

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

STATE OF OHIO EX REL., )  
ROBERT MERRILL, TRUSTEE, et al. )  
 )  
Plaintiffs-Relators )  
 )  
vs. )  
 )  
STATE OF OHIO, DEPARTMENT )  
OF NATURAL RESOURCES, et al. )  
 )  
Defendants-Respondents )

Case No. 04CV001080


Judge Eugene A. Lucci

**MOTION OF THE STATE OF OHIO  
FOR RECONSIDERATION  
AND BRIEF IN SUPPORT**

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 respectfully move this Court for reconsideration of its Journal Entry and Order, issued December 15, 2004, denying the Motion of the State of Ohio to Dismiss Plaintiffs-Relators’ First Amended Complaint (“the Order”), for the modification or vacation of that Order, and for an Order granting the State’s Motion to Dismiss 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,

**JIM PETRO  
ATTORNEY GENERAL OF OHIO**

  
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**CYNTHIA K. FRAZZINI (0066398)  
JOHN P. BARTLEY (0039190)**  
Assistant Attorneys General  
Ohio Attorney General's Office  
Environmental Enforcement Section  
2045 Morse Road, Building D-2  
Columbus, Ohio 43229-6605  
(614) 265-6870 (phone)  
(614) 268-8871 (facsimile)

## BRIEF IN SUPPORT

- I. The State's Motion to Dismiss clearly demonstrated that the majority of the named Plaintiffs lack ripeness and standing to bring the "as applied" constitutional challenge presented in Plaintiffs-Relators' First Amended Complaint against the State in any judicial forum (administrative or otherwise). The Order did not address these significant issues and reconsideration is warranted.

The First Amended Complaint on its face is not a declaratory judgment action seeking to determine the rights, title and interest of each of the respective named Plaintiffs and the State of Ohio. Plaintiffs could have filed such an action or amended their First Amended Complaint to create such an action, but they did not. Until Plaintiffs choose to do so, or until the Court orders them to do so, the First Amended Complaint remains as it is – an **as-applied** constitutional challenge and appropriation action against the State of Ohio.

The First Amended Complaint unequivocally states that “[t]his action arises from the **actions and threats to act** of the Ohio Department of Natural Resources.” (emphasis added) The State’s Motion to Dismiss clearly established that under the holdings of the Ohio Supreme Court and the 11<sup>th</sup> Appellate District, the following Plaintiffs have had no action taken against them by the State and therefore, have failed to present an actual justiciable controversy ripe for review in their First Amended Complaint, and lack standing to bring this case:

- (1) Robert Merrill, Trustee
- (2) Ohio Lakefront Group, Inc.
- (3) Anthony J. Yankel
- (4) Charles S. Tilk
- (5) Sandra Wade
- (6) David Zeber
- (7) Adrian F. Betleski
- (8) LeMarr L. French
- (9) Patricia J. French
- (10) Neal Oscar Luoma

(hereinafter collectively “Unaffected Parties”). *Karches et al., v. City of Cincinnati* (1988), 38 Ohio St. 3d 12; 526 N.E.2d 1350; *Dubeansky v. City of Mentor* (November 28, 1997), 11<sup>th</sup> Dist. No. 96-L-049, 4-5, 1997 Ohio App. LEXIS 5328 (copy attached to State’s Motion to Dismiss).

With regard to ripeness, these Unaffected Parties do not meet the first prong of the two-prong ripeness test adopted by the Ohio Supreme Court in *Karches, supra* and applied by the 11<sup>th</sup>

District in similar circumstances to this case in *Dubeansky, supra*. “The first step is a requirement of finality,” which is met when “the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.” *Karches, supra* at 14-15. In order to withstand dismissal of a declaratory judgment action, there must be a final definitive action taken by a party that is adverse to the party seeking judgment. *Karches, supra*. With regard to a declaratory judgment action brought against a governmental entity, a final decision by that entity is required to bring the matter into actual controversy. Without a final decision, the declaratory judgment action is not ripe for judicial review.

R.C. 2721.01 *et seq.* provides that a party may seek declaratory judgment regarding that party's rights. On this point the Ohio Supreme Court has held that:

“Any person whose rights, status or other legal relations are affected by a law may have determined any question of construction or validity arising under such law, where actual or threatened prosecution under such law creates a justiciable controversy ...”

*Pack v. Cleveland* (1982), 1 Ohio St. 3d 129, 438 N.E.2d 434, (syllabus, ¶ 1) (emphasis added).

By law, a final decision by the Department would take the form of an adjudication by its Director. Pursuant to R.C. 1506.10 and R.C. 119.01, an adjudication is the “determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specific person.”

As of this date, there has been no final decision made by the highest or ultimate authority within the Department with regard to any of the ten Unaffected Parties listed above, for the purposes of creating a real and actual controversy to support Plaintiffs’ attempted declaratory judgment action. In order to successfully maintain a takings claim under the theory of an **as-applied** constitutional challenge, there must be an **action** by the State that takes private property without compensation, not a general opinion on the existing law which has no force or effect and, without an action by the Director under the statute, can take nothing.

On this point, the State stated the following pertaining to the ten Unaffected Parties’ failure to meet the ripeness doctrine:

“No provision of Chapter 1506 of the Ohio Revised Code, nor any administrative rule promulgated thereunder, provide that the Director has the authority to determine the validity of deeds or to issue an Order proclaiming the location of the landward boundary of Lake Erie as a matter of law across its entire 262 mile

coast within the State of Ohio. **Yet, Plaintiffs' Complaint and Brief in Opposition proceeds as though the Director had taken one or both of those actions against the Plaintiffs.**" (emphasis added)

However, this statement was taken out of the ripeness context and applied to the affirmative defense of administrative remedies in the Court's Order.

"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," **such as ripeness and standing**, 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. In that clarifying decision the Court held:

"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.*

The affirmative defense of failure to exhaust administrative remedies was never raised by the State in its Motion to Dismiss against any of the ten Unaffected Parties. Rather, the State argued that the Court did not have subject matter jurisdiction regarding those Unaffected Parties as their claims were not ripe for review and they lacked standing. Because the Order did not consider the State's ripeness claims against the ten Unaffected Parties, the Court should vacate or modify its Order and issue an Order granting the State's Motion to Dismiss with regard to the ten Unaffected Parties as they have failed to present a controversy ripe for review.

With regard to the doctrine of standing, the State's Motion to Dismiss also established the important distinction between declaratory judgment actions challenging the constitutionality of a statute or regulation **on its face** and those actions challenging the constitutionality of a statute or regulation **as-applied**. In this action, Plaintiffs do not present a facial challenge to the constitutionality of R.C. 1506.10 - .11. Plaintiffs allege that the Department's **application** of these provisions is unconstitutional and has resulted in a taking of private property without compensation.

It is well-established that "the constitutionality of a state statute may not be brought into question by one who is not within the class against whom the operation of the statute is alleged to

have been unconstitutionally applied and who has not been injured by its alleged unconstitutional provision.” *State v. Spikes* (1998), 129 Ohio App. 3d 142; 717 N.E.2d 386 citing *Palazzi v. Estate of Gardner* (1987), 32 Ohio St. 3d 169, 512 N.E.2d 971, syllabus. “[I]t is not enough to show a hypothetical or potential injury.” *Williams v. Ohio Attorney General* (April 30, 1998), 10<sup>th</sup> District No. 97APE08-980, citing *State ex rel. Consumers League of Ohio v. Ratchford* (1982), 8 Ohio App. 3d 420, 424, 457 N.E.2d 878. “‘Concrete injury in fact’ must be established to have standing to mount a constitutional challenge.” *Id.*

Therefore, in addition to a failure to meet the ripeness test, the ten Unaffected Parties lack standing to challenge the Department’s application of R.C. 1506.10 - .11 to other third parties. Like the State’s ripeness arguments pertaining to the ten Unaffected Parties, the Order does not address the State’s standing defenses against those same Unaffected Parties. Accordingly, the Order should be vacated or modified and the Court should grant the State’s Motion to Dismiss as to the claims of the ten Unaffected Parties in Plaintiffs’ First Amended Complaint.

**II. The State’s Motion to Dismiss demonstrated clearly that under established precedent, the remaining Plaintiffs have administrative remedies which they have failed to pursue. The Director has the necessarily implied authority to determine the upper boundary of Lake Erie under R.C. 1506.10 - .11 and Ohio Admin. Code 1501-6, and is expressly required to make such a determination when the territory has been artificially filled. The Order should have acknowledged that administrative remedies are available to these Plaintiffs and that the Director has authority expressly granted by the legislature.**

All Plaintiffs claim to be harmed by the actions of the State. Yet, only the following Plaintiffs have had any specific and direct dealings with the State that would actually meet the ripeness and standing requirements discussed above:

- (1) Sheffield Lake, Inc., Thomas O. Jordan Pres.
- (2) Timothy and Kimberly Rosenberg
- (3) Steve Nickel

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:

“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.

Unlike the ten Unaffected Parties, Plaintiffs Steve Nickel and Timothy and Kimberly Rosenberg have 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. In fact, 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. Therefore, Mr. Jordan, Mr. Nickel, and the Rosenbergs may be able to meet the first prong of the two-prong ripeness test above, as the State has actually taken some action with regard to them. However, none of them meet the second prong of the test, for none of them have exhausted their respective administrative remedies as required by law.

“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.

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.

Instead of applying the rule announced by the Ohio Supreme Court, the Order denied the State’s Motion to Dismiss by mistakenly presuming the existence of an exception to this rule as follows:

“Although exhaustion of administrative remedies is usually required in cases challenging the constitutionality of an administrative rule ‘as applied,’ that requirement does not exist where there is no administrative remedy available or where pursuit of administrative remedies would be futile ...

Since the Director lacks the authority to grant the relief sought by the plaintiffs, there is no administrative remedy available and pursuit of administrative remedies would be futile.”

An exception to the failure to exhaust administrative remedies rule does not exist in the claims of Mr. Jordan, Mr. Nickel, and the Rosenbergs. Administrative remedies are clearly available to Mr. Jordan, Mr. Nickel and the Rosenbergs, and such administrative remedies would not be futile.

By their express terms, the leases granted to Mr. Nickel and the Rosenbergs 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.” Lessees Mr. Nickel and the Rosenbergs are each a “person,” as defined in R.C. 119.01(F). Therefore, Section 1506.10 and Chapter 119 of the Revised Code provide Mr. Nickel and the Rosenbergs 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. Mr. Nickel and the Rosenbergs 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.

Mr. Jordan is currently subject to an Order from the Director of the Department, and has failed to exhaust his administrative remedies. By his actions, Mr. Jordan is likewise attempting to bypass the legislative scheme of R.C. 1506.10 and Chapter 119. Like the plaintiff in

*Dubeansky, supra*, Mr. Jordan has never been previously denied any authorization and therefore has failed to establish that his administrative remedies would be futile.

The Court also relied on a presumption that because the “the Director lacks authority . . . to determine the validity of deeds or to issue an order proclaiming the location of the landward boundary of Lake Erie as a matter of law across its entire 262 mile coast within the State of Ohio,” the Director lacks the authority to grant the relief sought by Mr. Jordan, Mr. Nickel and the Rosenbergs. However, this statement was made with regard to the ten Unaffected Parties who have never had an action taken against them by the State, and **not** the three parties who have. 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.”

With regard to the Order issued to Mr. Jordan and the Leases issued to Mr. Nickel and the Rosenbergs, the Director is such “highest or ultimate authority” of the Department, the designated agency, pursuant to R.C. 1506.10 and 119.01(D). As such, the Director has all express authority and all authority necessarily implied to effectuate the implementation of the Director’s responsibilities under the statute. In issuing a lease for a portion of the “territory” under R.C. 1506.11, it is necessarily implied that the Director must determine what “territory” is held by the State under R.C. 1506.10 - .11 which may be leased under R.C. 1506.11 and Ohio Admin. Code 1501-6 et seq. Further, the Director is expressly required to determine the location of the landward boundary of Lake Erie when the “territory” is artificially filled. See Ohio Admin. Code 1501-6-01(W).

To the extent that the Order presumes that the Director has no authority to determine the location of the landward boundary of Lake Erie in the State of Ohio as necessary and required in the issuances of Leases and Orders under R.C. 1506.10 - .11, vacation or modification of the Order is warranted.

Further, the Order does not consider the controlling legal precedent demonstrating the full

adjudication of the same claims alleged by Mr. Jordan in this action. Mr. Jordan's situation is virtually identical to the administrative appeal of two upland owners who also chose not 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 plaintiffs in *Schnittker, supra*, also had the full and fair opportunity to preserve and raise all of their **as-applied** constitutional challenges before the Franklin County Court of Common Pleas, the 10<sup>th</sup> District Court of Appeals and the Ohio Supreme Court. Because the Order does not consider the binding legal precedent set by *Schnittker, supra* in its full adjudication of the same administrative and constitutional claims alleged by Mr. Jordan in this action, the Order should be vacated or modified, and the Court should issue an Order granting the State's Motion to Dismiss.

**III. Plaintiffs-Relators' First Amended Complaint is not limited to its first count in declaratory judgment, but contains two counts in mandamus. The Order does not address these issues.**

The First Amended Complaint is not limited to declaratory judgment. Plaintiffs seek the extraordinary remedy of mandamus in Counts II and III and in the Prayer for Relief of their First Amended Complaint. However, the Order is silent as to these two mandamus counts.

As presented in the Motion to Dismiss, Plaintiffs' allegations for mandamus lack ripeness. See *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. 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. Plaintiffs do not allege any facts that would constitute the material elements of the mandamus claims.

Where a clear legal duty sought to be compelled is one allegedly owed to an individual or a group of individuals, a demand for performance is necessary to place the respondent in default. “The function of mandamus is to compel the performance of a present existing legal duty as to which there has been a default. . . .” *State, ex rel. Federal Home Properties Inc. v. Singer* (1967), 9 Ohio St. 2d 95 (Emphasis added). It is undisputed that Plaintiffs have failed to establish this prerequisite.

With regard to the third mandamus element, under the statutory administrative relief provisions set forth in R.C. 1506.10, Plaintiffs know that they have, and will continue to have, plain and adequate remedies in the ordinary course of the law at their disposal. Their demand for the extraordinary remedy of mandamus, without any consideration of their available remedies in the ordinary course of the law, is inappropriate. *State ex rel. Hummell, supra*, at 87.

The allegations contained in the First Amended Complaint as to the ten Unaffected Parties are deficient to show either that these Unaffected Parties have any clear legal right to any relief or that the State has any clear legal duty to perform any act. 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. 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 three Plaintiffs, Mr. Jordan, Mr. Nickel, and the Rosenbergs could meet the first two prongs of the mandamus test, they all fail to meet the third requirement. Because they 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.

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.

**IV. Conclusion**

At times, the expeditious administration of justice requires reconsideration of an order. For the reasons established above, it is respectfully requested that the Court reconsider its Order denying the State's Motion to Dismiss. Application of the controlling law and the existence of the compelling grounds that may not have been fully considered warrant an Order dismissing Plaintiffs-Relators' First Amended Complaint.

Respectfully submitted,

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



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**CYNTHIA K. FRAZZINI (0066398)**

**JOHN P. BARTLEY (0039190)**

Assistant Attorneys General  
Ohio Attorney General's Office  
Environmental Enforcement Section  
2045 Morse Road, Building D-2  
Columbus, Ohio 43229-6605  
(614) 265-6870 (phone)  
(614) 268-8871 (facsimile)

**CERTIFICATE OF SERVICE**

We hereby certify that a copy of the foregoing Motion of the State of Ohio for Reconsideration and Brief in Support was sent by regular U.S. mail, postage prepaid, this 3<sup>rd</sup> day of January, 2005 to:

James F. Lang  
Michael T. Mulcahy  
Henry G. Grendell  
Attorneys at Law  
CALFEE, HALTER & GRISWOLD LLP  
1400 McDonald Investment Center  
800 Superior Avenue  
Cleveland, Ohio 44114-2688

**Counsel for  
Plaintiffs-Relators**

Homer S. Taft  
Attorney at Law  
P.O. Box 16216  
20220 Center Ridge Road, Suite 300  
Rocky River, Ohio 44116

**Plaintiff-Relator, Pro Se in *State ex rel. Taft***

L. Scot Duncan  
Attorney at Law  
1530 Willow Drive  
Sandusky, Ohio 44870

**Plaintiff-Relator, Pro Se  
and Counsel for  
Plaintiff-Relator Darla J. Duncan in *State ex rel. Taft***



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**CYNTHIA K. FRAZZINI (0066398)  
JOHN P. BARTLEY (0039190)**  
Assistant Attorneys General