

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. :
ROBERT MERRILL, Trustee, et al., :
 :
Plaintiffs-Appellees, :
 :
 :
v. :
 :
 :
STATE OF OHIO, DEPARTMENT :
OF NATURAL RESOURCES, et al., :
 :
Defendants – Appellants. :

Case No. 2009-1806

On Appeal from the
Lake County Court of Appeals
Eleventh Appellate District

Court of Appeals Case Nos.
2008-L-007, 2008-L-008
Consolidated

SUPPLEMENTAL JURISDICTIONAL BRIEF OF THE OHIO
DEPARTMENT OF NATURAL RESOURCES AND SEAN LOGAN,
DIRECTOR OF NATURAL RESOURCES

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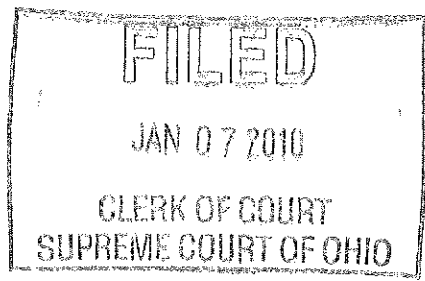
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This brief is submitted in response to the Court's December 22, 2009 Entry requesting the parties to brief the questions of whether the Attorney General has the authority to continue to prosecute this appeal as counsel for the State of Ohio, and if so, whether the record is sufficient to allow the Court to resolve the issues presented. The Ohio Department of Natural Resources and its Director Sean Logan ("ODNR") believe the answer to both questions is affirmative.

The Court's first question is premised on two assumptions: 1) that the prosecution of this appeal by the Attorney General is contrary to a directive of the Governor of Ohio, and 2) that the Attorney General is not representing ODNR, the administrative agency originally named in this action. The first assumption is not accurate. There was no directive from the Governor suggesting that the Attorney General should not pursue this action on behalf of the State of Ohio.

The only directive issued by the Governor regarding this case was a directive to ODNR that it should honor the presumptively valid real property deeds of the Lake Erie lakefront property owners unless a court determines that the deeds are limited by or subject to the public's interest in those lands or are otherwise defective and unenforceable. Responding to this directive, ODNR made its position known to the trial court and ceased to take an active role in the litigation. ODNR indicated to the trial court that it welcomed the court's resolution of the issues before it, based upon the able and exhaustive briefs submitted on behalf of the lakefront owners and on behalf of the State of Ohio by the Attorney General.

Thus, although ODNR ceased to take an active role in litigating this case, it continued to recognize that there was a significant case and controversy in need of judicial resolution. ODNR and the Governor fully expected that the Attorney General of Ohio would continue to defend the action on behalf of the State of Ohio, as a separately named party, and would continue to litigate the merits of the issues as framed in the trial court. ODNR and the Governor understood and expected that the Attorney General would continue to represent the State of Ohio in this action through the appellate process.

ODNR and the Governor believe that the Attorney General has the authority under the Ohio Constitution and the common law to represent the interests of the State of Ohio before the courts, regardless of whether he is acting as counsel for a particular state officer or administrative agency. The Attorney General's authority to represent the State of Ohio is not limited to only those instances in which he is directed to prosecute or defend an action by the Governor or some administrative agency. Nor is it limited to those cases in which the Governor of Ohio agrees with the legal arguments advanced by the Attorney General on behalf of the State of Ohio.

ODNR also believes that the record in this case is sufficient to permit the Court to resolve the issues presented. This case was decided on cross motions for summary judgment, and will be before the court for *de novo* review based upon the record made in the trial court. The fact that the court of appeals struck the State of Ohio's assignment of errors and briefs is immaterial. The court acted on its erroneous conclusion that the Attorney General did not have the authority to prosecute the action on behalf of the State of the Ohio, in the absence of ODNR

taking an active role in the litigation. The Court may and should reverse this error at the outset of this case and reinstate the State of Ohio's assignments of error. Notwithstanding the fact that it struck the State of Ohio's brief, the court of appeals proceeded to address the merits of the issues before it, such that there is no reason to remand the case back to the court of appeals.

ODNR filed a Joint Notice of Appeal with the State of Ohio in this Court. It separately filed its own Memorandum in Support of Jurisdiction urging the Court to take this appeal. ODNR, acting with the advice and consent of the Governor, urges the Court to review the merits of the significant issues presented in this case. ODNR continues to follow the Governor's policy directive to honor the apparently valid deeds of lakefront owners. It believes, however, that the issues in this case are of sufficient weight and importance that it is in the interests of all the parties to have these issues conclusively resolved by this Court at this time. ODNR seeks this Court's guidance so that it may faithfully discharge its duty to protect and balance the interests and rights of the public with the interests and rights of the owners of land fronting Lake Erie.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Supplemental Jurisdictional Brief was served upon the following counsel by regular U.S. Mail postage pre-paid, on January 7, 2010:

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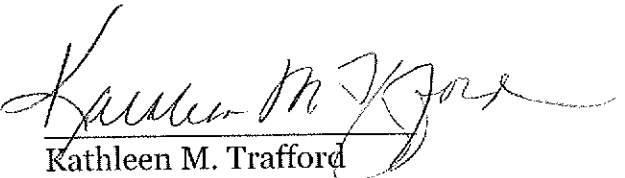
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