


**IN THE COURT OF COMMON PLEAS  
LAKE COUNTY, OHIO**

STATE OF OHIO EX REL.,	)	Case No. 04CV001080
ROBERT MERRILL, TRUSTEE, et al.	)	
	)	Judge Eugene A. Lucci
Plaintiffs-Relators	)	
	)	<b><u>MOTION OF THE STATE OF OHIO</u></b>
vs.	)	<b><u>TO DISMISS</u></b>
	)	<b><u>PLAINTIFFS-RELATORS'</u></b>
STATE OF OHIO, DEPARTMENT	)	<b><u>FIRST AMENDED COMPLAINT</u></b>
OF NATURAL RESOURCES, et al.	)	
	)	
Defendants-Respondents	)	

Expressly reserving all other defenses and rights they may have, Defendants-Respondents the State of Ohio, Department of Natural Resources, Sam Speck, Director, Ohio Department of Natural Resources, and the State of Ohio (hereinafter collectively "the State of Ohio" or "the State"), by and through counsel, Attorney General Jim Petro, hereby move this Court pursuant to pursuant to Civ. R. 12(B)(1) and (6) for an Order dismissing Plaintiffs-Relators' First Amended Complaint. The grounds for requesting this relief are more fully set forth in the accompanying Brief in Support which is incorporated into this motion as if fully set forth herein.

Respectfully submitted,

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ATTORNEY GENERAL OF OHIO**

  
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## **BRIEF IN SUPPORT**

### **I. STATEMENT OF THE FACTS**

As suggested in paragraph 8 of the First Amended Complaint (hereinafter “Complaint”), the law regarding Lake Erie has deep historic roots. In the United States, shorelands, tidelands, tidewaters, and navigable freshwaters, which include Lake Erie as well as the other Great Lakes, are accorded special treatment under state and federal law. These lands and waters are owned by the public, but held in trust by the state for the benefit of the public. The body of law pertaining to these lands and waters is called the Public Trust Doctrine. Authority vested in a state through the Public Trust Doctrine is based upon its power over state property, rather than a state’s regulatory powers through its sovereign police powers. The lands and waters under this doctrine are governed and managed by a state as the inalienable property of all its people.

In 1803, pursuant to the Constitution of the United States, Ohio was granted statehood into the United States of America and was granted title as proprietor in trust for all citizens of the State to all lands subject to the navigable waters of Lake Erie within the State's territorial boundaries. The federal government, in turn, reserved a navigational servitude over said navigable waters and lands, an easement for the purpose of regulating navigation and commerce over each of the Great Lakes and oceans between and among the several states pursuant to the commerce clause of the U.S. Constitution.

In 1917, the General Assembly codified a significant amount of Ohio's prior common law regarding the State's territory of Lake Erie in what came to be known as the Fleming Act. The current version of the Fleming Act is found at R.C. 1506.10 and 1506.11. The Fleming Act expresses the boundaries of the State's territory of Lake Erie in terms of “the international boundary line with Canada” and the “natural shoreline” and “the southerly shore.” The Act further provides that the State's territory of Lake Erie includes “the lands presently underlying the waters of Lake Erie and the lands formerly underlying the waters of Lake Erie and now artificially filled, between the natural shoreline and the international boundary line with Canada.” R.C. 1506.10 - .11. Finally, the Act prescribes that the State is to manage the development or improvement of Lake Erie through the medium of leasing Lake Erie lands. R.C. 1506.11.

Though the law has remained virtually unchanged since 1917, the State has changed the identity of its designee charged with its authority under the Fleming Act. In the original Fleming Act of 1917, this authority was delegated to the local authorities bordering Lake Erie. In the 1950s, the Act was amended whereby the State reclaimed its authority and designated its Department of Public Works. In the 1970s, this authority was transferred to the State's Department of Public Works. Finally, in the late 1980s, the legislature designated its Department of Natural Resources (hereinafter "the Department") as "the state agency in all matters pertaining to the care, protection and enforcement of the State's rights" in the territory of Lake Erie and provided that "[a]ny order of the director of natural resources in any matter pertaining to the care, protection, and enforcement of the state's rights in that territory is a rule or adjudication within the meaning of sections 119.01 to 119.13 of the Revised Code." R.C. 1506.10

In the Complaint, all Plaintiffs claim to be harmed by the actions of the State as alleged in paragraphs 10, 11, 12 and 13. Yet only four of the Plaintiffs have had any specific and direct dealings with the State that would actually support a theory that they would be entitled to pursue a recognized remedy. However, the State's relationship with these four Plaintiffs, namely Sheffield Lake, Inc., Thomas O. Jordan Pres., Timothy and Kimberly Rosenberg, and Steve Nickel, as intimated in the Complaint, is significant in demonstrating that a claim for relief from this forum is without merit.

Sheffield Lake, Inc., Thomas O. Jordan Pres.

On March 11, 1998, after eight written notifications from the Department between December 1993 and March 1998 of the need to obtain authorization under R.C. 1506.11 for the unauthorized improvement and development of approximately 10,000 square feet of Lake Erie, the Director of the Department issued an Order pursuant to R.C. 1506.10 and Chapter 119 to Thomas O. Jordan, President of Sheffield Lake, Inc., a copy of which is attached as Exhibit "A" hereto. Mr. Jordan submitted a written request for an administrative hearing of the Director's Order by letter dated March 26, 1998 and received by the Department on March 30, 1998. In that written request, Mr. Jordan states: "It has been my desire to comply with your requests. At this point, it is a matter of the survey. Possibly, we can solve the problem before the hearing date. I have had health problems and will be back to Ohio in May."

By letter dated November 4, 1998, David Brunkhorst, PE, RS of Brunkhorst Engineering

Consultants, Inc. notified the Department that “Mr. Tom Jordan retained our services in June of this year to ... prepare such submerged land lease descriptions and documents as are necessary ... Submission to you of the appropriate documents will follow as soon as we make the required determinations.” From the date of that written notice to present, Mr. Jordan has not provided “the appropriate documents” promised by his agent in 1998 and has not provided written notice to the Director of the Ohio Department of Natural Resources that he wishes to pursue a hearing of the Order rather than comply with the requests of the Department to obtain a lease or the Order of the Director to remove the unauthorized encroachment from Lake Erie.

Timothy and Kimberly Rosenberg

On December 27, 2001 the Department received an application from Gregory Rothman, predecessor in title to Timothy and Kimberly Rosenberg, requesting a lease from the State of Ohio pursuant to R.C. 1506.11 and OAC 1501-6. On July 11, 2002, the Department received an application from Timothy L. Rosenberg, requesting a lease from the State of Ohio pursuant to R.C. 1506.11 and OAC 1501-6 and notifying the Department that the upland property had been transferred from Mr. Rothman to Mr. Rosenberg. Lake Erie Submerged Land Lease No. SUB-1803B-LO, commencing October 1, 2002, was granted by the Director of the Ohio Department of Natural Resources to Lessees Timothy and Kimberly Rosenberg with the approval of the Governor and the Attorney General “pursuant to the provisions of Sections 1501.01, 1504.02, 1506.10 and 1506.11, Ohio Revised Code and the rules promulgated under Chapter 119, Ohio Revised Code, and authorized by Section 1506.02, Ohio Revised Code,” a copy of which is attached as Exhibit “B” hereto. From the commencement date of the lease until the date upon which they brought this action, Plaintiffs Timothy and Kimberly Rosenberg never provided notice to the Director of the Department of any claim of harm or concern.

Steve Nickel

On February 4, 2002, the Department received an application from Steve Nickel, requesting a lease from the State of Ohio pursuant to R.C. 1506.11 and OAC 1501-6. Lake Erie Submerged Land Lease No. SUB-1302-OT, commencing August 1, 2002, was granted by the Director of the Ohio Department of Natural Resources to Lessees Steven E. Nickel and Jennifer L. Nickel with the approval of the Governor and the Attorney General “pursuant to the provisions of Sections 1501.01, 1504.02, 1506.10 and 1506.11, Ohio Revised Code and the rules

promulgated under Chapter 119, Ohio Revised Code, and authorized by Section 1506.02, Ohio Revised Code,” a copy of which is attached as Exhibit “C” hereto. From the commencement date of the lease until the date upon which he brought this action, Plaintiff Steve Nickel never provided notice to the Director of the Department of any claim of harm or concern.

As will be discussed below, these four Plaintiffs knew that they have, and will continue to have, at their disposal, administrative remedies under Chapters 1506 and 119 of the Revised Code. Their failure to pursue or exhaust these remedies foreclose their claims for relief before this Court. Their knowledge of this fact is conspicuously absent from the allegations found in the Complaint.

The remainder of the Plaintiffs, namely Robert Merrill, Trustee, Ohio Lakefront Group, Inc., Anthony J. Yankel, Charles S. Tilk, Sandra Wade, David Zeber, Adrian F. Betleski, LeMarr L. & Patricia J. French, and Neal Oscar Luoma, have not been affected by an action of the State, administrative or otherwise. They have never submitted an application to the Director of the Department, have never been granted or denied a lease, and have never been subject to an Order of the Director pursuant to R.C. 1506.10 or 1506.11.

Without more substance, these individuals and entities are simply unaffected parties, with no real justiciable cause of action against the State. Being unaffected parties, the allegations as they relate to these Plaintiffs, are more an opportunity to air indiscriminate grievances as opposed to bringing a cause of action. As will be discussed herein, the law rejects such attempts and dismissal of these Plaintiffs becomes proper.

## **II. STATEMENT OF THE LAW AND ARGUMENT**

- A. Count I of the First Amended Complaint should be dismissed as to any Plaintiff against whom no final actions have been taken, or requested to be taken, by the State under R.C. 1506.10 - 1506.11, as there can be no actual justiciable controversy between any such Plaintiff and the State. Therefore, the claims of such Plaintiff is not ripe for review.**

Plaintiffs seek declaratory judgment in the first Count and in the Prayer for Relief in their Complaint. “It is a fundamental principle of law that courts will not issue advisory opinions,” but rather “[i]n the absence of a justiciable issue the court is without jurisdiction to entertain an action for declaratory judgment.” *Gates Mills Investment Company v. Village of Pepper Pike*

(November 21, 1974), 8<sup>th</sup> Dist. No. 33291, at 3, 1974 Ohio App. LEXIS 2870, citing *Fortner v. Thomas* (1970), 22 Ohio St. 2d 13. There must be an actual justiciable controversy for declaratory relief to issue. The mere possibility that a state agency may exercise its authority in the future is not sufficient. *State ex rel. Bolin v. Ohio Environmental Protection Agency* (1992), 82 Ohio App. 3d 410, 612 N.E.2d 498.

In the case of *Karches et al., v. City of Cincinnati*, the Ohio Supreme Court held that “a prerequisite to a determination that an actual controversy exists in a declaratory judgment action is a final decision concerning the application of the ... regulation to the specific property in question.” *Karches et al., v. City of Cincinnati* (1988), 38 Ohio St. 3d 12; 526 N.E.2d 1350, Syllabus, paragraph 2. The Supreme Court then went on to adopt the following two-step test to determine ripeness:

“The first step is a requirement of finality. That is met when ‘... the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.’ The second step requires an injured party to exhaust any available administrative remedies prior to instituting a suit for judicial relief.”

*Karches, supra* at 14-15.

The Eleventh District Court of Appeals recently applied this two prong test in the case of *Dubeansky v. City of Mentor* and found that “[i]t is clear that appellee failed to meet either prong of the foregoing test,” as “[a]ppellee withdrew his application for a conditional use permit before the Mentor Planning Commission arrived at a definitive position as to whether appellee needed one.” *Dubeansky v. City of Mentor* (November 28, 1997), 11<sup>th</sup> Dist. No. 96-L-049, 4-5, 1997 Ohio App. LEXIS 5328. Therefore, the “commission was never given the opportunity to take any action on appellee’s application.” *Dubeansky, supra*.

Just as the City of Mentor provided for the regulation of the improvement and development of the city through permits and variances issued by the Mentor Planning Commission in *Dubeansky, supra*, the General Assembly has provided for the management of the improvement and development of Lake Erie through leases granted by the Director of the Ohio Department of Natural Resources, with the approval of the Governor and the Attorney General. See R.C. 1506.11; Ohio Admin. Code 1501-6. Unlike *Dubeansky, supra*, none of the Plaintiffs in this action submitted and then withdrew an application. Rather, the following Plaintiffs have never submitted an application to the Director at all, and have never been subject

to an Order of the Director pursuant to R.C. Sections 1506.10, 1506.11 or Chapter 119: Robert Merrill, Trustee, Ohio Lakefront Group, Inc., Anthony J. Yankel, Charles S. Tilk, Sandra Wade, David Zeber, Adrian F. Betleski, LeMarr L. and Patricia J. French, or Neal Oscar Luoma (hereinafter “Unaffected Parties”).

In this regard, the Unaffected Parties listed above are on the same unripe footing as the plaintiff in *Gates Mills Investment Company, supra*, in which the Court found and held as follows:

“Prior to bringing this action plaintiff has sought neither a building permit nor a variance from the Village of Pepper Pike. The trial court dismissed the action for lack of jurisdiction over the subject matter and plaintiff appeals.

The Common Pleas Court is without jurisdiction to decide questions regarding the applicability of a zoning ordinance to a particular parcel of land when the appellant has not so much as applied for a building permit or a variance.

Until such time as a building permit or a variance has been requested no issue has arisen involving the parties and an action for declaratory judgment will not lie.

In the interests of judicial economy and in harmony with the purposes of the declaratory judgment act, the present action was properly dismissed until such time as all issues arising between the parties could be brought before the court.”

*Gates Mills Investment Company, supra* at 3-4. Therefore, under the holdings of *Karches, supra*, *Dubeansky, supra*, and *Gates Mills Investment Company, supra*, none of the above listed Unaffected Parties can begin to meet the first prong of the two-prong test for ripeness, and any claims specifically related to a constitutional application of R.C. 1506.10 - .11 to their respective individual interests under Count I of the Complaint must also fail.

Ohio Lakefront Group, Inc., may assert that such a ripeness standard should not apply to it because it is not an upland owner and therefore could not submit an application pursuant to R.C. 1506.11. It describes itself as “a duly formed non-profit corporation, which represents, and most of whose members are, owners of real property abutting Lake Erie.” However, R.C. 1506.11 does not state that only upland owners may submit an application to develop or improve Lake Erie. R.C. 1506.11 states that “any person who wants to develop or improve part of the territory” may submit an application. R.C. 1506.11(B) (emphasis added). Ohio Lakefront Group, Inc. is a “person” as that term is defined in R.C. 1506.01(D) and R.C. 1.59, therefore the first prong of the ripeness test appropriately applies to it, and its interests under Count I of the First Amended Complaint should be dismissed.

**B. Count I of the First Amended Complaint should be dismissed, as the only Plaintiffs who have arguably been subject to any action of the State, have failed to exhaust, or even commence, any administrative remedies as mandated by Ohio law.**

Unlike the Unaffected Parties listed above, Plaintiffs Steve Nickel and Timothy and Kimberly Rosenberg submitted applications and obtained leases pursuant to R.C. 1506.11, and its corresponding regulations under Ohio Admin. Code 1501-6, to develop or improve certain parts of Lake Erie adjacent to their respective properties. Further, Plaintiff Sheffield Lake, Inc., through Thomas O. Jordan, President is subject to an Order from the Director of the Department pursuant to R.C. 1506.10 and R.C. Chapter 119. These Plaintiffs may at least be able to meet the first prong of the two-prong ripeness test in that the State has actually taken some action with regard to them. However, none of them meet the second prong of the ripeness test, for none of them have exhausted their respective administrative remedies as required by law and, therefore, their claims under Count I must also be dismissed in this action.

The second prong of the ripeness test above, “the doctrine of failure to exhaust administrative remedies,” has recently been clarified by the Ohio Supreme Court as “not a jurisdictional defect to a declaratory judgment action” but “an affirmative defense that may be waived if not timely asserted and maintained.” *Jones v. Village of Chagrin Falls* (1997), 77 Ohio St. 3d 456, 462, 674 N.E.2d 1388.

“We agree with the United States Supreme Court and the courts of the many jurisdictions that have echoed the words of *Myers v. Bethlehem Shipbuilding Corp.* (1938), 303 U.S. 41, 50-51, 58 S. Ct. 459, 463, 82 L. Ed. 638, 644: ‘[It is] the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.’

Our decision today simply clarifies that under our adversarial system of justice it is the responsibility of the party seeking to benefit from the doctrine to raise and argue it. Once raised, it becomes the duty of the trial court to determine upon consideration of the affirmative defenses and the elements of a declaratory judgment action, whether such action is proper.

*Jones, supra.* This affirmative defense is raised and argued today by the State in this Motion.

Though technically an affirmative defense rather than a jurisdictional bar, “[e]xhaustion of administrative remedies,” like ripeness and standing is a “doctrine of judicial abstention.” *Denune v. City of Springfield* (June 28, 2002), Ohio Ct. App., Clark County, 17, 2002 Ohio 3287, 2002 Ohio App. LEXIS 3516. “Prior to seeking court action in an administrative matter, the party must exhaust the available avenues of administrative relief through administrative appeal.” *Denune, supra* quoting *Noernberg v. Brook Park* (1980), 63 Ohio St.2d 26, 29, 406 N.E.2d 1095. “The purpose of the doctrine ‘... is to permit an administrative agency to apply its special expertise ... in developing a factual record without premature judicial intervention.” *Id.*

Under the doctrine of failure to exhaust administrative remedies, “if there is a special statutory procedure which a party must use, an action for declaratory judgment is inappropriate.” *City of Galion v. American Fed'n of State, County & Mun. Employees, Local No. 2243* (1995), 71 Ohio St. 3d 620, 646 N.E.2d 813 citing *State ex rel. Albright v. Delaware Cty. Court of Common Pleas* (1991), 60 Ohio St.3d 40, 572 N.E.2d 1387 and *State ex rel. Taft v. Franklin Cty. Court of Common Pleas* (1992), 63 Ohio St.3d 190, 586 N.E.2d 114.

By its express terms, the leases granted to Steve Nickel (hereinafter “Lessee Nickel”) and Timothy and Kimberly Rosenberg (hereinafter individually and collectively “Lessee Rosenberg”) were issued “pursuant to the provisions of Sections 1501.01, 1504.02, 1506.10 and 1506.11, Ohio Revised Code and the rules promulgated under Chapter 119, Ohio Revised Code, and authorized by Sections 1506.02, Ohio Revised Code.” R.C. 1506.10 states in pertinent part:

“Any order of the director of natural resources in any matter pertaining to the care, protection, and enforcement of the state’s rights in that territory is a rule or adjudication within the meaning of sections 119.01 to 119.13 of the Revised Code.”

An “adjudication” is defined in R.C. 119.01(D) as “the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specific person.” In this instance, the Director is such “highest or ultimate authority” of the Department, the designated agency, pursuant to R.C. 1506.10 and 119.01(D). Lessees Nickel Rosenberg are each a “person,” as defined in R.C. 119.01(F). Therefore, Section 1506.10 and Chapter 119 of the Revised Code provide Lessees Nickel and Rosenberg with an exclusive statutory remedy concerning any alleged deficiency with their respective leases granted by the Director at their request pursuant to R.C. 1506.10 - .11, and their action in declaratory judgment

cannot be maintained to circumvent the clear legislative intent of R.C. 1506.10.

On this point, our state's highest court has also held that "where a special statutory procedure ... is available, actions for declaratory judgment and injunction cannot be used to bypass the statutory procedure." *State ex rel. Smith v. Frost* (1995), 74 Ohio St. 3d 107, 111 656 N.E.2d 673 citing *State ex rel. Albright v. Delaware Cty. Court of Common Pleas* (1991), 60 Ohio St. 3d 40, 42, 572 N.E.2d 1387, 1389. The Court went on to explain:

"Since it is always inappropriate for courts to grant declaratory judgments and injunctions that attempt to resolve matters committed to special statutory proceedings, their decisions should always be reversed on appeal, except when they dismiss the actions ... This [is] tantamount to a holding that courts have no jurisdiction to hear [the] actions in the first place ..."

*State ex rel. Smith, supra* quoting *Albright, supra*, 42.

Two exceptions to this general rule have been acknowledged by the Ohio Supreme Court as follows:

"First, if there is no administrative remedy available which can provide the relief sought, or if resort to administrative remedies would be wholly futile, exhaustion is not required. Second, exhaustion of remedies is unnecessary when the available remedy is onerous or unusually expensive."

*Karches v. Cincinnati* (1988), 38 Ohio St. 3d 12, 14-15, 526 N.E.2d 1350 (citations omitted). Neither of these exceptions apply to Lessees Nickel and Rosenberg. The administrative remedy is clearly available, as described in detail above. If the Director determines, after notice by these Lessees, that the legal descriptions in their respective leases should be modified, the cost of such remedy is free. Should an administrative hearing become necessary or requested by these Lessees, the cost would be far less than the present all encompassing and complex class action proposed in the First Amended Complaint.

However, Lessees Nickel and Rosenberg have failed to even commence, let alone avail themselves of their legal remedies through the appeal provisions of R.C. 1506.10 and Chapter 119. Had these three individuals not chosen to be complainants in this action, the Department would remain unaware of any of their claims to this day. The State has timely raised and argued the affirmative defense of failure to exhaust administrative remedies and such defense is clearly applicable here. Accordingly, this Court must deny declaratory and injunctive relief to Plaintiffs

Steve Nickel and Timothy and Kimberly Rosenberg and dismiss Count I of their First Amended Complaint pursuant to Civ. R. 12(B)(6).

As stated above, only one Plaintiff, Sheffield Lake, Inc., Thomas O. Jordan Pres. (hereinafter “Administrative Appellant Jordan”), is currently subject to an Order from the Director of the Department. Administrative Appellant Jordan has also failed to exhaust his administrative remedies. In an display of patience, perhaps rarely seen in any state agency, the Department has attempted to gain compliance with Ohio law from Administrative Appellant Jordan for more than a decade. The Department waited five years before its Director issued an Order to Administrative Appellant Jordan pursuant to R.C. 1506.10, and has continued to wait and has stayed an administrative hearing for five more years after compliance was promised by Mr. Jordan’s agent. As a reward for its good faith, the Department now finds itself sued in this action by Administrative Appellant Jordan. By his actions, Administrative Appellant Jordan is attempting to bypass the legislative scheme of R.C. 1506.10 and Chapter 119 which has been at his disposal for over five years. Like the plaintiff in *Dubeansky, supra*, Administrative Appellant Jordan has never been previously denied any authorization and therefore has failed to establish that his administrative remedies would be futile.

Administrative Appellant Jordan’s situation is virtually identical to the administrative appeal of two upland owners who also refused to obtain leases under R.C. 1506.11 for their respective improvements in Lake Erie and received a similar Order from the Director pursuant to R.C. 1506.10 - *Schnittker v. Ohio Department of Natural Resources* (2001), 2001 Ohio App. LEXIS 1828, *appeal denied* 93 Ohio St. 3d 1411, *reconsideration denied*, 93 Ohio St. 3d 1464. The only notable difference between Mr. Jordan’s situation and the plaintiffs in *Schnittker, supra* is that the plaintiffs in *Schnittker, supra* steadfastly refused to comply with Ohio law and never wavered from their demand for an administrative appeal. There was no offer of settlement or representation of future compliance in *Schnittker, supra*. The plaintiffs in *Schnittker, supra*, just as Mr. Jordan will have under his administrative remedies, also had the opportunity to raise all of their constitutional challenges to the law as applied by the Department, which all failed, before the Franklin County Court of Common Pleas, the 10<sup>th</sup> District Court of Appeals and the Ohio Supreme Court, the latter of which unanimously refused to hear both the appeal and the motion of reconsideration. Perhaps that is why Mr. Jordan would rather try this forum. However,

Administrative Appellant Jordan knows he has failed to exhaust administrative remedies. As a result, he must also understand that the claims of Plaintiff Sheffield Lake, Inc., Thomas O. Jordan Pres. for declaratory and injunctive relief must be denied, as this Court must dismiss Count I of the First Amended Complaint pursuant to Civ. R. 12(B)(6).

**C. Count I of the First Amended Complaint should also be dismissed as to any Plaintiff against whom no final actions have been taken, or requested to be taken, by the State under R.C. 1506.10 - 1506.11, as there can be no actual justiciable controversy between any such Plaintiff and the State. Therefore, such Plaintiff lacks standing.**

Closely related to doctrine of ripeness are the rules of standing. The standing rules serve as much a bar to Plaintiffs Robert Merrill, Trustee, Ohio Lakefront Group, Inc., Anthony J. Yankel, Charles S. Tilk, Sandra Wade, David Zeber, Adrian F. Betleski, LeMarr L. & Patricia J. French, and Neal Oscar Luoma (hereinafter “the Unaffected Parties”) as the doctrine of ripeness.

The type of harm alleged by these Unaffected Parties appear on the face of the First Amended Complaint to be “nothing more than a generalized grievance shared by a large class of citizens ... this is exactly the type of grievance for which standing is to serve as a bar and direction to the appropriate branch of government to redress.” *Warth v. Seldin* (1975), 422 U.S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343.

The First Amended Complaint makes sweeping, generalized allegations of “the actions and threats to act of the Ohio Department of Natural Resources” which allegedly “has unconstitutionally and unlawfully asserted ownership and possession of the private property of Ohio citizens abutting Lake Erie” in that they claim that the Department “has arbitrarily and abusively forced, and continues to threaten to force, private land owners to lease from ODNR portion of the land owners’ own private property.” Plaintiffs therefore allege that the Department’s actions are “directly contrary to law, including O.R.C. § 1506.10 and 1506.11” and that “an actual and justiciable controversy exists” between the Plaintiffs and the State. Finally, Plaintiffs assert that, because “ODNR lacks authority to compel Plaintiffs ... to lease back property already owned by them ... any current submerged land lease between ODNR and any of the Plaintiffs” should be “declared void and invalid as to any land below OHW but owned by Plaintiffs.” However, none of these allegations personally happened to any of them.

The ten Unaffected Parties listed above have never applied, have never been granted, and have never been denied a lease of any land from the Department pursuant to R.C. 1506.11. They have never been issued an Order from the Director of the Department pursuant to R.C. 1506.10 ordering them to do or refrain from doing anything.

Even though Plaintiff Ohio Lakefront Group, Inc. may seek representational standing only, that status “does not eliminate or attenuate the constitutional requirement of a case or controversy.” *Warth v. Seldin* (1975), 422 U.S. 490, 511, 95 S. Ct. 2197. Plaintiff Ohio Lakefront Group, Inc. “must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought the suit.” *Id.* As discussed at length above, Plaintiff-Relator Ohio Lakefront Group, Inc., along with the other Unaffected Parties listed above, fail to do so. Therefore, none of these Plaintiffs-Relators have standing to raise claims arising from alleged injuries to others.

As cogently compiled and summarized last month by Ohio’s Fourth District Court of Appeals:

“The standing doctrine encompasses ‘the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.’ *Elk Grove Unified School Dist. v. Newdow* (2004), -- U.S. --, 159 L. Ed. 2d 98, 124 S. Ct. 2301, 2309 (quoting *Allen v. Wright* (1984), 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556). ‘Without such limitations \* \* \* the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.’ *Id.* (quoting *Warth v. Seldin* (1975), 422 U.S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343). ‘The requirement of standing is not designed to shield agencies and officials from accountability to taxpayers; instead, it denies the use of the courts to those who, while not sustaining a legal injury, nevertheless seek to air their grievances concerning the conduct of government. The doctrine of standing directs those persons to other forums.’ *Racing Guild of Ohio, Local 304, Service Employees Intern. Union, AFL-CIO, CLC v. Ohio State Racing Com’n* (1986), 28 Ohio St.3d 317, 321, 28 Ohio B. 386, 503 N.E.2d 1025.”

*Save the Lake Ass’n v. City of Hillsboro* (August 23, 2004), 4<sup>th</sup> Dist. No. 04-CA-6, at ¶8, 2004 Ohio 4522, 2004 Ohio App. LEXIS 4098 (emphasis added).

The above passage is particularly relevant here where Plaintiffs have already aired the same grievances as those in their First Amended Complaint before this Court to the executive and legislative branches of Ohio's government. The latter is still pending before the General Assembly in the guise of H.B. 218. After passing the House in December 2003, the bill has remained in the Ohio Senate throughout 2004. Therefore, the Plaintiffs, without waiting for the General Assembly's final decision, have come to this Court to ask it to do what even the Legislature has not yet decided to do – redefine the landward boundary of Lake Erie in the State of Ohio as a matter of law. The final decision of Ohio's General Assembly regarding H.B. 218 may well render the First Amended Complaint moot. In the meantime, the Unaffected Parties listed above may have standing before the Legislature, but they do not have such before this Court, and their First Amended Complaint must be dismissed.

**D. Count II of the First Amended Complaint should be dismissed, as Plaintiffs have failed to establish the elements necessary for a Writ of Mandamus to issue. The Court should dismiss Count III of the First Amended Complaint, as the State does not seek to appropriate any lands in this action and has not requested that the Court make a determination as to whether any lands may be appropriated.**

Plaintiffs seek the extraordinary remedy of mandamus in Counts II and III and in the Prayer for Relief of their First Amended Complaint. Like their claims for declaratory judgment, Plaintiffs' allegations for mandamus lack ripeness. In finding that a controversy presented in a mandamus action was not ripe for review, the Ohio Supreme Court recently described the wise rationale underlying Ohio's ripeness doctrine as follows:

“Ripeness ‘is particularly a question of timing.’ The ripeness doctrine is motivated in part by the desire ‘to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies ...’ As one writer has observed:

‘The basic principle of ripeness may be derived from the conclusion that ‘judicial machinery should be conserved for problems which are real or present and imminent, not squandered on problems which are abstract or hypothetical or remote.’ ... The prerequisite of ripeness is a limitation on jurisdiction that is nevertheless basically optimistic as regards the prospects of a day in court: the time for judicial relief is simply not yet arrived, even though the alleged action of the defendant foretells legal injury to the plaintiff.’”

*State ex rel. Elyria Foundry Company v. Industrial Commission of Ohio, et al.* (1998), 82 Ohio St. 3d 88, 89, 694 N.E.2d 459 quoting *Regional Rail Reorganization Act Cases* (1974), 419 U.S. 102, 140, 95 S. Ct. 335, and *Abbott Laboratories v. Gardner* (1967), 387 U.S. 136, 148, 87 S. Ct. 1507, and Comment, Mootness and Ripeness: The Postman Always Rings Twice (1965), 65 Colum.L.Rev. 867, 876; see also *State of Ohio, Department of Taxation v. Merrill, et al.* (October 14, 1998), 4<sup>th</sup> Dist. No. 98 CA 2, 1998 Ohio App. LEXIS 4911; *Drillex, Inc. v. Lake County Board of Commissioners* (August 10, 2001), 11<sup>th</sup> Dist., 145 Ohio App. 3d 384, 763 N.E.2d 204. Just as in *State ex rel. Elyria, supra*, Plaintiffs are asking this Court “to address the abstract and the hypothetical.” *State ex rel. Elyria, supra* at 89.

The Ohio Supreme Court has also repeatedly held that before a writ of mandamus will issue, the Relator must prove: (1) that the Relator has a clear legal right to the relief prayed for; (2) that the Respondent is under a duty to perform the act requested, and; (3) that the Relator had or has no plain and adequate remedy in the ordinary course of law. *State, ex rel. Plain Dealer Publishing Co. v. Lesak* (1984), 9 Ohio St. 3d 1, 457 N.E.2d 821; *State, ex rel. Westchester v. Bacon* (1980), 61 Ohio St. 2d 42, 399 N.E.2d 81. Plaintiffs have failed to meet the three elements for mandamus to issue.

The allegations contained in the First Amended Complaint as to the Unaffected Parties are deficient to show either that Unaffected Parties have any clear legal right to any relief or that the State has any clear legal duty to perform any act. The unsupported conclusions of a request for a writ of mandamus are not considered admitted and are not sufficient to withstand a motion to dismiss. *State ex rel. Hickman v. Capots* (1989), 45 Ohio St. 3d 324. As demonstrated above, in this action, the Unaffected Parties’ “allegations” against the State consist of unsupported conclusions about alleged state actions which did not occur to them. The speculation of purported injuries to third persons contained in First Amended Complaint is insufficient to meet the first two elements of the Ohio Supreme Court’s mandamus test and the demand for a writ of mandamus under Count II of the First Amended Complaint must be dismissed as to the ten Unaffected Parties named as Plaintiffs in this action.

Further, mandamus is an extraordinary legal remedy that may be maintained only when the law does not afford a remedy to enable a person to obtain their rights by regular judicial

proceedings. Even if the remaining Plaintiffs, Steve Nickel, Timothy and Kimberly Rosenberg, and Sheffield Lake, Inc., Thomas O. Jordan Pres., could meet the first two prongs of the mandamus test, they all fail to meet this requirement. R. C. 2731.05 states that a writ of mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of the law. As was discussed above, Lessees Nickel and Rosenberg and Administrative Appellant Jordan have at least one plain and adequate remedy in the ordinary course of the law for the wrongs alleged in this action – the administrative remedies mandated by Section 1506.10 and Chapter 119 of the Revised Code. Because Lessees Nickel and Rosenberg and Administrative Appellant Jordan may pursue plain and adequate remedies at law, they are not entitled to litigate the same issues concurrently by means of a proceeding in mandamus. *State ex rel. Stanley v. Cook* (1946), 146 Ohio St. 348. Therefore, Plaintiffs’ First Amended Complaint, which wrongly seeks both ordinary and extraordinary remedies in tandem, is improper and Count II must be dismissed as to Lessees Nickel and Rosenberg and Administrative Appellant Jordan named as Plaintiffs in this action.

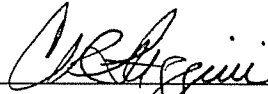
Even more insupportable is Count III of Plaintiffs’ First Amended Complaint. If the State succeeds in its defense against this action, then the State will have taken nothing. If it has taken nothing, then the State will neither need nor desire to appropriate anything. Count III of Plaintiffs’ First Amended Complaint strangely presumes that if the State successfully defends against this action, it will desire to purchase lands that it has not taken and has not sought to appropriate. This is, of course, an incorrect presumption. Accordingly, Count III of the First Amended Complaint should also be dismissed by the Court as manifestly flawed.

**III. CONCLUSION**

For the reasons established above, the State of Ohio respectfully requests that this Court grant its Motion and issue an Order dismissing Plaintiffs-Relators' First Amended Complaint.

Respectfully submitted,

**JIM PETRO**  
**ATTORNEY GENERAL**



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**CYNTHIA K. FRAZZINI (0066398)**

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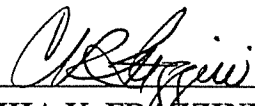
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**CERTIFICATE OF SERVICE**

We hereby certify that a copy of the foregoing **Motion of the State of Ohio to Dismiss Plaintiffs-Relators' First Amended Complaint** was sent by regular U.S. mail, postage prepaid, this 13<sup>th</sup> day of September, 2004 to:

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