

**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)	
	)	<u>REPLY BRIEF OF</u>
vs.	)	<u>THE STATE OF OHIO</u>
	)	<u>TO PLAINTIFFS-RELATORS'</u>
STATE OF OHIO, DEPARTMENT	)	<u>BRIEF IN OPPOSITION TO</u>
OF NATURAL RESOURCES, et al.	)	<u>THE STATE OF OHIO'S</u>
	)	<u>MOTION TO DISMISS</u>
Defendants-Respondents	)	<u>PLAINTIFFS-RELATORS'</u>
	)	<u>FIRST AMENDED COMPLAINT</u>

INTRODUCTION

Plaintiffs-Relators again claim in their Memorandum in Opposition to Motion of the State of Ohio to Dismiss Plaintiffs-Relators' First Amended Complaint (hereinafter "Brief in Opposition"), that the State has misconstrued Plaintiffs' Complaint. The Plaintiffs' Complaint can only be construed under the existing law of Ohio cited in Plaintiffs' Complaint. Pursuant to that existing law, the State, through its Director, Department of Natural Resources, issues orders pertaining to the care, protection, and enforcement of the State's rights in Lake Erie and grants or denies applications for leases for the improvement and development of Lake Erie.

R.C. 1506.10 and R.C. 1506.11 are not a "leasing program." They are provisions of the Ohio Revised Code, enacted by the Ohio General Assembly, and unless they are modified by the Legislature, they remain as part of the existing law of the State of Ohio. The State has not taken any action against any of the Plaintiffs under R.C. 1506.10 or 1506.11, with the exception of one administrative Order under R.C. 1506.10 and two Leases under R.C. 1506.11. The Administrative Appellant and the Lessees who are subject to or requested those actions have failed to exhaust their administrative remedies as required by law. Therefore, Plaintiffs have failed to meet the bare prerequisites necessary to bring this action and the State's Motion to Dismiss Plaintiffs-Relators' First Amended Complaint must be granted.

I. Count I of the First Amended Complaint must be dismissed as to any Plaintiff against whom no actions have been taken by the State, as there is no actual justiciable controversy ripe for review between any such Plaintiff and the State, and such Plaintiff lacks standing.

In the State's Motion to Dismiss it was clearly established that under the holdings of the Ohio Supreme Court and the 11th Appellate District, the following Plaintiffs have failed to present an actual justiciable controversy ripe for review in their First Amended Complaint: 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"). *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), 11th Dist. No. 96-L-049, 4-5, 1997 Ohio App. LEXIS 5328. Specifically, it was established that these Unaffected Parties have failed to meet the first prong of the two-prong ripeness test adopted by the Ohio Supreme Court in *Karches, supra* and applied by the 11th District in similar circumstances to this case in *Dubeansky, supra*.

"The first step is a requirement of finality," which is met when the "decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Karches, supra* at 14-15. 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. By law, a final decision by the Department would be an adjudication by its Director. 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." R.C. 1506.10; 119.01. As of this date, there has been no final decision made by the Director with regard to any of the Unaffected Parties, for the purposes of creating a real and actual controversy to support Plaintiffs' attempted declaratory judgment action. Consequently, Plaintiffs fail to demonstrate how they meet this threshold requirement necessary to invoke declaratory judgment.

The preamble to Plaintiffs' Complaint announces that "[t]his action arises from the actions and threats to act of the Ohio Department of Natural Resources." The question, which

was unanswered in Plaintiffs' Complaint and which remains unanswered by Plaintiffs' Brief in Opposition, is – what action? Nowhere in their Complaint, nor in their Brief in Opposition, do Plaintiffs state the dates or provide the Orders for any governmental actions taken against them.

Instead of supplying facts to support their claims, Plaintiffs persist in their unprecedented, relentless characterizations of the State's Department of Natural Resources as: A state agency that has purportedly engaged in "threats" and has "arbitrarily and abusively forced and continues to threaten to force." An agency that has "intentionally and willfully misrepresented" the law and has engaged in a "campaign of falsehoods" and the "confiscation and attempted confiscation of private property." An agency that allegedly "under cover of its 'coastal management program' ... has abused its authority," and "has confiscated for its own purposes." First Amended Complaint, Paragraphs 1, 10 and 12. An agency that "**understandably supports a 'divide and conquer' process by which it can seek to protect its unlawful conduct by mistreating and abusing property owners individually.**" Brief in Opposition, pgs 7 and 8 (emphasis added).

Yet, once the rhetoric is removed from Plaintiffs' Complaint, there is no governmental action against the Unaffected Parties to be found. Only the indeterminate word "policy" remains to echo alone through the Complaint, along with the Plaintiffs' allegation that by this "policy" "the State has confiscated their private property."

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).

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. As established in the State's Motion to Dismiss, the Director cannot and has not taken either of those actions. The only actions that the Director has taken with regard to

any of the Plaintiffs to this action is to grant two requests for Leases under R.C. 1506.11 and to issue one Order for one unauthorized improvement in Lake Erie under R.C. 1506.10. If there were any other governmental actions taken against any of the other Plaintiffs to this action, they would surely be listed in detail in Plaintiffs' Brief in Opposition, yet none appear. This is because, as to the Unaffected Parties, there has been no action by the State.

Further, with regard to the doctrine of standing, Plaintiffs avoid 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, 145; 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.” *Spikes, supra*, at 145 *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.*

Plaintiffs' Complaint and Brief in Opposition do not allege that the Unaffected Parties have been subjected to an application of the provisions of R.C. 1506.10 - .11 by the Department. In fact, they insist that “Plaintiffs do not have to violate the ODNR's leasing policy before they have standing to contest that policy.” Brief in Opposition, pg. 9. However, in order to have standing to bring a constitutional challenge to the application of a law, the issue is not whether or not a party has violated a law, but whether or not the law has been applied to them at all. *Spikes, supra; Williams, supra.*

At best, the Unaffected Parties claim that they have only the potential to be subjected to the provisions of R.C. 1506.10 - .11. However, these sections have not been applied to the Unaffected Parties and, therefore, there can be no injury under those provisions that would confer the requisite standing upon the Unaffected Parties. The constitutionality of the Department's

application of R.C. 1506.10 - .11 has no bearing or effect on the Unaffected Parties, and the State's Motion to Dismiss must be granted as to the claims of the Unaffected Parties.

II. Count I of the First Amended Complaint must also be dismissed as to those Plaintiffs who may have been affected by an action of the State, as they have failed to exhaust the administrative remedies mandated by Ohio law and no exceptions to that doctrine can be met by those Plaintiffs.

As established in the State's Motion to Dismiss, only Plaintiffs Steve Nickel and Timothy and Kimberly Rosenberg (hereinafter "Lessees") have submitted applications and obtained leases pursuant to R.C. 1506.11 to develop or improve certain parts of Lake Erie. Plaintiff Sheffield Lake, Inc., through Thomas O. Jordan, President (hereinafter "Administrative Appellant") is subject to an Order from the Director of the Department pursuant to R.C. 1506.10 and R.C. Chapter 119. These Lessees and Administrative Appellant may meet the first prong of the two-prong ripeness test. However, none of them meet the second prong of the ripeness test, for none have exhausted their respective administrative remedies as required by law. Accordingly, the State's Motion to Dismiss Count I Plaintiffs' First Amended Complaint as to these Lessees and Administrative Appellant must be granted.

Plaintiffs again neglect the distinctions made in the law between declaratory judgment actions which make facial challenges to statutes or regulations versus those that challenge a statute or regulation as applied. Plaintiffs claim in their Complaint and Brief in Opposition that they are challenging the constitutionality of a "policy" or an "administrative rule" of the Department. This is not an accurate statement. In its Complaint, Plaintiffs are challenging the alleged unconstitutional application of R.C. 1506.10 - .11 by the Department.

Ohio courts have held that where a party challenges the constitutionality of a statute, administrative rule or ordinance on its face, it may bring a declaratory judgment action without the need to first exhaust its available administrative remedies. *State ex rel. Columbus Southern Power Co. v. Sheward* (1992), 63 Ohio St. 3d 78; *Herrick v. Kosydar* (1975), 44 Ohio St. 2d 128. However, such holdings are not beneficial to Plaintiffs here who are not challenging the constitutionality of R.C. 1506.10 - .11 on its face, but rather are challenging the Department's application of that law.

On this point, Ohio courts have consistently held that where a party challenges the

constitutionality of a statute, administrative rule or ordinance as applied, such party must exhaust all available administrative remedies prior to bringing a declaratory judgment action. See *State ex rel. Lieux v. Westlake* (1951), 154 Ohio St. 412; *Driscoll v. Austintown Associates* (1975), 42 Ohio St. 2d 263; *Johnson's Island, Inc. v. Bd. of Township Trustees of Danbury Township* (1982), 69 Ohio St. 2d 241. Pursuing an administrative remedy may provide the party with the relief it seeks, without ever having to unnecessarily reach the constitutional question. *Lieux, supra*, at 412.

Plaintiffs cite to *Jones v. Village of Chagrin Falls* (1997), 77 Ohio St.3d 456, in support of their argument that the Lessees and Administrative Appellant need not exhaust their administrative remedies. However, that case is inapplicable because it deals with a facial constitutional challenge and not an as applied challenge, which is the basis of the Lessees' and Administrative Appellant's claims. It has been held that trial courts may properly dismiss complaints pursuant to Civ. R. 12 (B)(6) that concern the constitutionality of a rule or statute as applied based upon the plaintiff's failure to exhaust administrative remedies. See *AEI Group, Inc v. Ohio Dep't of Commerce* (1990), 67 Ohio App. 3d 546, 550 (noting that it is more appropriate to resolve an as applied claim in the administrative hearing process).

The Ohio Supreme Court has discussed the rationale supporting the principle of law established above and the reason why Plaintiffs' action for declaratory relief is inappropriate in this instance. In *Nemazee v. Mt. Sinai Medical Ctr.* (1990), 56 Ohio St. 3d 109, the Ohio Supreme Court explained:

"It is a well-established principle of Ohio law that, prior to seeking court action in an administrative matter, the party must exhaust the available avenues of administrative relief through administrative appeal." (Citations omitted) . . . As the United States Supreme Court has stated, "[e]xhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." *Weinberger v Salfi* (1975), 422 U.S. 749, 765. The purpose of the doctrine ". . . is to permit an administrative agency to apply its special expertise. . . and in developing a factual record without premature judicial intervention." *Southern Ohio Coal Co. v. Donovan* (C.A. 6, 1985), 774 F. 2d 693, 702. The judicial deference afforded administrative agencies is to ". . . prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court. . ."

In this matter, if the Lessees and the Administrative Appellant follow their respective administrative

remedies provided by R.C. 1506.10, then their arguments regarding the inapplicability of R.C. 1506.10 - .11 to their respective improvements may be upheld. In such a case, the Lessees and Administrative Appellant would not be prejudiced by the application of the law which they seek to have declared unconstitutional. *Lieux, supra*.

Further, to bring a declaratory judgment action attacking the constitutionality of a governmental action, a party must first exhaust all administrative remedies, unless the party can demonstrate that the administrative agency does not have the authority to grant the relief sought; an administrative remedy is not equally serviceable as a declaratory judgment action; or the administrative remedy is unusually expensive, onerous or constitutes a vain act. *See, e.g., Driscoll v. Austintown Associates* (1975), 42 Ohio St. 2d 263; *Paris v. Mayfield Village* (1984), 14 Ohio App. 3d 450. Plaintiffs claim in their Brief in Opposition, that they meet all of these exceptions. They make this claim based on their misguided assumption that those who must exhaust their administrative remedies are “all littoral owners.”

As stated above, both the first prong of the ripeness test and the doctrine of standing bar all Plaintiffs who have not been subject to a governmental action under R.C. 1506.10 - .11 from asserting a claim regarding the alleged unconstitutional application of those provisions by the Department. Accordingly, it would not be “thousands of administrative actions” that “would have to be commenced, one for each owner of land abutting Lake Erie.” Other than Mr. Nickel and Mr. and Mrs. Rosenberg in this action, no other Lessees have expressed a concern regarding the accuracy of the legal descriptions that Lessees provide to the State for their respective leases. If Administrative Appellant Jordan desires to withdraw his prior representations of settlement to the Department and proceed with an administrative hearing on the Order issued to him, he may so notify the Department at his convenience. Therefore, there may be three (3) administrative hearings requested, not thousands, with a cost considerably less for both the Appellants and the taxpayers of Ohio than the litigation posed by this action and *State ex rel Taft*.

The question of the appropriate court to which to appeal or question the validity of specific orders of a state agency is governed exclusively by the statute which creates such right. The rights of Lessees and Administrative Appellant to question the administrative process is governed by R.C. 119.12. In this instance, the designated forum for them, after an administrative hearing is concluded and the Director has issued a final appealable order from the Report and

Recommendation of the Hearing Officer, is the court of common pleas for Franklin County. *Ludwig v. Willoughby-Eastlake Bd. of Edn.* (1983), 10 Ohio App. 3d 229. In that forum, Lessees and Administrative Appellant would have the opportunity to present their arguments regarding any alleged unconstitutional application of R.C. 1506.10 and/or 1506.11 by the Department. *Zieverink v. Ackerman* (1981), 1 Ohio App. 3d 10. The only prerequisite placed on an appellant, in preserving this right, is to raise the constitutionality issue at the first available opportunity during the proceedings before the administrative agency. Therefore, Plaintiffs are incorrect in their assertions in the Brief in Opposition that “no administrative remedy is available” or that “resort to an administrative appeal would be futile.” Brief in Opposition, pg. 7.

Similarly, Plaintiffs’ Brief in Opposition is also inaccurate in its claims that “there has been no showing whatsoever that exhaustion is required in this context (all the cases cited by the State are zoning cases).” Brief in Opposition, pg. 7. Plaintiffs may understandably wish to ignore the State’s citation to *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 appellants in *Schnittker* alleged unconstitutional application of the law by the Department. They alleged that they owned the land beneath their respective improvements. They alleged that the State had taken private property from them without compensation. They made all of those claims before the Franklin County Court of Common Pleas, the 10th District Court of Appeals, and the Ohio Supreme Court, just as the Lessees and Administrative Appellant may do if this case is dismissed. They also brought a declaratory judgment action in the Erie County Court of Common Pleas, which the State moved to dismiss for failure to exhaust administrative remedies. That Motion was granted. *Schnittker, supra* is now binding precedent. Accordingly, Count I of Plaintiffs’ First Amended Complaint before this Court cannot meet the requirements necessary to survive the State’s Motion and must be dismissed as to all Plaintiffs.

III. Counts II and III of the First Amended Complaint must be dismissed, as Plaintiffs have failed to establish the elements necessary for a writ of mandamus to issue.

Plaintiffs cite solely to *State ex rel. Hummell v. Sadler* (2002), 96 Ohio St. 3d 84 and *State ex rel. Elass v. Shelby County Bd. of Commissioners* (2001), 92 Ohio St. 3d 533 in their attempt to salvage their misguided mandamus claims. In citing to these particular cases,

Plaintiffs' argument appears to be that even if the Court finds compelling grounds for dismissal of their declaratory judgment claim, based on the doctrines of ripeness, standing, and a failure to exhaust administrative remedies, Plaintiffs' mandamus claims should still survive. Plaintiffs attempt to avoid the consequences of these doctrines by asserting, falsely, that the State is "relying on its theory that this case is about the State's leasing program." Brief in Opposition, pg. 9. In fact, the State is relying on the Court's consideration of well established principles of law applied to the allegations set forth in the First Amended Complaint that warrant dismissal of this action, both in declaratory judgment and mandamus.

Plaintiffs must concede that before a writ of mandamus will issue, Plaintiffs must prove: that they have a clear legal right to the relief prayed for; that the State is under a duty to perform the act requested and; that Plaintiffs had or have 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. Regarding the first two elements – a clear legal right and a duty to perform – Plaintiffs' First Amended Complaint is replete with unsupported, self-serving inferences and legal conclusions. These are not sufficient to withstand a motion to dismiss, nor do the Plaintiffs allege any facts that would constitute the material elements of a mandamus claim.

With regard to the third mandamus requirement, 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 even scant consideration of their available remedies in the ordinary course of the law, is inappropriate. *State ex rel. Hummell, supra*, at 87.

Finally, Plaintiffs must also know that 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. It is an imperative prerequisite that an express and distinct demand to perform the act must be made by a relator, and it must specifically appear that the respondent refused to comply with the demand. *State ex rel. Hacharedi v. Baxter* (1947), 148 Ohio St. 221. "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 evident from Plaintiffs' allegations that they have failed to establish this prerequisite.

Finally, Plaintiffs defend their bringing of two different counts in mandamus as simply pleading in the alternative. Despite their insistence that there “is absolutely nothing wrong with this manner of pleading,” this is a grievous miscalculation on their part. The second count runs far astray from an alternative pleading. In essence, Plaintiffs’ tactic is that if they fail on their declaratory judgment claim, the only alternative for the Court would be to determine “that the State lawfully could confiscate the property at issue” and Plaintiffs would “still remain entitled to compensation.” Brief in Opposition, pg. 10. It is beyond all doubt that Plaintiffs could prove no set of facts warranting such a determination by any court. No such facts could ever exist to have mandamus lie in this case. Pleading in the alternative does not include the scenario: if we win, they lose; and, in the alternative, if we lose, they still lose. Plaintiffs’ gambit is disingenuous and it must be rejected. Accordingly, Counts II and III of Plaintiffs’ First Amended Complaint must be dismissed.

CONCLUSION

For the reasons stated in its pending Motion to Dismiss and in this Reply Brief, the State of Ohio respectfully requests that this Court grant its Motion to Dismiss Plaintiffs-Relators’ First Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing Reply Brief of the State of Ohio to Plaintiffs-Relators' Brief in Opposition to the State of Ohio's Motion to Dismiss Plaintiffs-Relators' First Amended Complaint was sent by regular U.S. mail, postage prepaid, on the 8th day of October, 2004 to:

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