

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.)	CASE NO. 2009-1806
ROBERT MERRILL, Trustee, <i>et al.</i> ,)	
)	
Plaintiffs-Appellees,)	On Appeal from the
)	Lake County Court of Appeals
and)	Eleventh Appellate District
)	
HOMER S. TAFT, <i>et al.</i> ,)	Court of Appeals Case Nos.
)	2008-L-007, 2008-L-008
Intervening Plaintiffs-)	Consolidated
Appellees-Cross-Appellants)	
)	
v.)	
)	
STATE OF OHIO, DEPARTMENT OF)	
NATURAL RESOURCES, <i>et al.</i> ,)	
)	
Defendants-Appellants-)	
Cross-Appellees)	
)	
and)	
)	
NATIONAL WILDLIFE FEDERATION, <i>et al.</i> ,)	
)	
Intervening Defendants-)	
Appellants-Cross-Appellees.)	

BRIEF OF AMICI CURIAE WILLOW BEACH CLUB, BROOKWOOD - CRESTHAVEN BEACH CLUB, INC., THE LINWOOD PARK COMPANY AND THE OHIO ASSOCIATION OF REALTORS

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THE INTEREST OF AMICI CURIAE

Brookwood - Cresthaven Beach Club, Inc. was formed in 1949 to own, maintain and control certain private park reserves – i.e., a private beach on the shore of Lake Erie – which are part of the Brookwood Beach Allotment subdivision situated partly in the City of Euclid, Ohio, and partly in the City of Willowick, Ohio and recorded as Park Reserve Parcels Number Four and Five in Volume D of Maps, Page 73 of Lake County Records. Brookwood - Cresthaven Beach Club controls and maintains upon this private beach structures and other conveniences for the recreation, amusement and enjoyment of its members, who consist of all property owners in Brookwood Beach Estates No. 2. A few of these property owners are littoral property owners, meaning that their properties are adjacent to Lake Erie. Most of these property owners are not littoral property owners, but have a right to make use of the association's private beach.

Willo-Beach Park Association, Inc. was formed in 1948 to acquire, maintain and control certain private lands – i.e., a private swimming beach on the shore of Lake Erie – which are part of the Will-O-Beach Improvement Company's subdivision situated in the Village of Willowick, Ohio and recorded as Sublot Parcels Number 131, 132 and 133 in Volume 293, Page 369 of Lake County Records. Willo-Beach Park Association, Inc. control and maintains their lands, include the private swimming beach, for the recreational, social and cultural enjoyment of its members, who consist of property owners in Willo-Beach Park Allotment. A few of these property owners are littoral property owners, meaning that their properties are adjacent to Lake Erie. Other property owners are not littoral property owners, but have a right to make use of the association's private beach.

The Linwood Park Company was founded in 1919 to operate the property known as Linwood Park Summer Gated Cottage Community. The community was originally founded in 1884 as a religious summer camp. The community consists of 147 cottages located in

Vermilion, Ohio. The Linwood Park Company controls and maintains a private beach for the recreation, amusement and enjoyment of cottage owners and their guests. Members of the public can also access the privately maintained beach by paying a ticket fee and by agreeing to abide by the rules and regulations set out by the Linwood Park Company. A few of the cottage owners are littoral property owners, meaning that their properties are adjacent to Lake Erie. Most of these cottage owners are not littoral property owners, but have a right to make use of the private beach.

The Ohio Association of REALTORS is an organization that represents realtors across Ohio. Formed in 1910, the Association now counts as the state's largest professional trade organization, with more than 29,000 members.

Brookwood - Cresthaven Beach Club, Willow Beach Club and The Linwood Park Company share an interest in maintaining private ownership of the shore of Lake Erie and are strongly opposed to the State of Ohio's recent, unprecedented efforts to take their private property and convert it to public use. The Ohio Association of REALTORS is a major champion of private property rights in Ohio, and has a long-standing mission to protect private property rights enjoyed by Ohio property owners now and into the future. Amici support the public trust as a long-standing doctrine associated with *the waters* of Lake Erie and *the lands currently beneath those waters*, which does not and should not include privately owned and maintained beaches. The Eleventh District Court of Appeals' decision recognizes and affirms what has always been Ohio law: the Lake Erie shore in Ohio has always been subject to private ownership, such as that held by Amici. Reversal of this decision, as urged by the Ohio Attorney General, would eviscerate Amici's long-standing real property interest and effect a taking of their property.

ARGUMENT

I. The State's Public Trust Interest in the Waters of Lake Erie and the Lands Presently Beneath Those Waters Should Not Be Extended Landward to Include the Property of Private Beach Clubs and Cottage Communities, as This Would Amount to an Unlawful and Unreasonable Seizure by the State of Private Property Rights and Likely Do Long-Term Damage to Lake Erie.

Private beach clubs and cottage communities are both evidence of and a reason for affirming traditional private ownership of the beach/shore. For many years, private individuals have joined together in these associations so they can obtain exclusive access to a small portion of Ohio's Lake Erie shore. They have deeded property dating at least as far back as the original development of land along the shore. These beach properties typically include all lands between the water's edge and the ordinary high water mark – the shore or beach. They are duly recorded and of legal record in the counties bordering Lake Erie, and county auditors have assessed and collected taxes on these beach properties for many years. Private beach clubs and cottage communities along the Lake Erie shoreline number at least one hundred and are evidence of the common and long-settled understanding of both private landowners and government officials that the beach/shore may be privately owned.

At present, these associations maintain and protect the shores of Lake Erie under their control. Because their members live near Lake Erie, they have the strongest, most personal interest in ensuring that Lake Erie and its shores remain healthy. Indeed, as a group each association acts similarly to a municipality that owns and manages beachfront property for the use of the community. Beach clubs are managed by an elected board of directors and collect a small annual fee from members. Beach clubs use these dues to pay property taxes, assure proper maintenance of club facilities (such as playgrounds), perform lawn care, keep the beach clean, and control erosion as deemed necessary. Most associations, including Amici, have hours of use and rules that govern the appropriate use of and behavior of users of the beach. When necessary,

local law enforcement is called in the case of inappropriate behavior or improper use of the shore.

Appellants want to “nationalize” the shore, place it under the jurisdiction of bureaucrats in Columbus, and thereby eliminate the oversight and protection currently provided by local communities. The environmentalists and sportsmen claim that they represent beneficent interests that would do nothing more than enjoy and improve the shore. Both, however, would likely seek uniform, governmental regulation of beach activities, the former through bans on access and use (nature preserves), the latter through mandated access rights and permitted uses (the right to shoot and fish from any shore).¹ The Attorney General would simply take financial control over the shore, extracting a fee from the former owners in order that they could continue to enjoy the private rights they have exercised through their deeded ownership, or excluding them from enjoying those rights altogether. Although Appellants have varying interests, they all appear to lack any understanding of the societal benefits of private property ownership and actively seek to conceal the risks of public ownership.

Of course, private property ownership affords benefits to those who invest in ownership. Appellants ultimately would destroy the benefits that private owners pay real value to have: the right of exclusive access with safety and assurance against trespassers. As noted above, these benefits are enjoyed by entire communities of homes. The beaches owned by these private

¹ Although both argue that the shore should be subject to the “modern” public trust *right* of recreational use, certain amici claim that bonfires, alcohol and firearms use can be prohibited as “illicit and dangerous” behavior. *Brief of Amici Curiae Joseph Sommer, Frances Buchholzer, Robert Teater, Ohio Bass Federation, and Izaak Walton League of America Ohio Chapter, and Northeast Ohio Watershed Council* at p. 11-12. It’s clear that beach clubs and local law enforcement currently can regulate and/or prohibit such activities. If the beaches are removed from private ownership and placed under the “public trust,” then under what authority will the state and local law enforcement determine that a citizen’s exercise of his or her public trust right to recreate does not include bonfires, drinking alcohol and discharging firearms? There is no doubt that a substantial portion of Ohioans view these activities as purely recreational and not in any way illicit or dangerous. Likewise, beach clubs, cottage communities and the thousands of other owners of private property along Lake Erie ensure that their private beaches are free of litter. If these beaches are taken for public use, it is not realistic to believe that ODNR will hire thousands of litter pickers to clean the beaches regularly.

groups typically are located in front of other private property along the shore, and their deeds provide community access to Lake Erie through ownership of lakeshore lots and/or narrow access strips to the beach. If this Court were to reverse the court of appeals' decision, it would effectively convert private beaches into lands held in trust by the state. Once this transfer of ownership has occurred, the state will be able to lease this land to others under R.C. § 1506.11, thereby severely limiting or completely foreclosing access to the beach by non-littoral cottage owners or beach club members (including members of the amici supporting the state). The practical result is that entire subdivisions of homes will see their home values fall. Justice and fairness demand that the Amici's members be protected from this threat.

If the Court were to accept Appellants' argument and reverse more than two-hundred years of Ohio law protecting private property ownership, it would destroy the ability of like-minded individuals to join together to promote the appropriate use of Lake Erie's shores and also would erase the value that bona fide purchasers have paid for certain property rights. Amici urge the Court to reject Appellants' misguided attempts to seize private beach properties and to affirm the decision of the Eleventh District Court of Appeals.

Respectfully submitted,



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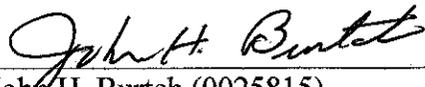
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I certify that a copy of this Brief of Amici Curiae was served by regular U.S. Mail, postage pre-paid, on this 20th day of September, 2010, upon the following counsel of record:

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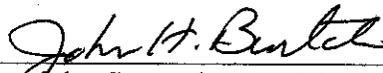
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