

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.)
ROBERT MERRILL, TRUSTEE, *et al.*,)

Plaintiffs-Appellees,)

And)

HOMER S. TAFT, *et al.*,)

Intervening Plaintiffs/
Cross-Appellants,)

vs.)

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

Defendants-Appellants,)

And)

STATE OF OHIO,)

Defendant-Appellant/
Cross-Appellee,)

And)

NATIONAL WILDLIFE FEDERATION, *et al.*,)

Intervening Defendants/
Appellants and Cross-
Appellees.)

CASE NO. 2009-1806

On Appeal from the
Lake County
Court of Appeals,
Eleventh Appellate District

Court of Appeals Case
Nos. 2008-L-007, 2008-L-008
Consolidated

BRIEF OF AMICUS CURIAE GEAUGA CONSTITUTIONAL COUNCIL

RECEIVED
SEP 20 2010
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
SEP 20 2010
CLERK OF COURT
SUPREME COURT OF OHIO

JAMES F. LANG (0059668)
Counsel of Record
FRITZ E. BERCKMUELLER (0081530)
Calfee, Halter & Griswold LLP
1400 KeyBank Center
800 Superior Avenue
Cleveland, OH 44114
216-622-8671
216-241-0816 (fax)
jlang@calfee.com
fberckmueller@calfee.com

Attorneys for Plaintiffs-Appellees

HOMER S. TAFT (0025112)
20220 Center Ridge Road, Suite 300
P.O. Box 16216
Rocky River, Ohio 44116-0216
440-333-1333
440-409-0286 (fax)

Intervening Plaintiff-Appellee and Cross-Appellant, Pro Se

L. SCOT DUNCAN (0075158)
1530 Willow Drive
Sandusky, Ohio 44870
419-627-2945
419-625-2904 (fax)

Intervening Plaintiff-Appellee, Pro Se, and Counsel for Intervening Plaintiff-Appellee, Darla J. Duncan

RICHARD CORDRAY (0038034)
Attorney General of Ohio
BENJAMIN C. MIZER (0083089)
Solicitor General
STEPHEN P. CARNEY (0063460)
Deputy Solicitor
CYNTHIA K. FRAZZINI (0066398)
JOHN P. BARTLEY (0039190)
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 (fax)

Attorneys for Defendants-Appellant and Cross-Appellee State of Ohio

KATHLEEN M. TRAFFORD (0021753)
PORTER WRIGHT MORRIS & ARTHUR
41 S. High St.
Columbus, Ohio 43215
614-227-1915
614-227-2100 (fax)
ktrafford@porterwright.com

Special Counsel for Defendant-Appellants, State of Ohio, Department of Natural Resources, and Sean Logan, Director

NEIL S. KAGAN
National Wildlife Federation
Great Lakes Natural Resource Center
213 West Liberty Street, Suite 200
Ann Arbor, Michigan 48104
734-887-7106
734-887-7199 (fax)

PETER A. PRECARIO (0027080)
326 South High Street Annex, Suite 100
Columbus, Ohio 43215
614-224-7883
614-224-4510 (fax)

Attorneys for Intervening Defendants-Appellants and Cross-Appellees, National Wildlife Federation and Ohio Environmental Council

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. STATEMENT OF AMICUS INTEREST 2

III. STATEMENT OF THE CASE AND FACTS 3

IV. ARGUMENT..... 3

 A. THE PUBLIC TRUST DOCTRINE ONLY APPLIES TO THE
 PUBLIC’S USE OF NAVIGABLE WATERS, NOT TO THE
 PUBLIC’S TRESPASS ON DEEDED PRIVATE PROPERTY. 3

 B. THE FUNDAMENTAL DEEDED REAL PROPERTY
 OWNERSHIP RIGHTS OF LAKEFRONT PROPERTY
 OWNERS ARE CONSTITUTIONALLY PROTECTED AND
 MUST BE RECOGNIZED..... 5

V. CONCLUSION..... 7

TABLE OF AUTHORITIES

Cases

City of Norwood v. Horne, (2006) 110 Ohio St.3d 353, 2006 Ohio 3799, 853
N.E.2d 1115, 2006 Ohio LEXIS 2170..... passim

Other Authorities

Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial
Intervention, *Mich. L. Rev. Vol. 68, No. 3, p 471 (1970)*..... 6

Constitutional Provisions

Ohio Constitution. Article I, Section 1 3

Ohio Constitution, Article I, Section 19 1, 2, 3

U.S. Constitution, Amendment V 3

I. INTRODUCTION

This case is not about the Public Trust Doctrine -- the principle that all citizens have the right to use NAVIGABLE WATERS for commerce, navigation, and fishing. Nowhere is the public's right to use the WATERS of Lake Erie challenged or threatened in this case.

Rather, this case concerns the proposed misuse of the Public Trust Doctrine to take the deeded private property rights of homeowners and property owners along Lake Erie without paying any compensation to those property owners. What appellants are attempting to do in this case is seize deeded private property interests from individuals under the guise that such an unconstitutional taking of land (not water or land presently under water) is in the public's interest. Appellant's argument is a radical and unjustified departure from the universally recognized principle that "[t]he right of private property is an original and fundamental right, existing anterior to the formation of government itself." *City of Norwood v. Horney* (2006), 110 Ohio St.3d 353, 362; 2006-Ohio-3799, 853 N.E.2d 1115, 1128.

As founding father John Adams correctly said:

The moment the idea is admitted into Society that property is not sacred as the laws of God, and there is not a force of law and Public Justice - to protect it, anarchy and tyranny commence. Property must be sacred or liberty cannot exist.

This Supreme Court recognized this "inalienable" nature of private property right in Ohio in *City of Norwood v. Horney, supra*. The citizens of Ohio recognized the importance of private property rights as evidenced by Article I, Section 19 of the Ohio Constitution.

Contrary to the misplaced arguments of Appellants and their amici, the rights of the public to lawfully use Lake Erie are not infringed or threatened by the Eleventh District Court of Appeals decision. The public will still have their public trust right to use the WATERS of Lake Erie when ever that water is located and the public will have unlimited access to Lake Erie's WATERS through use of the numerous state parks (Mentor Headlands, Maumee, Cleveland

area, Gordon, Edgewater) and dozens of local municipal parks along Lake Erie's shores. However, reversal of the Appellate Court's decision will not only infringe upon, but will actually TAKE, deeded "fundamental" private property rights of thousands of homeowners and property owners who paid a premium for their beachfront properties along Lake Erie.

Such reversal would be contrary to Article I, Section 19 of the Ohio Constitution and this Court's nationally recognized, profoundly grounded recognition of the original and fundamental nature of the lakefront property owners' deeded private property rights and interests in *City of Norwood*.

The Geauga Constitutional Council, as an entity formed to promote the protection of Ohioans' constitutional rights, respectfully urges affirmance of the well-reasoned, constitutionally protective decision of the Eleventh District Court of Appeals in this case.

II. STATEMENT OF AMICUS INTEREST

The Geauga Constitutional Council was founded in January, 2008 "to protect our great country by promoting Constitutional rights." As this Court has so correctly recognized: "There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces." *City of Norwood v. Horney*, 110 Ohio St.3d at 363, 853 N.E.2d at 1129. As Article I, Section 1 of the Ohio Constitution states: "All men...have certain inalienable rights, among which are those of...acquiring, possessing, and protecting property."

Amicus Curiae Geauga Constitutional Council, as do all Ohio citizens, have a strong and shared interest in protecting the "fundamental," "inalienable," and "inviolable" right of private property in Ohio. Moreover, Amicus Geauga Constitutional Council, as do all Ohioans, have a strong and shared interest in making sure that the "fundamental," "inalienable" and "inviolable" right of private property ownership is not taken or infringed by ODNR's regulatory fiat or

Appellants' misuse and misapplication of the Public Trust Doctrine. If Appellants and ODNR are permitted to take lakefront property owners' deeded land without compensation for the so-called "public good," when numerous state and local parks and other access points already provide the "public" with ample access to Lake Erie's waters, all Ohioan's private property rights will be placed at risk of future similar uncompensated governmental interpretational takings for the benefit of the public. The action Appellants seek this Court to condone is unconstitutional.

III. STATEMENT OF THE CASE AND FACTS

Amicus Curiae Geauga Constitutional Council accepts the statement of the case and facts submitted by Appellees.

IV. ARGUMENT

A. THE PUBLIC TRUST DOCTRINE ONLY APPLIES TO THE PUBLIC'S USE OF NAVIGABLE WATERS, NOT TO THE PUBLIC'S TRESPASS ON DEEDED PRIVATE PROPERTY.

The fact that some of the amici for Appellants in this case, such as The States of Pennsylvania and Michigan rely on Roman Civil Law or pre-Revolutionary English Law to promote the public trust doctrine should be unsettling. Perhaps attorneys in Pennsylvania and Michigan are not aware of the fact that our nation was formed after the Roman Empire and English Monarchy ruled and that our Founding Fathers were greatly concerned about the Emperor's and King's ability to trod upon private property rights. Indeed, our forefathers fought a Revolution against such tyranny and specifically protected private real property rights from similar English or Roman government takings. See U.S. Const. Amend. V. Moreover, our Ohio forefathers expressly incorporated individual property rights into the Ohio Constitution in terms that reinforced the sacrosanct nature of the individual's "inalienable" property rights. Ohio

Const. Art. I, Section 1. Indeed, those individual constitutionally protected private property rights are to be held forever “inviolable.” Ohio Constitution Article I, Section 19.

In this case, those “inalienable” and “inviolable” private property rights pertain to the dry beach area located within a lakefront homeowner’s deed. This does not contravene the public’s right to use the waters of Lake Erie. The public has the unlimited right to access those waters with access at more than sixty state and local parks and beaches along Lake Erie’s shores. If Appellants’ argument was true that all of the beachfront/shore of Lake Erie was owned by the State of Ohio by application of the Public Trust Doctrine, why did the State of Ohio and numerous municipalities along Lake Erie purchase land and create public beaches and parks for the public’s use? The answer: Since Ohio’s statehood only the waters of Lake Erie are held in public trust. That is still the law today. Indeed, R.C. Section R.C. § 1506.10 is titled “Waters of Lake Erie” and says that waters of Lake Erie and land beneath it are held in trust. That means that only where there is water -- there is a public right to use.

The Eleventh District Court of Appeals correctly recognized this demarcation of public use of the water and private ownership of dry land.

Moreover, since Lake Erie is not a tidal water body, the law governing the coasts does not apply to Lake Erie.

The fact that the State of Michigan Supreme Court incorrectly ruled that the public can walk on private property along Lake Michigan should not mislead this Court. This Court was not misled by the constitutionally misguided *Kelo* “takings” decision when it issued its decision in *Norwood*. Amicus Geauga Constitutional Council is confident that this Court will not be misled by Michigan’s failure to protect the constitutional private property rights of its lakefront property owners. Perhaps private property rights are not inalienable or inviolable in Michigan or

Pennsylvania. Those property rights are ‘inalienable’ and “ are to be held forever ‘inviolable’” in Ohio. *City of Norwood, supra*.

Amicus urges that this Court protect the bundle of venerable rights of lakefront property owners along Lake Erie and respect the public’s right to use Lake Erie’s waters. That is precisely what the appellate court did in this case and the appellate court’s decision should be affirmed.

B. THE FUNDAMENTAL DEEDED REAL PROPERTY OWNERSHIP RIGHTS OF LAKEFRONT PROPERTY OWNERS ARE CONSTITUTIONALLY PROTECTED AND MUST BE RECOGNIZED.

Lakefront property owners possess the recorded deeded ownership of the dry land described in their deeds. These lakefront property owners are assessed taxes on this dry land by agencies of government formed pursuant to state law. This is private land, not public trust waters.

The rights related to property (use, enjoyment control, disposition) “are among the most revered in our law and traditions.” *City of Norwood*, 110 Ohio St.3d at 362, 853 N.E.2d at 1128. As this Court noted in *City of Norwood*: “Indeed, property rights are integral aspects of our theory of democracy and notions of liberty.” *Id.*

As John Adams said:

The moment the idea is admitted into society that property is not sacred as the laws of God, and there is not a force of law and public justice - to protect it, anarchy and tyranny commence. Property must be sacred or liberty cannot exist.

Appellants and their amici in this case place the public’s need for access to Lake Erie above the fundamental constitutional property rights of lakefront property owners. This is wrong and a direct threat to our democracy and liberty.

The public has access to Lake Erie by the use of more than sixty state and local beaches and parks along Lake Erie. The public does not need to walk on private homeowners' deeded land to access Lake Erie.

Appellants' bold effort to abolish the longstanding deeded private property rights of thousands of Ohioans is most troublesome. Indeed, Karl Marx describes in his Communist Manifesto the ten steps necessary to destroy a free enterprise system and replace it with a system of omnipotent government power, so as to effect a communist state. The first plank of Max's Communist Manifesto is -- "Abolition of private property and the application of all rents of land to public purposes."

Appellants effort to take lakefront owners' private property right under the guise of public trust constitutes such an "abolition of private property." Indeed, this movement can be traced back to a law review article by Joseph Sax, then at the University of Michigan, that advocated the use of the Public Trust Doctrine to take private property for environmental purposes without having to pay the affected landowners any compensation. See Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, *Mich. L. Rev. Vol. 68, No. 3, p 471 (1970)*.

Amicus Geauga Constitutional Council urges that this Court not be fooled by, or fall prey to, Appellants' scheme to abolish constitutionally protected private property rights without compensation under the false guise of public access to Lake Erie.

To protect Ohioans' liberty, democracy, and constitutionally protected private property rights, Amicus Geauga Constitutional Council respectfully asks that this Court affirm the well-reasoned and constitutionally sound decision of the Eleventh District Court of Appeals in this case.

V. CONCLUSION

This Court has said:

“There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of the forces.”

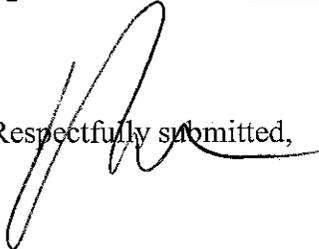
City of Norwood, 110 Ohio St.3d at 363, 853 N.E.2d at 1129.

In this case, the appellate court recognized the “venerable rights” of lakefront property owners along Lake Erie and trodded lightly; recognizing that the weight of the Public Trust - Lake Erie access forces, while considerable, did not outweigh the deeded ownership rights of the lakefront homeowners to their dry land. Of course, (1) the public has ample access to Lake Erie through more than sixty state and local parks and beaches, and (2) the Public Trust Doctrine only applies to the waters (not the shore) of Lake Erie for “commerce, navigation and fishing”.

By affirming the appellate court’s constitutionally correct decision in this case, this Court will extend its constitutionally sound recognition in “City of Norwood” of the “fundamental,” “inalienable,” and “inviolable” nature of private property rights in Ohio, while still recognizing the Public Trust Doctrine as it applies to the WATERS of Lake Erie. That is the correct and constitutional decision.

For these reasons, Amicus Curiae respectfully urges that this Court affirm the decision of the Eleventh District Court of Appeals.

Respectfully submitted,



Michael E. Gilb, Esq. (0029868)
7547 Central Parke Blvd.
P.O. Box 773
Mason, OH 45040
513-204-6703 P
513-770-3301 F

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **Brief of Amicus Curiae Geauga**

Constitutional Council has been sent by regular U.S. Mail upon the following persons this

18th day of September, 2010:

Benjamin C. Mizer, Solicitor General
Stephen P. Carney, Deputy Solicitor
Cynthia K. Frazzini, Assistant Attorney General
John P. Bartley, Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

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

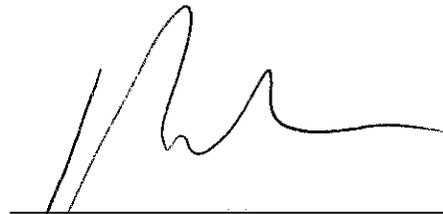
L. Scot Duncan
1530 Willow Drive
Sandusky, Ohio 44870

Neil S. Kagan
National Wildlife Federation
Great Lakes Natural Resource Center
213 West Liberty Street, Suite 200
Ann Arbor, Michigan 48104

Peter A. Precario
326 South High Street
Annex, Suite 100
Columbus, Ohio 43215

Kathleen M. Trafford
Porter Wright Morris & Arthur
41 S. High St.
Columbus, Ohio 43215

James F. Lang
Fritz E. Berckmueller
Calfee, Halter & Griswold LLP
1400 KeyBank Center
800 Superior Avenue
Cleveland, OH 44114



Michael E. Gilb, Esq. (0029868)
Attorney for Amicus Curiae
Geauga Constitutional Council