ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. ROBERT MERRILL, Trustee, et al.,	:	
Plaintiffs-Appellees,	:	**Case No. 2009-1806**
v.	:	**On Appeal from the Lake County Court of Appeals Eleventh Appellate District**
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,	:	**Court of Appeals Case Nos. 2008-L-007, 2008-L-008 Consolidated**
Defendants – Appellants.	:	

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

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COMBINED STATEMENT OF FACTS AND STATEMENT OF THE CASE

This action was commenced in May 2004 by plaintiff-appellee owners of property bordering Lake Erie. The property owners sought a declaratory judgment determining the landward boundary of Lake Erie and the rights of the State, the public and littoral owners to the Lake Erie shore. The property owners also sought a declaration that their land had been unconstitutionally taken, and equitable relief and damages related to the alleged taking, by the State of Ohio. The complaint separately named as defendants: 1) the Ohio Department of Natural Resources, 2) Sean Logan, the director of natural resources, and 3) the State of Ohio. The first two defendants-appellants will be referred to in this brief collectively as "ODNR."

In June 2006, in response to a stipulation by the parties, the trial court certified the case as a class action with respect to three discrete questions of law affecting the initial determination of the landward boundary defining the public trust territory. The court reserved judgment as to the related constitutional takings claims pending the resolution of the initial declaratory judgment.

The parties and the intervenors addressed the questions of law certified by the trial court through cross-motions for summary judgment. While the motions were pending, the Governor of Ohio issued a directive to ODNR that it should honor the presumptively valid real property deeds of the Lake Erie lakefront property owners unless a court determines that the deeds are limited by or subject to the public's interest in those lands or are otherwise defective and unenforceable. Responding to this directive, ODNR changed its prior policy of

requiring lakefront property owners to obtain leases from the State of Ohio before building structures along the Lake Erie shore that could impact coastal lands, although the property owners are still required to obtain permits from ODNR's Office of Coastal Management before commencing any such construction.

ODNR advised the trial court of the Governor's directive and its new regulatory policy and presented no further argument on the merits of the boundary-related issues before the trial court. ODNR indicated to the court that it welcomed the court's resolution of the issues before it, based upon the briefs submitted on behalf of the State of Ohio by the Attorney General and on behalf of the lakefront owners and intervenors. *Response of Defendants-Respondents Ohio Department of Natural Resources and Sean Logan, Director of Natural Resources to the Pending Motions for Summary Judgment.* (Tr. Dkt. 179, July 16, 2007) (Supp., p. 4.) ODNR and the Governor fully expected that the Attorney General of Ohio would continue to defend the action on behalf of the State of Ohio, as a separately named party, and would continue to advocate the merits of the issues as framed in the trial court until there was a final resolution after all appeals were concluded.

Although ODNR ceased to take an active role in advocating how the trial court should resolve the certified legal questions, it remained a party defendant and continued to recognize that there was a significant case and controversy in need of judicial resolution. The plaintiffs-appellees never dismissed ODNR as a party defendant. It remains a defendant in the case for purposes of the equitable

and legal claims reserved by the trial court as well as the final resolution on appeal of the initial declaratory judgment entered by the trial court.

The trial court entered its summary judgment order on December 11, 2007. As to the boundary issue, the trial court declined to adopt any of the views advocated by the parties. Instead it declared that the most landward boundary of Lake Eire held in trust by the State of Ohio, the "territory" as defined in R.C. 1506.10 and R.C. 1506.11, is "the water's edge, which means the most landward place where the lake water actually touches the land at any given time." (Summary Judgment Order, Tr. Dkt. 183, p. 71.) The trial court also declared that the artificial filling of submerged lands would not alter the landward boundary. (Id., p. 72 at ¶ 5.)

The State of Ohio and the intervening defendants appealed the trial court's summary judgment order and the plaintiffs filed cross-appeals. ODNR did not file a notice of appeal or participate in merit briefing before the Court of Appeals. ODNR believed that the issues again would be ably briefed by the State of Ohio, a party defendant represented by the Ohio Attorney General, the property owners, and the intervenors.

The Court of Appeals issued its decision on August 24, 2009. The Court of Appeals sua sponte raised the issue of whether the State of Ohio had standing to participate in the appeal, concluded that it did not, and struck its assignments of error and brief. The Court of Appeals affirmed the trial court's judgment that the boundary of the public title to Lake Erie and the lands beneath the lake is the "water's edge," which it defined as the shoreline between the high and low water mark. In doing so, however, the Court of Appeals deviated from the trial court

by implying in its definition of shoreline that artificial fill could remove submerged lands from the public trust. The Court of Appeals held "the shoreline, that is, the actual water's edge, is the line of demarcation between the waters of Lake Erie and the land when submerged thereunder held in trust by the state of Ohio and those natural or filled in lands privately held by littoral owners." *State ex rel. Merrill v. State of Ohio,* 11th Dist. Nos. 2008-L-007, 2008-L-008, 2009-Ohio-4256, at ¶127.

These two aspects of the Court of Appeals' decision – the questioning of the State of Ohio's standing as a party defendant and its statement regarding the effect of artificial fill – has made it necessary for ODNR to take an active role in this case again.

LAW AND ARGUMENT

Proposition of Law No. 1

> **THE OHIO ATTORNEY GENERAL HAS THE AUTHORITY UNDER THE OHIO CONSTITUTION AND THE COMMON LAW TO REPRESENT THE INTERESTS OF THE STATE OF OHIO AS A PARTY BEFORE THE COURTS, REGARDLESS OF WHETHER HE IS ACTING AS COUNSEL FOR A PARTICULAR STATE OFFICER OR ADMINISTRATIVE AGENCY AND REGARDLESS OF WHETHER HE HAS BEEN REQUIRED TO DO SO BY THE GOVERNOR OF OHIO.**

The Court of Appeals erred in holding that the "state of Ohio no longer has standing in this matter." (Op. at ¶ 44.) Its holding confuses the concept of standing, which speaks to a party's (typically the plaintiff's) relationship to the controversy, with the right of the State of Ohio to be represented by the Attorney General when it is made a party defendant. The court's conclusion also is based on two false assumptions. Its first false assumption is that R.C. 109.02 limits the Attorney General's right to represent the State to only those matters in which he

is directed to act by the Governor or the General Assembly. Its second false assumption is that ODNR's change in policy at the direction of the Governor negated any continuing state interest in this matter.

The Attorney General has the authority under the Ohio Constitution and the common law to represent the interests of the State of Ohio before the courts, regardless of whether he is acting as counsel for a particular state officer or administrative agency. The Attorney General's authority to represent the State of Ohio is not limited to only those instances in which he is directed to prosecute or defend an action by the Governor or the General Assembly.

While R.C. 109.02 requires the Attorney General to appear for the State in a court or before a tribunal "when required by the Governor or General Assembly"; the statute does not say that the Attorney General may appear for the State *only* when required to appear by the Governor or the General Assembly. The Court of Appeals' interpretation of the statute impermissibly reads words into the statute that are not there. *Lorain Cty. Auditor v. Ohio Unemployment Comp. Rev. Comm.*, 113 Ohio St.3d 124, 2007-Ohio-1247, 863 N.E.2d 133, at ¶24.

The Court of Appeals' interpretation of R.C. 109.02 focuses on the fourth sentence of the statute but ignores the context in which it appears. R.C. 109.02 designates the attorney general as the "chief law officer for the state and all its departments." This designation is consistent with the Attorney General's status as an independently-elected constitutional officer under Ohio Constitution, Article III, Section 1. The Attorney General's constitutional status and statutory designation as the "chief law officer" preclude interpreting the statute to make

the Attorney General's role with respect to the legal representation of the State always dependent upon gubernatorial or legislative direction.

R.C. 109.02 also requires the Attorney General to appear for the State in any cause in this Court in which the State is directly or indirectly interested. Presumably as to matters before this Court, the Attorney General has the discretion to determine on his own, without gubernatorial or legislative direction, whether the State has an interest in the matter. The Court of Appeals offered no explanation as to why it makes sense to give the Attorney General discretion to determine the State's interest in a matter before this Court but no discretion to recognize and act to protect the State's interest in a matter pending before a lower Ohio court, a court in another state, a federal court or any state or federal tribunal. Indeed, the Court of Appeals' reading of the fourth sentence makes no sense when read in context with the third. If the Attorney General is required by statute to appear in this Court on behalf of the State when he determines that the State has a *direct or indirect* interest in the matter before the Court, surely he should be permitted to appear in a lower court when the State has such an interest, because that is where the issues are framed and the record made. Yet, the Court of Appeals' interpretation allows the Attorney General to appear in the lower courts only when there is a direct state interest and then only in response to gubernatorial or legislative direction.

There are likely many cases in which the Attorney General's required advocacy before this Court, because of a direct or indirect state interest, could be compromised if the Attorney General was not permitted to represent the State in

the lower court as the case developed. This case, in fact, is a good illustration of the error in the Court of Appeals' reasoning.

There is no question that the State of Ohio has a direct interest in the determination of the boundary of the Lake Erie public trust. Thus there is no question that the Attorney General, under R.C. 109.02, is now required to appear for the State in this Court in this matter. Yet, the Court of Appeals held that the State of Ohio and Attorney General had no right to participate in the case, to frame the issues or to make the record, in the courts below because he was not specifically required to represent the State of Ohio in the trial court or Eleventh District by the Governor or the General Assembly.

According to the Court of Appeals, this important question of state law, affecting the rights of the public generally, had to be left to the advocacy of private parties, with no ongoing State involvement once ODNR adopted a new policy. The Court of Appeals reached this conclusion even though ODNR had expressly advised the trial court that its revised policy was contingent on the outcome of this litigation by noting that it welcomed the courts' resolution of the boundary issue based on the briefing submitted by the lakefront owners and the Attorney General on behalf of the State of Ohio. See *Response of Defendants-Respondents Ohio Department of Natural Resources and Sean Logan, Director of Natural Resources to the Pending Motions for Summary Judgment.* (Tr. Dkt. 179, July 16, 2007) (Supp., p. 4.) Neither the Court of Appeals nor the Appellees can satisfactorily answer the question of how this case made its way to judgment at either the trial court or appellate level if, as they suggest, neither ODNR nor

the State of Ohio continued on as a proper party defendant-appellant after ODNR changed its policy in July 2007.

Proposition of Law No. 2

THE ARTIFICIAL FILLING IN OF SUBMERGED LANDS OF LAKE ERIE DOES NOT ALTER THE BOUNDARY OF THE PUBLIC TRUST AND THE STATE OF OHIO RETAINS TITLE TO SUCH LANDS.

The primary issue in this case is the proper interpretation of the landward boundary of the "territory" declared to be held in public trust in R.C. 1506.10 and R.C. 1506.11. The Attorney General on behalf of the State of Ohio argues that the boundary is the ordinary high water mark. Intervenors National Wildlife Federation and Ohio Environmental Council agree with that position. The plaintiffs, on the other hand, argue that the boundary is either the day-to-day low-water mark or the historic low-water mark. For the reasons already noted, ODNR takes no position as to this issue. ODNR, however, does have a distinct, practical interest in whether artificial fill affects that boundary, wherever it lies, because its ability to effectively act as proprietor in trust for the people of the State is compromised by the Court of Appeals' suggestion that artificial fill changes the boundary of the public trust. That suggestion is clear error as it is in direct conflict with the statutory definition of the public trust and is inconsistent with numerous prior precedents which have consistently held that the artificially filling in of submerged lands does not remove such land from the public trust.

In defining the territory of Lake Erie held in public trust, R.C. 1506.10 reserves to the State the right to authorize, and impose conditions upon, any "artificial encroachments by public or private littoral owners, which interfere

with the free flow of commerce in navigable channels, whether in the form of wharves, piers, fills, or otherwise, beyond the natural shoreline of those waters." R.C. 1506.11 reposes in ODNR the discretion to exercise this right by granting leases or permits for improvements or development, including artificial fill, within the territory. For purposes of R. C. 1506.11, the term "territory" is defined to include "the waters and 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. 1506.11(A).[1] Similarly, R.C. 721.04, which grants municipalities the right to use the shore of the waters of Lake Erie in aid of navigation and water commerce, specifically recognizes that the State has title over any "submerged or artificially filled land made by accretion resulting from artificial encroachments."

While ODNR takes no position as to whether the courts below correctly interpreted the statutory definition of the landward boundary of the public trust, it does believe that the trial court correctly held that the public trust encompasses all lands formerly beneath the waters of Lake Erie up to the landward boundary, "notwithstanding any subsequent artificial filling of those lands." (Summary Judgment Order, Tr. Dkt. 183, p. 72, at ¶ 5.) Under the trial court's holding,

[1] The definition of "territory" does not include lakefront land that is not part of the public trust which is suddenly lost due to avulsion. If the property owner restores the land in a timely manner, the property owner may retain title. Although the law has not been clarified in Ohio with respect to this issue, ODNR supports the principle of a limited right of littoral owners to restore property landward of the natural shoreline by using artificial fill to regain land suddenly lost to avulsion. The issue here is whether the extensive artificial filling beyond the natural shoreline along many waterfronts and properties has removed such areas from the territory, effectively removing any title or interest of the public to those lands.

ODNR unquestionably has the authority to continue to regulate development or improvement within the territory, notwithstanding the fact that such development or improvement will take place on artificially-filled land.

The Court of Appeals' decision, however, has "muddied the waters" with respect to the fill issue. The Court of Appeals affirmed the judgment below, except insofar as it reformed the littoral owner's deeds. *Merrill v. State of Ohio,* 2009-Ohio-4256, at ¶131.[2] Thus, it does not appear to have intended to modify the trial court's conclusion with respect to the proper interpretation of "territory" in R.C. 1506.11. Similarly, the Court of Appeals repeatedly reaffirms that state law determines the scope of the public interest in the land and waters of the territory. Id. at ¶¶ 67, 77, 81 and 84. Yet the Court of Appeals inexplicably appends to its definition of the boundary of the territory a phrase, totally contradictory of R.C. 1506.10 and R.C. 1506.11(A), that implies that artificially-filled lands are no longer within the territory. The inconsistent and confusing reference states:

> Therefore, the shoreline, that is, the actual water's edge, is the line of demarcation between the waters of Lake Erie and the land when submerged thereunder held in trust by the state of Ohio and those natural or filled in lands privately held by littoral owners.

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[2] The Court of Appeals vacated the trial court's judgment to the extent that it reformed the littoral property owners' deeds for procedural reasons. The Court believed that portion of the trial court's judgment exceeded the scope of the class certification and addressed an issue not properly before the court at that time. The Court of Appeals also was concerned that the parties were not afforded the opportunity to argue their positions for the trial court's consideration. This deed reformation issue has important practical ramifications for how ODNR carries out its duties under R.C. 1506.11 after the boundary issue is resolved by this Court. This issue needs to be addressed at the appropriate point in this case and after all interested parties have an opportunity to be heard.

Id. at ¶ 127.

To the extent that the Court of Appeals intended to hold that artificially filling in submerged lands removes the lands from the public trust territory, it clearly erred. In *State v. Cleveland & Pittsburgh RR. Co.* (1916), 94 Ohio St. 61, 113 N.E. 677, this Court called upon the General Assembly to codify the public trust doctrine and define the boundaries of the Lake Erie public trust. The General Assembly responded with the passage of the Fleming Act, now codified in R.C. Chapter 1506 and R.C. 721.04. R.C. 1506.11(A) defines the territory which comprises the public trust and is subject to coastal management regulation. The statutory definition unambiguously includes within the territory subject to regulation "lands formerly underlying the waters of Lake Erie and now artificially filled." The Court of Appeals' duty was to enforce this definition as written. The court should not have carved out artificially filled land from the public trust.

Ohio courts have consistently recognized the common law principle, now codified in R.C. 1506.11(A), that the artificial filling in of submerged lands subject to the public trust does not remove the lands from the public trust or affect the State's title to such lands. See, e.g., *State ex rel. Duffy v. Lakefront East Fifty-Fifth Street Corp.* (1940), 137 Ohio St. 8, 11-12, 17 O.O. 301, 27 N.E.2d 485 (holding that in order for title to vest in the littoral property owner by accretion, the land must be formed gradually by the action of the lake and not by artificial fill); *Cleveland & Pittsburgh RR. Co.*, 94 Ohio St. at paragraphs five and six of the syllabus (recognizing that a littoral owner's right to wharf out to navigable water does not alter the rights of the public in the trust estate); *Beach Cliff Bd. of Trustees v. Ferchill*, 8th Dist. No. 81327, 2003-Ohio-2300, at ¶22-25 (the

presence of historic fill on beachfront property means that the property remains within the "territory" as defined in R.C. 1506.11 and is subject to the State's public trust); *Thomas v. Sanders* (1979), 65 Ohio App.2d 5, 413 N.E.2d 1224 (land reclaimed from the waters of Sandusky Bay for use by the littoral owner is still part of the public trust and title to such land cannot thereafter be held by private persons); *Lake Front-East Fifty-Fifth St. Corp. v. Cleveland* (1939), 21 O.O. 1, 20, 7 Ohio Supp. 17 ("The state of Ohio does not lose its title to submerged land under Lake Erie by reason of a fill made by the littoral owner for the purpose of reclaiming such submerged land."). Cf. *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* (2010), ___ U.S. ___, 178 U.S.L.W. 4578, 2010 WL 2400086 (recognizing the common law principle, adopted by Florida Supreme Court, that formerly submerged land that becomes dry land by sudden natural avulsion or artificial fill continues to belong to the state as owner of the seabed).

The Court of Appeals' unfortunate, and perhaps unintended, statement in paragraph 127 of its opinion appears to be based on a misreading of this Court's decision in *Sloan v. Biemiller* (1878), 34 Ohio St. 492. The issue in *Sloan* was whether the plaintiff, in acquiring title to part of Cedar Point, thereby acquired an exclusive right to the fisheries in Lake Erie and Sandusky Bay. Id. at 511. The plaintiff argued that the English common law applicable to navigable rivers applied and gave him rights to the fisheries. Id. The Court rejected that view in favor of the view that American great navigable lakes are properly regarded as public property. Id. at 512. To answer the specific question before it, the Court adopted the view expressed by the Illinois Supreme Court in *Seaman v. Smith*

(1860), 24 Ill. 521, 1860 WL 6451. *Sloan*, 34 Ohio St. at 512-13. This Court held that "the boundary of land, in a conveyance calling for Lake Erie and Sandusky bay, extends to the line at which the water usually stands when free from disturbing causes." Id., paragraph four of the syllabus.

The Court of Appeals expanded the *Sloan* holding to equate artificial fill to a "disturbing cause." There is nothing in *Sloan* upon which to premise that conclusion. *Sloan* did not have before it any issue related to artificially-filled lands. *Sloan* did not define what it meant by "disturbing causes." The *Sloan* court merely picked up this phrase from the *Seaman* decision. In *Seaman*, it is clear that the court used the phrase "disturbing causes" to mean storms and other natural causes that could affect the usual water's edge. 1860 WL 6451, at *3. Thus, the Court of Appeals erred by misreading *Sloan* to suggest that filled-in lands become the property of the littoral owners and are no longer subject to state ownership and regulation as part of the public trust. Its reading and extension of *Sloan* cannot be reconciled with this Court's unambiguous later holdings in both *State v. Cleveland & Pittsburgh RR. Co.* and *State ex rel. Duffy v. Lakefront East Fifty-Fifth St. Corp.* that artificially filling in submerged lands does not transfer title to the filled lands to the littoral owner.

This Court should reverse the Court of Appeals as to this issue and hold, as it must to give effect to R.C. 1506.11(A) and to conform to prior precedents, that artificial fill, or other improvements or encroachments, on the formerly submerged lands of Lake Erie do not alter the landward boundary of the Lake Erie public trust and that such lands remain subject to state regulation consistent with R.C. 1506.11.

CONCLUSION

The judgment of the Court of Appeals should be reversed to the extent that it held that the State of Ohio represented by the Attorney General did not have standing to continue as a party in this matter and to the extent that it implied that formerly submerged land under Lake Erie now artificially filled is no longer within the public trust and is privately held.

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The undersigned certifies that a copy of this Merit Brief was served upon the following counsel by electronic delivery or regular U.S. Mail postage pre-paid, on July 12, 2010:

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In the

Supreme Court of Ohio

STATE OF OHIO ex rel. ROBERT MERRILL, TRUSTEE, et al.,	:	Case No. 2009-09-1806
Plaintiffs-Appellees,	:	
and	:	On Appeal from the Lake County Court of Appeals,
HOMER S. TAFT, et al.,	:	Eleventh Appellate District
Intervening Plaintiffs-Appellees	:	Court of Appeals Case Nos. 2008-L-007, 2008-L-008 Consolidated
v.	:	
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,	:	
Defendants-Appellants,	:	
and	:	
STATE OF OHIO,	:	
Defendant-Appellant,	:	
and	:	
NATIONAL WILDLIFE FEDERATION, et al.,	:	
Intervening Defendants-Appellants.	:	

JOINT NOTICE OF APPEAL OF DEFENDANTS-APPELLANTS STATE OF OHIO, OHIO DEPARTMENT OF NATURAL RESOURCES, AND SEAN LOGAN, DIRECTOR

JOINT NOTICE OF APPEAL OF DEFENDANTS-APPELLANTS STATE OF OHIO, OHIO DEPARTMENT OF NATURAL RESOURCES, AND SEAN LOGAN, DIRECTOR

Defendants-Appellants State of Ohio, Ohio Department of Natural Resources, and Sean Logan, Director, give notice of their claimed appeal of right and discretionary appeal to this Court, pursuant to the Court's Rule II, Sections 1(A)(2) and (3), from a decision of the Lake County Court of Appeals, Eleventh Appellate District, journalized in consolidated Case Nos. 2008-L-007 and 2008-L-008 on August 24, 2009. Date-stamped copies of the Eleventh District's Judgment Entry and Opinion are attached as Exhibits 1 and 2, respectively, to the Defendant-Appellant State of Ohio's Memorandum in Support of Jurisdiction.

These parties, represented by separate legal counsel listed below, jointly file this notice of appeal pursuant to Rule II, Section 4. However, the parties are filing separate Memoranda in Support of Jurisdiction, each of which will separately explain why this case raises substantial constitutional questions and is of public and great general interest.

Respectfully submitted,

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I certify that a copy of this Joint Notice of Appeal of Defendants-Appellants State of Ohio, Ohio Department of Natural Resources, and Sean Logan, Director, was served by U.S. mail this 7th day of October, 2009, upon the following counsel:

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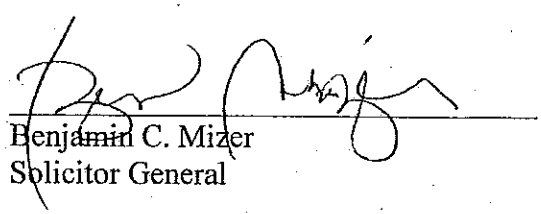

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THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE ex rel. ROBERT MERRILL, TRUSTEE, et al.,	:	**O P I N I O N**
	:	**CASE NO. 2008-L-007**
Plaintiffs-Appellees/ Cross-Appellants,	:	
HOMER S. TAFT,	:	
Intervening Plaintiff-Appellee/ Cross-Appellant,	:	
	:	
L. SCOT DUNCAN, et al.,	:	
Intervening Plaintiffs-Appellees,	:	
- vs -	:	
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,	:	
Defendants,	:	
NATIONAL WILDLIFE FEDERATION, et al.,	:	
Intervening Defendants-Appellants/Cross-Appellees.	:	
	:	
STATE ex rel. ROBERT MERRILL, TRUSTEE, et al.,	:	**CASE NO. 2008-L-008**
	:	
Plaintiffs-Appellees/ Cross-Appellants,	:	
HOMER S. TAFT, et al.,	:	
Intervening Plaintiffs-Appellees,	:	
- vs -		

STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al., :

Defendants, :

STATE OF OHIO, :

Defendant-Appellant/ Cross-Appellee. :

Civil Appeal from the Court of Common Pleas, Case No. 04 CV 001080.

Judgment: Modified and affirmed as modified.

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COLLEEN MARY O'TOOLE, J.

{¶1} The issue before us in this case is one of first impression, concerning title to the lands below the ordinary high water mark of Lake Erie. Lake Erie is a non-tidal, navigable body of water, part of which lies within the territorial boundaries of the state of Ohio. The natural shoreline of Lake Erie extends approximately 262 miles, within the

eight counties of Lucas, Ottawa, Sandusky, Erie, Lorain, Cuyahoga, Lake, and Ashtabula.

{¶2} The state of Ohio, through the Ohio Department of Natural Resources ("ODNR"), has asserted trust ownership rights to the area of land along the southern shore of Lake Erie up to the ordinary high water mark, set at 573.4 feet above sea level by the U.S. Army Corps of Engineers in 1985. The Ohio Lakefront Group,[1] ("OLG"), along with several of its members, many of whom own property adjoining Lake Erie, dispute the authority of ODNR to assert these trust ownership rights without first acquiring the property in question through ordinary land appropriation proceedings. The validity of the ordinary high water mark, set at 573.4 feet International Great Lakes Datum (IGLD)(1985) is also disputed, the argument being that the ordinary high water mark is a boundary that must be determined on a case-by-case basis with respect to each parcel bordering the lake. Further, the ODNR's authority to require landowners to lease land from the state of Ohio when that land is already contained within the legal description in their respective deeds is disputed.

{¶3} **Procedural History**

{¶4} May 28, 2004, OLG, Robert Merrill, and other individuals owning real property abutting Lake Erie, filed a lawsuit (Case No. 04CV001080) in the Lake County Court of Common Pleas against ODNR, ODNR's director, and the state of Ohio, for declaratory judgment, mandamus, and other relief. Immediately thereafter, on said date, Homer S. Taft, L. Scot Duncan and Darla J. Duncan filed a complaint (Case No.

1. Ohio Lakefront Group is a duly formed non-profit corporation which represents owners of littoral property on Lake Erie.

04CV001081) in the Lake County Court of Common Pleas against the same defendants, containing nearly identical factual allegations and seeking similar relief.

{¶5} July 2, 2004, an amended complaint seeking certification as a class action and for declaratory judgment, mandamus, and other relief was filed in Case No. 04CV001080. August 12, 2004, the trial court consolidated Case Nos. 04CV001080 and 04CV001081.

{¶6} February 23, 2005, ODNR and the state of Ohio filed an answer, a counterclaim, and a cross-claim against the United States of America and the United States Army Corps of Engineers. The counterclaim sought a declaration that the state of Ohio owns and holds in trust for the people of Ohio the lands and water of Lake Erie up to the natural location of the ordinary high water mark within the territorial boundaries of the state, subject only to the paramount authority retained by the United States for the purposes of commerce, navigation, national defense, and international affairs. Also, a declaration was sought that the state of Ohio has owned and held those lands and waters in trust since statehood.

{¶7} This case was removed to the United States District Court for the Northern District of Ohio on March 28, 2005, on the motion of the United States of America and the United States Army Corps of Engineers. The federal case was dismissed on April 14, 2006, when the federal district court found that neither the federal defendants nor the federal questions were properly before it. Consequently, the case was remanded to the court of common pleas.

{¶8} **Class Certification**

{¶9} June 8, 2006, the parties filed a notice of joint stipulation to class certification on count one of the first amended complaint, which sought a declaration regarding the extent of the state of Ohio's property rights. Counts two and three of the complaint, which deal with constitutional takings issues, were reserved pending the outcome of the declaratory judgment action. The trial court certified the following group of persons as a class for purposes of pursuing a declaratory judgment action:

{¶10} "'*** all persons, as defined in R.C. 1506.01(D), excepting the State of Ohio and any state agency as defined in R.C. 1.60, who are owners of littoral property[1] bordering Lake Erie (including Sandusky Bay and other estuaries previously determined to be a part of Lake Erie under Ohio law) within the territorial boundaries of the State of Ohio' ***. To the extent that governmental entities are included in the class, they are included solely in their proprietary capacity as property owners and not for any purpose or capacity implicating their governmental authority or jurisdiction.

1. "The parties have stipulated that 'upland property' is defined as real property bordering a body of water and that, in Ohio, 'littoral property' is defined as upland property that borders an ocean, sea, lake, or a bay of any of these water bodies, as opposed to 'riparian property' which is defined as upland property that borders a river, stream, or other such watercourse."

{¶11} The class certification order found the following three questions of law common to the class:

{¶12} "(1) What constitutes the furthest landward boundary of the 'territory' as that term appears in R.C. 1506.10 and 1506.11, including, but not limited to, interpretation of the terms 'southerly shore' in R.C. 1506.10, 'waters of Lake Erie' in R.C. 1506.10, 'lands presently underlying the waters of Lake Erie' in R.C. 1506.11,

'lands formerly underlying the waters of Lake Erie and now artificially filled' in R.C. 1506.11, and 'natural shoreline' in R.C. 1506.10 and 1506.11.

{¶13} "(2) If the furthest landward boundary of the 'territory' is declared to be the natural location of the ordinary high water mark as a matter of law, may that line be located at the present time using the elevation of 573.4 feet IGLD (1985), and does the State of Ohio hold title to all such 'territory' as proprietor in trust for the people of the State.

{¶14} "(3) What are the respective rights and responsibilities of the class members, the State of Ohio, and the people of the State in the 'territory.'"

{¶15} **Intervenors**

{¶16} Thereafter, the trial court allowed two groups to intervene: (1) Homer Taft and L. Scot Duncan, members of the class, and (2) the National Wildlife Federation ("NWF") and the Ohio Environmental Council ("OEC"), environmental organizations whose purpose is to protect the rights of their members to make recreational use of the shores and waters of Lake Erie. NWF and OEC assert that the state holds the area of the "territory" of the waters of Lake Erie in trust for the public up to the ordinary high water mark.

{¶17} February 13, 2007, the city of Cleveland filed a motion to opt out of the class, which motion was held in abeyance pending further order of the trial court.

{¶18} **Overview of Motions for Summary Judgment**

{¶19} A motion for summary judgment was filed on behalf of the state of Ohio, Department of Natural Resources, its director, and the state, by the Ohio Attorney General. In this motion, the state advanced three arguments:

{¶20} "(1) As a matter of law, the furthest landward boundary of the 'territory' as that term appears in R.C. 1506.10 and 1506.11, is the ordinary high water mark, and the State of Ohio holds title to all such 'territory' as proprietor in trust for the people of the state;

{¶21} "(2) The furthest landward boundary of the 'territory' is the ordinary high water mark as a matter of law, and that line may be located at the present time using the elevation of 573.4 feet IGLD (1985); and

{¶22} "(3) The rights and responsibilities of littoral owners in their upland property, as well as the respective rights and responsibilities of the federal government, the State of Ohio, the public, and the littoral owners in the 'territory,' have long been settled in state and federal law, as has the hierarchy of those rights."

{¶23} In their motion for summary judgment, NWF and OEC concurred with and affirmatively adopted the state's position.

{¶24} OLG asserted that under Ohio's case law, public trust rights in Lake Erie, extend no farther than the actual waters and those public rights do not extend to the shores or uplands. Further, OLG maintained that "shoreline" cannot be defined as the ordinary high water mark, for this boundary would run afoul of case law, opinions authored by the Ohio Attorney General, ODNR's own rules as set out in the Ohio Administrative Code, and would violate the rights of littoral property owners. OLG alleged that in locating the ordinary high water mark, ODNR unilaterally adopted the Army Corps of Engineers' estimate of 573.4 feet IGLD (1985), which the Corps adopted for regulatory purposes unrelated to the establishment of boundaries between private property and public trust property.

{¶25} In their motion for summary judgment, Taft and Homer argued that in determining this case, the trial court was required to consider the historical record, which was extensively set forth in their brief and attachments.

{¶26} **Trial Court's Ruling on Motions for Summary Judgment**

{¶27} In ruling on the motions for summary judgment, the trial court stated:

{¶28} "(1) each owner of Ohio real estate that touches Lake Erie owns title lakeward as far as the water's edge; (2) if the lakeside owner's deed contains a legal description that extends into the lake beyond the water's edge, then that legal description is hereby reformed so that the legal description ends at the water's edge; (3) likewise, the State of Ohio has ownership in trust of the waters of Lake Erie and the lands beneath those waters landward as far as the water's edge, but no farther [sic]. With respect to Lake Erie, this is the boundary of the 'territory' that is subject to the regulatory authority of the State of Ohio's Department of Natural Resources; and (4) the lakeside landowner also has littoral rights, such as the right to wharf out to navigable waters, and those littoral rights extend into the lake as an incident of titled ownership of property adjoining the lake."

{¶29} The trial court further concluded:

{¶30} "Defendants-Respondents and Intervening Defendants have failed, as a matter of law, to show that the *landward* boundary of the public trust territory in Ohio along the Lake Erie shore is the Ordinary High Water Mark of 573.4 IGLD (1985), and Plaintiffs-Relators and Intervening Plaintiffs have failed to show that the *lakeward* boundary of the public trust territory in Ohio along the Lake Erie shore is the Ordinary Low Water Mark. The court declares that the law of Ohio is that the proper definition of

the boundary line for the public trust territory of Lake Erie is the water's edge, wherever that moveable boundary may be at any given time, and that the location of this moveable boundary is a determination that should be made on a case-by-case basis.

{¶31} "The court's decision does not attempt to list or comprehensively define all of the littoral rights of landowners of Ohio property adjoining Lake Erie, preferring instead to have those rights determined on a case-by-case basis." (Emphasis sic.)

{¶32} **Standard of Review**

{¶33} In order for a motion for summary judgment to be granted, the moving party must prove:

{¶34} "***(1) [N]o genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385. (Citation omitted.)

{¶35} Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, *written admissions*, affidavits, transcripts of evidence, and written stipulations of facts, if any, *** show that there is no genuine issue as to any material fact ***." Civ.R. 56(C). (Emphasis added.) Material facts are those that might affect the outcome of the suit under the governing law of the case. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, quoting *Anderson v. Liberty Lobby, Inc.*, (1986), 477 U.S. 242, 248.

{¶36} If the moving party meets this burden, the nonmoving party must then provide evidence illustrating a genuine issue of material fact, pursuant to Civ.R. 56(E). *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Civ.R. 56(E), provides:

{¶37} "When a motion for summary judgment is made *and supported as provided in this rule*, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." (Emphasis added.)

{¶38} Summary judgment is appropriate pursuant to Civ.R. 56(E), if the nonmoving party does not meet this burden.

{¶39} Appellate courts review a trial court's grant of summary judgment de novo. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. "*De novo* review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine if as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383, citing *Dupler v. Mansfield Journal Co., Inc.* (1980), 64 Ohio St.2d 116.

{¶40} **Ohio's Standing**

{¶41} Before considering the issues, we must ascertain whether the state of Ohio has standing to participate in this appeal. We conclude it does not.

{¶42} On July 16, 2007, ODNR, acting with the consent and direction of Governor Strickland, filed a response to the then pending motions for summary judgment stating that ODNR "will discharge its statutory duties and will adopt or enforce

administrative rules and regulatory policies with the assumption that the lakefront owners' deeds are presumptively valid." In addition, ODNR asserted that while it would still require construction permits for structures that may impact coastal lands, it "no longer require[d] property owners to lease land contained within their presumptively valid deeds[,]" and that it "must and should honor the apparently valid real property deeds of the plaintiff-relator lakefront owners unless a court determines that the deeds are limited by or subject to the public's interest in those lands or are otherwise defective or unenforceable."

{¶43} "'Standing' is defined at its most basic as '(a) party's right to make a legal claim or seek judicial enforcement of a duty or right.' Black's Law Dictionary (8th Ed.2004) 1442. Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue. *Ohio Contrs. Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320, ***. '"(T)he question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.'"' (Citations omitted.) *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 178-179, ***, quoting *Sierra Club v. Morton* (1972), 405 U.S. 727, 732, ***, quoting *Baker v. Carr* (1962), 369 U.S. 186, 204, ***, and *Flast v. Cohen* (1968), 392 U.S. 83, ***." *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, at ¶27. (Parallel citations omitted.)

{¶44} The Ohio Attorney General may only act at the behest of the governor, or the General Assembly. R.C. 109.02. In this case, the attorney general represented the

state due to the activities of the ODNR, which department is under the authority of the governor, in whom the constitution vests the "supreme executive power." Section 5, Article III, Ohio Constitution. The governor has ordered ODNR to cease those activities that made it a party to the action. We find no authority for the attorney general to prosecute this matter on his own behalf. We conclude that the state of Ohio no longer has standing in this matter, and order its assignments of error and briefs stricken.

{¶45} **Appellants'/Cross-Appellees' Assignments of Error**

{¶46} NWF and OEC[2] assert the following assignments of error:

{¶47} "[1.] The trial court erred in holding that the public trust in Lake Erie is demarcated by the line the water of the lake touches at any given time.

{¶48} "[2.] The trial court erred in holding that the Ohio Department of Natural Resources may not use the IGLD elevation to establish the high water mark of Lake Erie.

{¶49} "[3.] The trial court erred in holding that littoral property owners may exclude the people from using the lands below the high water mark of Lake Erie."

{¶50} **OLG's and Taft's Cross-Assignments of Error:**

{¶51} OLG avers the following cross-assignments of error:

{¶52} "[1.] The Trial Court Erred in Finding that the Boundary of the Territory is Not the Low Water Mark.

{¶53} "[2.] The Trial Court Erred In Reforming All Littoral Property Deeds to the Water's Edge."

{¶54} Taft asserts the following cross-assignments of error:

2. NWF and OEC filed a joint brief in the instant case.

{¶55} "[1.] THE [TRIAL] COURT ERRED IN PERMITTING THE INTERVENTION OF [NWF] AND [OEC] AS DEFENDANTS AND COUNTERCLAIMANTS, AS THEY PRESENTED NO JUSTICIABLE CLAIM AGAINST ANY PARTY, AND THEIR APPEAL SHOULD BE DISMISSED.

{¶56} "[2.] THE [TRIAL] COURT ERRED IN REFORMING THE DEEDS OF PRIVATE PROPERTY OWNERS[.]

{¶57} "[3.] THE [TRIAL] COURT ERRED IN FAILING TO DECLARE THE LITTORAL RIGHTS OF PRIVATE PROPERTY OWNERS ALONG LAKE ERIE."

{¶58} **Applicable Law**

{¶59} Prior to analyzing the parties respective assignments and cross-assignments of error, a brief summary of Ohio case law, statutes, rules and regulations regarding the rights of littoral property owners along Lake Erie is in order. For a complete history of the development of littoral property rights in the Great Lakes states, we can only advise the reader to study the immensely scholarly opinion of the trial court, attached hereto as an appendix.

{¶60} We commence with the lead case of *Sloan v. Biemiller* (1878), 34 Ohio St. 492, a quiet title action regarding property on Cedar Point. The Supreme Court of Ohio held, at paragraph four of the syllabus:

{¶61} "Where no question arises in regard to the right of a riparian owner to build out beyond his strict boundary line, for the purpose of affording such convenient wharves and landing places in aid of commerce as do not obstruct navigation, *the boundary of land, in a conveyance calling for Lake Erie and Sandusky bay, extends to*

the line at which the water usually stands when free from disturbing causes." (Emphasis added.)

{¶62} The *Sloan* court derived this definition from the opinion of the Illinois Supreme Court in *Seaman v. Smith* (Ill. 1860), 24 Ill. 521, and quoted that case with approbation in the body of its opinion. *Sloan* at 512-513. We further note that none of the parties to this hard fought contest, nor we ourselves, have found any other syllabus law of the Supreme Court of Ohio defining *where* littoral owners' property extends relative to Lake Erie. Consequently, we find this extended quote from *Seaman* illuminating:

{¶63} "This record presents the question as to what answers the call for Lake Michigan, as a boundary line, in the various deeds in a chain of title, held by the plaintiff below. If high water mark is the point at which his land terminates, then this judgment should be reversed; but if, on the contrary, the line where the water usually stands when unaffected by storms and other disturbing causes, is the boundary, then the judgment must be affirmed. *** The great lakes of the north, present questions affecting riparian rights, that are different from those arising under boundaries on the sea, upon rivers, or other running streams. They have neither appreciable tides nor currents, nor are they affected, like running streams, by rises and falls produced by a wet or dry season. Yet the rules that govern boundaries on the ocean, govern this case.

{¶64} "A grant giving the ocean or a bay as the boundary, by the common law, carries it down to ordinary high water mark. *** The doctrine, it is believed, is well settled, that the point at which the tide usually flows is the boundary of a grant to its shore. As the tide ebbs and flows at short and regular recurring periods, to the same

points, a portion of the shore is regularly and alternately sea and dry land. This being unfit for cultivation or other private use, is held not to be the subject of private ownership, but belongs to the public. When the adjacent owner's land is bounded by the sea or one of its bays, the line to which the water may be driven by storms, or unusually high tides, is not adopted as the boundary. On the contrary, the ordinary high water mark indicated by the usual rise of the tide, is his boundary.

{¶65} "The principle, however, which requires that the usual high water mark is the boundary on the sea, and not the highest or lowest point to which it rises or recedes, applies in this case, although this body of water has no appreciable tides. Here, as there, the highest point to which storms or other extraordinary disturbing causes may drive the water on the shore, should not be regarded as the point where the owner's rights terminate, nor yet should it not be extended to the lowest point to which it may recede from like disturbing causes, But (sic) it should be at that line where the water usually stands when unaffected by any disturbing cause." *Seaman*, supra, at 524-525. (Citation omitted.)

{¶66} In *State v. Cleveland & Pittsburgh RR. Co.* (1916), 94 Ohio St. 61, the Supreme Court of Ohio acknowledged the "public trust" doctrine – i.e., that the state holds the waters and subaqueous lands of Lake Erie in perpetual trust for the people of the state, while littoral owners retain a right to "wharf out" from the shore to the lake's navigable waters. Cf. id., at 79-83. However, the court did not define where the public trust physically commenced, merely using the term "shore." Id. at 68, 79.

{¶67} The *Cleveland & Pittsburgh* court further called upon the legislature to codify the public trust doctrine, which the General Assembly did the following year, with

passage of the Fleming Act, presently codified at R.C. Chapter 1506. However, present R.C. 1506.10, defining the state's rights in Lake Erie, merely states that they commence at the lake's "southerly shore" or "natural shoreline." R.C. 1506.11(A), defining the extent of the public trust "Territory," again merely refers to the "natural shoreline."

{¶68} In *State ex rel. Duffy v. Lakefront East Fifty-Fifth Street Corp.* (1940), 137 Ohio St. 8, the Supreme Court of Ohio determined that the Fleming Act, as supplemented by the Abele Act of 1925, did not alter the common law of accretion as it applied to littoral property owners along Lake Erie. Id. at 11-13. The court consistently used the term "shore line," without further description, in referencing where the public trust territory commenced. Id. at 9, 11, 12.

{¶69} Finally, in *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, the Supreme Court of Ohio was presented with a dispute regarding whether construction of the east shoreway in Cleveland, Ohio, impinged upon the rights of certain littoral property owners. Id. at 316-321. Throughout the body of the opinion, the court generally used the term "natural shore line" to describe where the property of littoral owners cease, and the public trust in Lake Erie commences. Id. at 317, 319-322, 334, 337, 339. Notably for the matters at issue herein, the court, in describing the briefs filed on the case, states, at 322:

{¶70} "There is a full discussion of the common-law rule to the effect that the title to subaqueous and marginal lands of tidal and navigable waters in Great Britain is in the crown, that the law with reference to tidal waters in Great Britain applies not only to tidal waters in the United States but likewise is applicable to the waters of Lake Erie, and that

the title to subaqueous and filled-in lands *beyond high water mark* is in the state bordering upon such waters." (Emphasis added.)

{¶71} Further, at 337, the *Squire* court observed: "The littoral owners of the upland have no title beyond the natural shore line; they have only the right of access and wharfing out to navigable waters."

{¶72} Moreover, while we recognize that an opinion authored by the Attorney General is persuasive authority and not binding on this court, *Gen. Dynamics Land Sys., Inc. v. Tracy* (1998), 83 Ohio St.3d 500, 504, the Ohio Attorney General has issued an opinion regarding this matter, which concludes, "[t]he land that lies above the natural *shoreline* of Lake Erie belongs to the littoral owner." 1993 Ohio Atty.Gen.Ops. No. 93-025, at 15. The attorney general further remarked: "The 'shoreline' is '(t)he line marking the edge of a body of water.' *The American Heritage Dictionary* 1133 (2d college ed. 1985). Naturally, the shoreline of a body of water is in a constant state of change." Id. at 11.

{¶73} Further, the Ohio Administrative Code, Chapter 1501-6, "Lease of Lake Erie Submerged Lands," defines the term "shoreline" as "the line of intersection of lake Erie with the beach or shore." OAC 1501-6-10(U). "Shore" is defined as the "land bordering the lake[,]" OAC 1501-6-10(T) and "beach" means "[a] zone of unconsolidated material that extends landward from the shoreline to the toe of the bluff or dune. Where no bluff or dune exists, the landward limit of the beach is either the line of permanent vegetation or the place where there is a marked change in material or physiographic form." OAC 1501-6-10(E).

{¶74} Having summarized the leading authorities bearing on the questions at hand, we turn to the assignments and cross-assignments of error.

{¶75} **Assignments of Error of NWF and OEC**

{¶76} By their first assignment of error, NWF and OEC assert the trial court erred in applying dictionary definitions to determine what the "natural shoreline" is under R.C. 1506.10 and 1506.11(A). The first issue they raise is that federal law requires that the Lake Erie shoreline be defined as the high water mark. In support of this contention, they cite to the decision of the United States Supreme Court in *Shively v. Bowlby* (1894), 152 U.S. 1, recognizing both the equal-footing doctrine and the public trust doctrine, for the proposition that states upon entering the Union, automatically receive land beneath navigable waters below the high water mark.[3]

{¶77} We respectfully reject this argument. The *Shively* court merely noted that the public trust doctrine, in England, set the border of the crown's trust for the benefit of the public at the high water mark. The *Shively* court specifically recognized that state law determined the scope of the public trust in land beneath navigable waters in this country.

{¶78} Next, NWF and OEC turn to federal statutory law. Citing to the Submerged Lands Act ("SLA"), 43 U.S.C.S. 1301-1315, they maintain that Congress confirmed a uniform boundary at the ordinary high water mark for all states. Specifically, they refer to 43 U.S.C.S 1311(a), which provides:

{¶79} "*** [T]itle to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands

3. The "equal-footing" doctrine holds that those states entering the Union following the establishment of the United States have the same rights as those originally forming the Union.

and waters, and *** the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof[.]"

{¶80} For non-tidal waters, "lands beneath navigable waters" includes "lands and water *** up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction[,]" 43 U.S.C.S. 1301(a)(1), and "all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined[.]" 43 U.S.C.S. 1301(a)(3).

{¶81} We find this reliance upon the SLA to be misplaced. As the United States Supreme Court has observed, the effect of the SLA "was merely to confirm the States' title to the beds of navigable waters within their boundaries as against any claim of the United States Government." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.* (1977), 429 U.S. 363, 372, fn. 4. Further, state law governs the determination of ownership in the land under the Act, as evidenced by the provision "'under the law of the respective States in which the land is located *** [.]'" *California ex rel. State Lands Comm. v. United States* (1982), 457 U.S. 273, 288. See, also, *Corvallis Sand & Gravel Co.*, at 372, fn. 4 (discussing *Bonelli Cattle Co. v. Arizona* (1973), 414 U.S. 313).

{¶82} This issue lacks merit.

{¶83} By their second issue under the first assignment of error, NWF and OEC argue that, in defining the public trust territory in Lake Erie as commencing at anything

below the high water mark, land is removed from the public trust, which is strictly forbidden. See, e.g., *Cleveland & Pittsburgh RR. Co.*, supra, at paragraph six of the syllabus. In support of this, they cite to the Fleming Act, and the decisions of the Supreme Court of Ohio in *Cleveland & Pittsburgh RR. Co.*, and *Squire*. They contend that these decisions specifically incorporate the United States Supreme Court's decision in *Shively*, recognizing the English doctrine of the public trust in tidal waters, as well as that court's decision in *Illinois Cent. RR. Co. v. Illinois* (1892), 146 U.S. 387, 452, making the public trust doctrine applicable to the non-tidal waters of the Great Lakes. Consequently, they argue that any interpretation of the Fleming Act requires the courts of Ohio to recognize the high water mark as the boundary of the public trust in Lake Erie.

{¶84} We respectfully reject this argument. Just as the public trust in Lake Erie cannot be abandoned, it cannot be improperly extended in violation of littoral property owners' rights. The *Shively* court specifically recognized that state law defines the boundary of the public trust in navigable waters. We find that any reference by the Supreme Court of Ohio to the "high water mark" acting as the boundary of the public trust in navigable waters in *Cleveland & Pittsburgh RR. Co.*, and *Squire*, is simply a reference to the history of the public trust doctrine, as imported from English law – not a finding as to the boundary of that trust in Lake Erie.

{¶85} The second issue lacks merit, as does the assignment of error.

{¶86} By their second assignment of error, NWF and OEC protest the trial court's determination that ODNR cannot use the IGLD to establish the high water mark for Lake Erie.

{¶87} As ODNR is no longer enforcing this policy, we find this assignment of error moot.

{¶88} By their third assignment of error, NWF and OEC contend the trial court erred in determining that littoral property owners may exclude the public from lands below the high water mark of Lake Erie. By his third cross-assignment of error, Taft asserts the trial court erred in failing to declare the rights of littoral property owners. As the matters are interrelated, for purposes of brevity, we consider them together. We respectfully find each to be without merit.

{¶89} Nearly 130 years ago, the Supreme Court of Ohio observed that littoral owners have the right to exclude the public from their property. *Sloan*, supra. We appreciate and respect the fact that, in Ohio, the public has broad access to navigable waters, including "all legitimate uses, be they commercial, transportational, or recreational." *State ex rel. Brown v. Newport Concrete Co.* (1975), 44 Ohio App.2d 121, 128. See, also, R.C. 1506.10 and 1506.11(G). However, contrary to NWF's and OEC's assertion, the judgment of the trial court does not abolish the rights of the public to walk along Lake Erie. In fact, the public retains the same rights to walk lakeward of the shoreline along Lake Erie, but these rights have always been limited to the area of the public trust (i.e., on the lands under the waters of Lake Erie and lakeward of the shoreline). Therefore, the public does not interfere with littoral property rights when their recognized, individual rights are exercised within the public trust; that is, lakeward of the shoreline as defined herein.

{¶90} The littoral owner has certain well-defined rights incident to the ownership of shore land. Littoral owners may exercise these rights upon the soil and navigable

waters lakeward of the shoreline of Lake Erie within the territorial boundaries of the state, subject to regulation and control by the federal, state and local governments. Those rights include: (1) the right to wharf out to navigable waters to the point of navigability for the purposes of navigation; (2) the right of access to the navigable waters of Lake Erie; and (3) the right to make reasonable use of waters in front of or flowing past their lands.

{¶91} In its judgment entry, the trial court recognized the above enumerated rights of littoral owners. Additionally, the trial court noted that it had not been "asked to define categorically all of the littoral rights that are recognized under Ohio law for land adjoining Lake Erie. Accordingly, notwithstanding the argumentation of the parties, the court declines to make a comprehensive, categorical declaration of what those littoral rights are with respect to all members of the class. Such questions are probably best left to the resolution of specific disputes involving individual parties who are asserting such littoral rights with respect to a specific parcel of land, according to specific deed language, and pertaining to a specific area of the Lake Erie coastline."

{¶92} The trial court generally recognized the special rights that littoral owners possess, incident to owning shore land. However, it appreciated that the application of such rights to a particular littoral owner or parcel of land would best be resolved on a case-by-case basis. The trial court could not conceivably anticipate every possible scenario with respect to all members of the class. We find that the trial court properly declared the rights of the littoral owners, while acknowledging that individual members of the class may have to adjudicate a specific, individualized question.

{¶93} NWF's and OEC's third assignment of error, as well as Taft's third cross-assignment of error, lack merit.

{¶94} **Cross-Assignments of Error of OLG**

{¶95} We next turn to OLG's first cross-assignment of error, which states: "[t]he trial court erred in finding that the boundary of the territory is not the low water mark."

{¶96} OLG first argues that common usage dictates when interpreting the term "natural shoreline." The 1916 edition of Webster's New International Dictionary, relied upon by the trial court, defined "shoreline" as the "'line of contact of a body of water with the shore.'" OLG states that based upon the 1916 Webster's New International Dictionary, "shore" is defined as the land between low and high water marks. As such, because the "shoreline" is the line separating the water and the shore, and the "shore" describes the land between high and low water marks, the common meaning of the "shoreline" must be the low water mark. We find OLG's analysis to be flawed.

{¶97} First, the trial court found that the terms "shore" and "beach" are synonyms in the context of the issues in the instant case and, as a matter of law, they mean "'the land between low and high water marks.'" Since no party objected and we find this definition to be consistent with other dictionary definitions, as well as definitions adopted by Ohio courts and administrative agencies, we hold that "shore" is "the land between low and high water marks."[4] However, this does not mean that the boundary of the territory for purposes of the public trust doctrine should be set at the low water

4. See, e.g., *Busch v. Wilgus* (Aug. 21, 1922), 1922 Ohio Misc. LEXIS 272, at 14, stating "[t]he term 'shore' includes and designates the land lying between the high and low water mark[;]" OAC 1501-6-10(T) defining "shore" as "the land bordering the lake." Black's Law Dictionary defines "shore" as the "[l]and lying between the lines of high- and low-water mark; lands bordering on the shores of navigable waters below the line of ordinary high water." Black's Law Dictionary (8 Ed.2004) 1412.

mark. Instead, shoreline is the line of actual physical contact by a body of water with the land *between the high and low water mark* undisturbed and under normal conditions. See, e.g., *Sloan*, supra, at paragraph four of the syllabus.

{¶98} In addition, OLG cites to *Wheeler v. Port Clinton* (Sept. 16, 1988), 6th Dist. No. OT-88-2, 1988 Ohio App. LEXIS 3702, and *Mitchell v. Cleveland Elec. Illuminating Co.* (1987), 30 Ohio St.3d 92, to support the proposition that the natural shoreline is the low water mark. However, we find *Wheeler* and *Mitchell* to be inapposite to the instant situation.

{¶99} In *Wheeler*, the appellant, a swimmer who sustained injuries while swimming off of City Beach in Port Clinton, Ohio, sought review of the trial court's decision in granting the city's motion for summary judgment. *Wheeler*, supra, at 1-2. In reviewing the decision of the trial court, the Sixth District Court of Appeals stated, "[t]he north territorial boundary of Port Clinton extends to, but not beyond, the Lake Erie shoreline." Id. at 3. Although OLG attempts to utilize this decision as one that supports the low water mark as the boundary of the territory, we disagree. As we have previously concluded, the shoreline is not the low water mark. Furthermore, the main issue before the *Wheeler* court was whether the city was liable for appellant's injuries, not the definition of the public trust boundary.

{¶100} Similar to *Wheeler*, the issue before the court in *Mitchell* was not the definition of the public trust doctrine. In *Mitchell*, "[t]he sole question before [the Supreme Court of Ohio was] whether [the] appellee's opening statement and the allegations of the amended complaint state a cause of action against Avon Lake." *Mitchell*, supra, at 93. In its discussion of whether Avon Lake owed a duty to

decedents, the Supreme Court observed that it was "undisputed that Avon Lake's territorial limits extend only to the low water line of Lake Erie." Id. at 94. In making this statement, the Supreme Court was merely observing that the parties chose not to dispute the low water mark as the proper boundary; it clearly was not a legal conclusion of the Court.

{¶101} We, therefore, decline to adopt the low water mark to be the boundary of the public trust territory.

{¶102} Since OLG's second and Taft's second cross-assignments of error are interrelated, we consider them in a consolidated analysis.

{¶103} We agree with OLG's and Taft's assertion that the trial court erred in reforming the deeds. First, in reforming the deeds, the trial court went beyond the scope of the class certification. Further, since this issue was not before the trial court, the parties were not afforded the opportunity to argue their positions for the trial court's consideration. Reformation of the littoral owner's deeds could potentially have an impact on title insurance policies and the littoral owners' rights established by the Fleming Act or other legislation. By reforming all of the littoral owners deeds to the water's edge, all parties were deprived of the opportunity to be notified of each other's arguments, and to respond to those arguments, which is contrary to traditional notions of due process. As a result, we vacate this portion of the trial court's judgment entry.

{¶104} Taft's First Cross-Assignment of Error

{¶105} As Taft's first cross-assignment of error, he alleges NWF and OEC presented no justiciable claim against any party and, thus, the trial court erred in permitting their intervention.

{¶106} Ohio courts should liberally construe Civ.R. 24 in favor of intervention. *Indiana Ins. Co. v. Murphy*, 165 Ohio App.3d 812, 2006-Ohio-1264, at ¶5. The granting or denial of a motion to intervene rests with the discretion of the trial court and will not be disturbed on appeal absent the showing of an abuse of discretion. *Peterman v. Pataskala* (1997), 122 Ohio App.3d 758, 761. (Citation omitted.) "'The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" (Citations omitted.) *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶107} Pursuant to Civ.R. 24, there are two avenues of intervention: intervention of right and permissive intervention. Civ.R. 24(A)(2) sets forth the relevant requirements for intervention of right:

{¶108} "Upon timely application anyone shall be permitted to intervene in an action: *** (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

{¶109} To be entitled to intervene as of right, pursuant to Civ.R. 24(A), the applicant must demonstrate: (1) the application is timely; (2) an interest in the property or transaction that is the subject of the suit; (3) the disposition of the action may impair or impede his ability to protect that interest; and (4) the existing parties do not adequately protect that interest. *Blackburn v. Hamoudi* (1986), 29 Ohio App.3d 350, 352. (Citations omitted.)

{¶110} In his brief, Taft alleges NWF and OEC failed to demonstrate a "legally protectable" interest in the real estate boundary in question. We disagree.

{¶111} "Civ.R. 24(A) requires that the applicant claim an interest relating to the property or transaction which is the subject of the action. While the claim may be shown to be without merit, *** it is not required that the interest be proven or conclusively determined before the motion is granted." *Blackburn* at 354. (Internal citation omitted.)

{¶112} According to the affidavit of David B. Strauss, attached to NWF and OEC's brief in support of the motion to intervene, NWF is a non-profit organization whose mission is to conserve natural resources and the wildlife that depends on such resources for the use and aesthetic enjoyments of its members. NWF is comprised of approximately 921,922 members nationwide, approximately 303,997 members in the states bordering the Great Lakes, and approximately 98,114 members in Ohio alone.

{¶113} According to the affidavit of Vicki Deisner, also attached to the brief in support of the motion to intervene, OEC is an Ohio, non-profit corporation, whose purpose is to preserve and protect the environment of the state of Ohio and to represent the interests of its members across the state regarding environmental and conservation issues. OEC is comprised of approximately 2,135 individual members and 113 group members that represent thousands of citizens throughout the state of Ohio.

{¶114} As further stated in their brief in support of the motion to intervene, the NWF and OEC sought to intervene since the relief requested by appellant, if granted, would extinguish the rights of its members to make recreational use of the shore along

Lake Erie below the ordinary high water mark and would have a direct and substantial adverse impact upon the recreational use and aesthetic enjoyments of such shorelands.

{¶115} Therefore, by fulfilling the requirements as set forth under Civ.R. 24(A) and, further, since it has been established that Ohio courts should liberally construe Civ.R. 24, we conclude the trial court was correct in granting NWF's and OEC's motion to intervene.

{¶116} The second type of intervention, permissive, is governed by Civ.R. 24(B), which states:

{¶117} "Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

{¶118} We further conclude that NWF and OEC were permitted to intervene under Civ.R. 24(B), permissive intervention, since they demonstrated their defense and counterclaim were both legally and factually related to the claims of OLG. In addition, it is evident that NWF and OEC's intervention did not "unduly delay or prejudice the adjudication of the rights of the original parties." Civ.R. 24(B).

{¶119} Taft also argues that the counterclaim of NWF and OEC failed to state a claim upon which relief could be granted. Civ.R. 12(B) provides, in pertinent part:

{¶120} "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: *** (6) failure to state a claim upon which relief can be granted ***[.]"

{¶121} Save for the exceptions stated in Civ.R. 12(H), a party generally waives all defenses and objections not properly raised by motion, a responsive pleading, or amendment allowed under Civ.R. 15(A). Although Taft alleges he asserted a Civ.R. 12(B)(6) claim in his responsive pleading to NWF's and OEC's counterclaim, a review of the record in this case reveals that this responsive pleading is not part of our record on appeal, for it was only filed in Case No. 04CV001081, which is not pending before this court. Therefore, we cannot consider it on appeal. App.R. 9(A).

{¶122} Based on the foregoing, Taft's first cross-assignment of error is without merit.

{¶123} Public Trust Boundary is the Water's Edge

{¶124} In *Sloan*, the Supreme Court of Ohio affirmed private property rights in the "shores" of Lake Erie and held the boundary between public and private rights is, "the line at which the water usually stands when free from disturbing causes." Id. at paragraph four of the syllabus.

{¶125} As we have identified, the Supreme Court of Ohio recognized the public trust doctrine by holding, "[t]he title of the land *under the waters of Lake Erie* within the

limits of the state of Ohio, is in the state as trustee for the benefit of the people, for the public uses to which it may be adapted." *Cleveland & Pittsburgh RR. Co.*, at paragraph three of the syllabus. (Emphasis added.) As a result of the Supreme Court's decision, the Fleming Act, now codified at R.C. Chapter 1506, was enacted. In *Squire*, the Supreme Court of Ohio further spoke of the title to the lands under the waters of Lake Erie, stating:

{¶126} "The state of Ohio holds the title to the *subaqueous* soil of Lake Erie, which borders the state, as trustee for the public for its use in aid of navigation, water commerce or fishery, and may, by proper legislative action, carry out its specific duty of protecting the trust estate and regulating its use." Id., at paragraph two of the syllabus. (Emphasis added.) The *Squire* court also declared that littoral owners of the upland do not have title beyond the *natural shoreline*, for they only have the right of access and wharfing out to navigable waters.

{¶127} Based upon its decisions, the Supreme Court has identified that the waters, and the lands under the waters of Lake Erie, when submerged under such waters, are subject to the public trust, while the littoral owner holds title to the natural shoreline. As we have identified, the shoreline is the line of contact with a body of water with the land *between the high and low water mark*. Therefore, the shoreline, that is, the actual water's edge, is the line of demarcation between the waters of Lake Erie and the land when submerged thereunder held in trust by the state of Ohio and those natural or filled in lands privately held by littoral owners.

{¶128} By setting the boundary at the water's edge, we recognize and respect the private property rights of littoral owners, while at the same time, provide for the public's

use of the waters of Lake Erie and the land submerged under those waters, when submerged. The water's edge provides a readily discernible boundary for both the public and littoral landowners.

{¶129} Based on principle, authority, and considerations of public policy, we determine that the waters and submerged bed of Lake Erie when under such waters is controlled by the state and held in public trust, while the littoral owner takes fee only to the water's edge.

{¶130} **Conclusion**

{¶131} Based on the above analysis, the Ohio Attorney General's assignments of error are stricken. NWF's and OEC's first and third assignments of error lack merit, while the second assignment is moot. OLG's first cross-assignment of error lacks merit, as do Taft's first and third cross-assignments of error. OLG's second cross-assignment of error, as well as Taft's, have merit to the extent indicated. The judgment of the Lake County Court of Common Pleas is modified to vacate the portion of the judgment concerning the amendment of the littoral owner's deed, and the judgment of the Lake County Court of Common Pleas is hereby affirmed as modified.

{¶132} It is the further order of this court that the parties share equally costs herein taxed.

{¶133} The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDELL, J., concurs,

TIMOTHY P. CANNON, J., concurs in part and dissents in part with Concurring/ Dissenting Opinion.

Appendix attached.

TIMOTHY P. CANNON, J., concurring in part and dissenting in part.

{¶134} I respectfully concur in part with the majority opinion as to the overall disposition of the case; however, I dissent in part as it pertains to the disposition of the issue of standing.

{¶135} At the outset, I would note a concern and the need for caution about issuing rulings on matters not raised by any party, particularly when the parties have not been given an opportunity to brief those issues. While App.R. 12(A)(2) allows an appellate court to consider issues not briefed by the parties, I believe the better rule is "*** when a court of appeals chooses to consider an issue not briefed by the parties, the court should notify the parties and give them an opportunity to brief the issue." *State v. Blackburn*, 11th Dist. No. 2001-T-0052, 2003-Ohio-605, at ¶45, citing *State v. Peagler* (1996), 76 Ohio St.3d 496, 499, fn.2.

{¶136} The state of Ohio is a named defendant. The majority cites R.C. 109.02 for the proposition that the attorney general may "only act at the behest of the governor, or the General Assembly." I do not agree with that reading of the statute. The statute states: "[w]hen *required* by the governor or the general assembly, the attorney general *shall* appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested." R.C. 109.02. (Emphasis added.) This is language of inclusion, not of exclusion. There is nothing that *prohibits* the attorney

general from appearing and representing the state when suit has been filed against it. I would not suggest the attorney general needs an order from the governor or legislation from the General Assembly to defend the state in litigation without first giving the attorney general the full opportunity to brief the issue. It is, quite simply, ground that does not need to be plowed in this case. As acknowledged by the majority, it is clear the citizens of the state of Ohio have an interest in the public trust portion of the waters of Lake Erie. Consequently, they are entitled to representation.

STATE OF OHIO)
)SS.
COUNTY OF LAKE)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

JUDGMENT ENTRY

CASE NO. 2008-L-007

VOL 0076 PAGE 0362

STATE ex rel. ROBERT MERRILL, TRUSTEE, et al.,

Plaintiffs-Appellees/
Cross-Appellants,

HOMER S. TAFT,

Intervening Plaintiff-Appellee/
Cross-Appellant,

L. SCOT DUNCAN, et al.,

Intervening Plaintiffs-Appellees,

-vs-

STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,

Defendants,

NATIONAL WILDLIFE FEDERATION, et al.,

Intervening Defendants-
Appellants/Cross-Appellees.

STATE ex rel. ROBERT MERRILL, TRUSTEE, et al.,

CASE NO. 2008-L-008

Plaintiffs-Appellees/
Cross-Appellants.

HOMER S. TAFT, et al ,

Intervening Plaintiffs-Appellees,

-vs-

STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,

Defendants,

STATE OF OHIO,

Defendant-Appellant/
Cross-Appellee.

For the reasons stated in the opinion of this court, the Ohio Attorney General's assignments of error are stricken. National Wildlife Federation's and Ohio Department of Natural Resource's first and third assignments of error lack merit, while the second assignment is moot. The Ohio Lakefront Group's first cross-assignment of error lacks merit, as Homer S Taft's first and third cross-assignments of error. Ohio Lakefront Group's second cross-assignment of error, as well as Homer S. Taft's have merit to the extent indicated. The judgment of the Lake County Court of Common Pleas is modified to vacate the portion of the judgment concerning the amendment of the littoral owner's deed, and the judgment of the Lake County Court of Common Pleas is hereby affirmed as modified

It is the further order of this court that the parties share equally costs herein taxed.

The court finds there were reasonable grounds for this appeal

JUDGE COLLEEN MARY O'TOOLE

DIANE V. GRENDELL, J., concurs,
TIMOTHY P. CANNON, J., concurs in part and dissents in part with Concurring/ Dissenting Opinion

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OHIO CONSTITUTION, ARTICLE III, SECTION 1.

The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and an attorney general, who shall be elected on the first Tuesday after the first Monday in November, by the electors of the state, and at the places of voting for members of the General Assembly.

(As amended October 13, 1885; 82 v 446.)

R. C. 109.02 Duties as chief law officer.

The attorney general is the chief law officer for the state and all its departments and shall be provided with adequate office space in Columbus. Except as provided in division (E) of section 120.06 and in sections 3517.152 to 3517.157 of the Revised Code, no state officer or board, or head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys at law. The attorney general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested. When required by the governor or the general assembly, the attorney general shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested. Upon the written request of the governor, the attorney general shall prosecute any person indicted for a crime.

Effective Date: 08-24-1995

R. C. 721.04 Use and control of waters and soil of Lake Erie.

Any municipal corporations within the limits of which there is included a part of the shore of the waters of Lake Erie may, in aid of navigation and water commerce, construct, maintain, use, and operate, piers, docks, wharves, and connecting ways, places, tracks, and other water terminal improvements with buildings and appurtenances necessary or incidental to such use, on any land belonging to the municipal corporation held under title permitting such use, and also over and on any submerged or artificially filled land made by accretion resulting from artificial encroachments, title to which is in the state, within the territory covered or formerly covered by the waters of Lake Erie in front of littoral land within the limits of such municipal corporation, whether such littoral land is privately owned or not.

Any such municipal corporation may, by ordinance, subject to federal legislation, establish harbor lines and other regulations for such territory and prohibit the placing, maintaining, or causing or permitting to be placed therein any unlawful encroachments on such territory.

The territory to which this section applies is limited to that within the limits of the municipal corporation and extending into Lake Erie to the distance of two miles from the natural shore line. For all purposes of government and exercise of such powers the limits of any such municipal corporation shall be held to extend out, in, over, and under such water and land made or that may be made within such territory. This section does not limit the now existing boundaries of any municipal corporation. Where two municipal corporations have upland territory fronting on such waters, and there is a conflict because of the curve of the shore line or otherwise as to such two mile boundary, the boundaries of each such municipal corporation may be determined by agreement between the municipal corporations concerned.

All powers granted by this section shall be exercised subject to the powers of the United States government and the public rights of navigation and fishery in any such territory. All mineral rights or other natural resources existing in the soil or waters in such territory, whether now covered by water or not, are reserved to the state.

Effective Date: 10-13-1955

R. C. 1506.10 Lake Erie boundary lines.

It is hereby declared that the waters of Lake Erie consisting of the territory within the boundaries of the state, extending from the southerly shore of Lake Erie to the international boundary line between the United States and Canada, together with the soil beneath and their contents, do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state, for the public uses to which they may be adapted, subject to the powers of the United States government, to the public rights of navigation, water commerce, and fishery, and to the property rights of littoral owners, including the right to make reasonable use of the waters in front of or flowing past their lands. Any artificial encroachments by public or private littoral owners, which interfere with the free flow of commerce in navigable channels, whether in the form of wharves, piers, fills, or otherwise, beyond the natural shoreline of those waters, not expressly authorized by the general assembly, acting within its powers, or pursuant to section 1506.11 of the Revised Code, shall not be considered as having prejudiced the rights of the public in such domain. This section does not limit the right of the state to control, improve, or place aids to navigation in the other navigable waters of the state or the territory formerly covered thereby.

The department of natural resources is hereby designated as the state agency in all matters pertaining to the care, protection, and enforcement of the state's rights designated in this section.

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.

Effective Date: 03-15-1989

R. C. 1506.11 Development and improvement of lakefront land.

(A) "Territory," as used in this section, means the waters and 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.

(B) Whenever the state, acting through the director of natural resources, upon application of any person who wants to develop or improve part of the territory, and after notice that the director, at the director's discretion, may give as provided in this section, determines that any part of the territory can be developed and improved or the waters thereof used as specified in the application without impairment of the public right of navigation, water commerce, and fishery, a lease of all or any part of the state's interest therein may be entered into with the applicant, or a permit may be issued for that purpose, subject to the powers of the United States government and in accordance with rules adopted by the director in accordance with Chapter 119. of the Revised Code, and without prejudice to the littoral rights of any owner of land fronting on Lake Erie, provided that the legislative authority of the municipal corporation within which any such part of the territory is located, if the municipal corporation is not within the jurisdiction of a port authority, or the county commissioners of the county within which such part of the territory is located, excluding any territory within a municipal corporation or under the jurisdiction of a port authority, or the board of directors of a port authority with respect to such part of the territory included in the jurisdiction of the port authority, has enacted an ordinance or resolution finding and determining that such part of the territory, described by metes and bounds or by an alternate description referenced to the applicant's upland property description that is considered adequate by the director, is not necessary or required for the construction, maintenance, or operation by the municipal corporation, county, or port authority of breakwaters, piers, docks, wharves, bulkheads, connecting ways, water terminal facilities, and improvements and marginal highways in aid of navigation and water commerce and that the land uses specified in the application comply with regulation of permissible land use under a waterfront plan of the local authority.

(C) Upon the filing of the application with the director, the director may hold a public hearing thereon and may cause written notice of the filing to be given to any municipal corporation, county, or port authority, as the case may be, in which such part of the territory is located and also shall cause public notice of the filing to be given by advertisement in a newspaper of general circulation within the locality where such part of the territory is located. If a hearing is to be held, public notice of the filing may be combined with public notice of the hearing and shall be given once a week for four consecutive weeks prior to the date of the initial hearing. All hearings shall be before the director and shall be open to the public, and a record shall be made of the proceeding. Parties thereto are entitled to be heard and to be represented by counsel. The findings and order of the director shall be in writing. All costs of the hearings, including publication costs, shall be paid by the applicant. The director also may hold public meetings on the filing of an application.

If the director finds that a lease may properly be entered into with the applicant or a permit may properly be issued to the applicant, the director shall determine the consideration to be paid by the applicant, which consideration shall exclude the value of the littoral rights of the owner of land fronting on Lake Erie and improvements made or paid for by the owner of land fronting on Lake Erie or that owner's predecessors in title. The lease or permit may be for such periods of time as the director determines. The rentals received under the terms of such a lease or permit shall be paid into the state treasury to the credit of the Lake Erie submerged lands fund, which is hereby created, and shall be distributed from that fund as follows:

(1) Fifty per cent of each rental shall be paid to the department of natural resources for the administration of this section and section 1506.10 of the Revised Code and for the coastal management assistance grant program required to be established under division (C) of section 1506.02 of the Revised Code;

(2) Fifty per cent of each rental shall be paid to the municipal corporation, county, or port authority making the finding provided for in this section.

All leases and permits shall be executed in the manner provided by section 5501.01 of the Revised Code and shall contain, in addition to the provisions required in this section, a reservation to the state of all mineral rights and a provision that the removal of any minerals shall be conducted in such manner as not to damage any improvements placed by the littoral owner, lessee, or permit holder on the lands. No lease or permit of the lands defined in this section shall express or imply any control of fisheries or aquatic wildlife now vested in the division of wildlife of the department.

(D) Upland owners who, prior to October 13, 1955, have erected, developed, or maintained structures, facilities, buildings, or improvements or made use of waters in the part of the territory in front of those uplands shall be granted a lease or permit by the state upon the presentation of a certification by the chief executive of a municipal corporation, resolution of the board of county commissioners, or resolution of the board of directors of the port authority establishing that the structures, facilities, buildings, improvements, or uses do not constitute an unlawful encroachment on navigation and water commerce. The lease or permit shall specifically enumerate the structures, facilities, buildings, improvements, or uses so included.

(E) Persons having secured a lease or permit under this section are entitled to just compensation for the taking, whether for navigation, water commerce, or otherwise, by any governmental authority having the power of eminent domain, of structures, facilities, buildings, improvements, or uses erected or placed upon the territory pursuant to the lease or permit or the littoral rights of the person and for the taking of the leasehold and the littoral rights of the person pursuant to the procedure provided in Chapter 163. of the Revised Code. The compensation shall not include any compensation for the site in the territory except to the extent of any interest in the site theretofore acquired by the person under this section or by prior acts of the general assembly or grants from the United States government. The failure of any person to apply for or obtain a lease or permit under this section does not prejudice any right the person may have to compensation for a taking of littoral rights or of improvements made in accordance with a lease, a permit, or littoral rights.

(F) If any taxes or assessments are levied or assessed upon property that is the subject of a lease or permit under this section, the taxes or assessments are the obligation of the lessee or permit holder.

(G) If a lease or permit secured under this section requires the lessee or permit holder to obtain the approval of the department or any of its divisions for any changes in structures, facilities, or buildings, for any improvements, or for any changes or expansion in uses, no lessee or permit holder shall change any structures, facilities, or buildings, make any improvements, or expand or change any uses unless the director first determines that the proposed action will not adversely affect any current or prospective exercise of the public right of recreation in the territory and in the state's reversionary interest in any territory leased or permitted under this section.

Proposed changes or improvements shall be deemed to "adversely affect" the public right of recreation if the changes or improvements cause or will cause any significant demonstrable negative impact upon any present or prospective recreational use of the territory by the public during the term of the lease or permit or any renewals and of any public recreational use of the leased or permitted premises in which the state has a reversionary interest.

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