide parties with the opportunity to negotiate an arms-length sale without the need to resort to eminent domain. *See* R.C. 163.04(D) (allowing an agency to acquire property through eminent domain only if "the agency is unable to agree on a conveyance or the terms of a conveyance" with the property's owner). The Country Club has never indicated that it would have accepted a higher offer had the History Connection made one. And it has now conclusively demonstrated through its actions that it would not have done so. The Country Club cannot now be heard to complain that a higher offer was not made in the first place.

Appellee's Proposition of Law No. 2:

> *An agency that passes a resolution declaring that the acquisition of property through the use of eminent domain is necessary is entitled to a rebuttable presumption as to the necessity of the acquisition and a landowner bears the burden of overcoming that presumption.*

The Country Club next challenges the Fifth District's determination that it was "necessary" to acquire the Club's leasehold. As a matter of statutory law and the cases interpreting it, that argument fails.

A. The acquisition of the Country Club's lease by the History Connection is necessary for the creation of a public park.

1. The Ohio Constitution states that "[p]rivate property shall ever be held inviolate," but it also recognizes that private property remains "subservient to the public welfare." Ohio Const. Art. I, §19. The Constitution requires, in other words, that a "taking be necessary for the common welfare." *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, ¶41. The General Assembly has codified this limitation, requiring that any exercise of the power of eminent domain be "necessary and for a public use." R.C. 163.021(A).

The legislature has defined "public use" and identified when a taking is "necessary." Certain uses of property, like the creation of a public park, are presumed to be public uses. R.C. 163.01(H)(2). The General Assembly has established a similar presumption with respect to the necessity of a taking: "A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation creates a rebuttable presumption of the necessity for [an] appropriation." R.C. 163.09(B)(1)(a).

In addition to these general principles, which govern all exercises of the eminent domain power, the General Assembly has specifically addressed the power of the History Connection to acquire certain property. It has granted the History Connection the power to acquire and hold property, including any property that is "the site of any historic or prehistoric mound [or] earth works." R.C. 1743.07. And it has authorized the History

Connection to acquire such property through eminent domain if it is unable to "agree upon the price to be paid." *Id.*

The History Connection here lawfully exercised this statutory power to declare necessity by resolution. The History Connection's Board of Trustees adopted a resolution declaring that the acquisition of the leasehold estate is necessary "for the preservation and improvement of the [Octagon Earthworks] for a public use." Ohio History Connection Board of Trustees Resolution, Hearing Ex.11 at 2. Specifically, the resolution stated that it is necessary that the History Connection acquire the lease so that it can restore the Octagon Earthworks, open the Earthworks to the public, preserve the ceremonial and cultural significance of the site, and nominate the site to the World Heritage List. *Id.* at 3–4. In light of the statutory presumptions found in R.C. 163.01(H)(2) and R.C. 163.09(B)(1)(a), the resolution adopted by the Board of Trustees conclusively establishes that the History Connection's acquisition of the remaining term of the Country Club's lease is necessary to accomplish a public purpose.

2. The Country Club failed to rebut either the presumption of public use or the presumption of necessity. Just the opposite. It admitted the relevant facts supporting each presumption. It acknowledged, for example, that the continued presence of the golf course on the Octagon Earthworks site was incompatible with the use of the Earthworks as a public park. *See* Country Club Answer and Counterclaim, ¶¶47 and 55; R.8; Petition, ¶¶46 and 54, R.1. And it likewise admitted that the History Connection's Board of

Trustees had adopted a resolution pursuant to R.C. 163.09(B) declaring that the acquisition of the Country Club's lease was necessary for the creation of a public park. *See* Country Club Answer and Counterclaim, ¶86; R.8; Petition, ¶85 and Ex.L, R.1. Those admissions leave little for the Court to say: the Country Club has effectively conceded that the History Connection's acquisition of the Octagon Earthworks is necessary for a public use.

Even if the Court were to ignore the Country Club's admissions, the Club still failed to carry its burden in the proceedings below. As the Fifth District noted, "the trial court had before it extensive evidence and testimony to adequately support its conclusion that" the History Connection's acquisition of the Country Club's lease was necessary to provide "full public access to [the] geographic remnants left by the prehistoric Native American inhabitants of [the] region." App.Op.¶43. The trial court, in turn, held that the evidence introduced at the necessity hearing was so overwhelming that only one conclusion was possible: the History Connection's acquisition of the remaining term of the Country Club's lease was necessary and served a public purpose. Tr.Ct.Op.9. That evidence was so compelling, the trial court wrote, that it ultimately did not matter which party bore the burden of establishing necessity; the History Connection would prevail regardless. Tr.Ct.Op.10 n.13. The trial court's finding can be reversed only if this Court deems it clearly erroneous. *See Kalain*, 25 Ohio St. 3d at 159. The Country Club has not proven clear error.

B. For purposes of eminent domain, necessity and public use are not determined by weighing the benefits of competing uses of a property.

Rather than challenging the statutory presumptions that support the History Connection's acquisition of the leasehold estate, the Country Club seeks to redefine what it means for a taking to be "necessary" and what constitutes a "public use." The Club asks the Court to determine the meaning of "public use" by weighing the benefits that the public would derive from different, competing uses of a property. It further argues that a taking is not "necessary" if some (but not all) of the proposed uses could take place while the property remained in private hands. The courts below both declined to adopt either argument. App.Op.¶¶41–42; Tr.Ct.Op.10. This Court should do the same.

Public use. The Country Club argues that the creation of a public park on the Octagon Earthworks site is not a public use because the public would benefit more if the Earthworks remain under private control. Country Club Br.26. The Club has not identified a single Ohio court that has adopted the type of weighing analysis for which it advocates. To the extent this Court has considered the question, it has declined to weigh the relative benefits of competing public uses. *Cf. City of Worthington v. City of Columbus*, 100 Ohio St. 3d 103, 2003-Ohio-5099, ¶¶25–27 (Pfeifer, J. dissenting) (arguing that the majority erred because the Court should resolve property disputes between public entities "through a reasoned weighing of alternative possible uses").

The Country Club suggests that its approach to determining public use is supported by the Court's decision in *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-

Ohio-3799. It is not. The Country Club correctly cites *Norwood* for the principle that, in Ohio, the power of eminent domain may only be used for the "common welfare" or the "common good." *Id.* at ¶¶41 and 43. But that general statement of legal principles does nothing to advance the Club's argument. Everyone agrees that the taking here must serve a public purpose, the only question is whether it will. And the answer is, "it will"; as shown above, the planned park constitutes a public use. R.C. 163.01(H)(2).

Necessity. The Country Club also suggests that the History Connection's acquisition of the Octagon Earthworks is not necessary. That argument is foreclosed by the Club's own admissions. The Country Club has acknowledged that the continued operation of a private club and golf course on the Octagon Earthworks site is incompatible with the use of the Earthworks as a public park. Petition, ¶¶46 and 54, R.1; Country Club Answer and Counterclaim, ¶¶47 and 55, R.8. The Club attempts to creatively avoid that admission by arguing that "a *majority* of [the History Connection's] prospective uses of the property" are compatible with the continued operation of the club. *See* Country Club Br.24 (emphasis added). Creative phrasing cannot change the facts, however. The History Connection seeks to acquire the Octagon Earthworks for the purpose of creating a public park. Tr.465; *see also* Notice of Intent to Acquire and Good Faith Offer, Hearing Ex.12 at 1. The creation of a park is a public use under R.C. 163.01(H)(2). And the use of the Earthworks property as a private country club and golf course is incompatible with

its use as a public park. Petition, ¶¶46 and 54, R.1; Country Club Answer and Counter-claim, ¶¶47 and 55, R.8.

Even if not barred by its admission, the Country Club's challenge to the necessity of the acquisition at issue here would still be without merit. It has long been settled that, with respect to eminent domain, "necessity relates rather to the nature of the property and the uses to which it is applied, than to the exigencies of the particular case." *Giesy v. Cincinnati, Wilmington & Zanesville R.R. Co.*, 4 Ohio St. 308, syl. (1854). As a result, courts have consistently held that there is no need to show that the acquisition of property is absolutely necessary; it is sufficient that the use is "reasonably convenient or useful to the public." *Bd. of Trs. of Sinclair Cmty. College Dist. v. Farra*, 2010-Ohio-568, ¶37 (2d Dist.). Necessity in the eminent-domain context therefore does not mean "absolutely necessary or indispensable"; it means "reasonably necessary to secure the end in view." *Media One v. Manor Park Apartments, Ltd.*, Nos. 99-L116, 99-L117, 2000-L-045, and 2000-L-046, 2000 Ohio App. LEXIS 4791 (11th Dist. Oct. 13, 2000) (quotations and citations omitted); *see also Wadsworth*, 170 Ohio App. 3d 264, ¶12 (the Ohio Constitution does not require that a "taking be immediately necessary, only that the taking is necessary for a public purpose.").

Applied here, there is more than enough evidence to show that the History Connection's acquisition of the remaining term of the Country Club's lease is reasonably necessary and reasonably convenient for the public. As discussed above, the History

Connection intends to create a public park on the Octagon Earthworks site, Tr.465, expand opportunities for the public to visit and learn about the Earthworks, Tr.199, 202–03, restore the Earthworks to their original condition, Tr.172–73, 467, conduct additional research on the site, Tr.465, and, together with other examples of Hopewell earthworks, nominate the Octagon Earthworks to the World Heritage List, Tr.363–64. The testimony and evidence introduced at the necessity hearing established that none of that will be possible as long as the Octagon Earthworks remain under the control of a private club. Experience has shown that expanded public access to the Octagon Earthworks is incompatible with the use of the site as a golf course and private country club. *See, e.g.*, Tr.131–32, 262–63 (spraying of pesticides and herbicides interfered with visits and research); Tr.525–31, 536–37 (golf outings interfered with visits); Tr.191–92, 264–65 (golfers and golf balls interfered with research efforts). The other proposed uses of the site are incompatible as well. Restoration of the site would require removal of much of the golf course infrastructure. Tr.173. Research requires continuous access to the site during warm weather—the very same time that golf is most frequently played. Tr.195. As for nomination to the World Heritage List, the evidence was unequivocal. As long as the golf course remains on the site, nomination of the Octagon Earthworks—and the other earthworks that make up the Hopewell Ceremonial Earthworks complex—is simply not possible. Tr.364–64; U.S. Dept. of the Interior Letter, Hearing Ex.28.

Finally, the Country Club's suggestion that all of the History Connection's plans for the site depended on a successful World Heritage designation, *see* Country Club Br.27, is simply incorrect. Burt Logan testified that, even without that designation, it was "absolutely" the History Connection's intention to convert the Octagon Earthworks site into a public park. Tr.467.

CONCLUSION

The Court should affirm the Fifth District's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of Appellee The Ohio History Connection was served via e-mail this 21st day of October, 2020, upon the following counsel:

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