ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2014-0796

ON APPEAL FROM THE OHIO COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
COURT OF APPEALS CASE NO. 2012-L-113

STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, *et al.*,
DEFENDANTS-APPELLANTS,

v.

STATE OF OHIO EX REL. ROBERT MERRILL, TRUSTEE, *et al.*,
PLAINTIFFS-APPELLEES.

CLASS PLAINTIFFS/APPELLEES MEMORANDUM IN RESPONSE TO APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION

MIKE DEWINE
OHIO ATTORNEY GENERAL

ANNE MARIE SFERRA (0030855)
DANIEL C. GIBSON (0080129)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
(614) 227-2300
(614) 227-2390 (fax)
asferra@bricker.com
dgibson@bricker.com

Counsel for Defendants/Appellants State of Ohio, Ohio Department of Natural Resources, and the Director of Ohio Department of Natural Resources

JAMES F. LANG (0059668)
(Counsel of Record)
FRITZ E. BERCKMUELLER (0081530)
LINDSEY E. SACHER (0087883)
CALFEE, HALTER & GRISWOLD LLP
1405 East Sixth Street
Cleveland, Ohio 44114
(216) 622-8200
(216) 241-0816 (fax)
jlang@calfee.com
fberckmueller@calfee.com
lsacher@calfee.com

Counsel for Class Plaintiffs/Appellees

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TABLE OF CONTENTS

I. NEITHER ODNR'S MISREADING OF THE COURT OF APPEALS' OPINION NOR ITS ATTEMPTED CHALLENGE TO WELL-ESTABLISHED PRINCIPLES OF CIVIL PROCEDURE CREATE MATTERS OF GREAT GENERAL OR PUBLIC INTEREST.

Neither of the propositions raised by ODNR involve matters of public or great general interest, and there is no need for this Court to accept jurisdiction over the instant appeal. This Court's "role as a court of last resort is not to serve as an additional court of appeals on review, but rather to clarify rules of law arising in courts of appeals that are matters of public or great general interest." *State v. Bartrum*, 121 Ohio St.3d 148, 2009-Ohio-355, 902 N.E.2d 961, ¶ 31. (O'Donnell, J., dissenting). ODNR's first proposition asks this Court to reverse not a rule of law, but an extremely fact-bound determination that turned on, among other things, the nearly ten-year litigation history of this case and ODNR's prior stipulation that all class certification elements were satisfied. ODNR's second proposition attempts to manufacture a conflict that doesn't exist (ODNR has not sought to proceed under S.Ct.Prac.R. 8.01 governing certified-conflict cases), and ignores that certification of mandamus actions under Civ.R. 23(B)(2) is standard practice in courts throughout the United States. Review is not warranted here.

Since this action was filed in 2004 on behalf of a class of Lake Erie property owners by the Ohio Lakefront Group and several individual owners of real property abutting Lake Erie (the "Class Representatives"), the key question has been whether ODNR acted unlawfully by claiming public ownership of the private shorelands of Lake Erie up to the Ordinary High Water Mark ("OHWM"), by depriving Lake Erie property owners of their right to exclude others from their private property, and by compelling those property owners to lease their own property from

ODNR.[1] Count I of the First Amended Complaint sought declaratory judgments that ODNR's interest in Lake Erie did not extend beyond Lake Erie's waters up to the OHWM and that any ODNR-mandated lease was invalid to the extent it included privately-owned lands. Contingent on Count I being decided in favor of all Lake Erie property owners, Count II requests a writ of mandamus in favor of the exact same class of property owners to compel ODNR to commence appropriation proceedings to determine the amount of compensation due to each class member for ODNR's temporary taking of their private property. Thus, any class certified for purposes of Count II is necessarily identical to and follows directly from the class certified for purposes of Count I, and a class that all parties agree meets the certification standards for Count I will necessarily meet the certification standards for Count II.

In 2006, after extensive class discovery, the Class Representatives and ODNR stipulated that the proposed class satisfied all Civil Rule 23 requirements, including numerosity, commonality, typicality and adequacy of representation. The trial court made findings of fact based on the joint stipulation and certified a class of owners of real property abutting Lake Erie (the "Class Plaintiffs") under Civil Rule 23(B)(2) for purposes of hearing Count I. The court postponed certification of a class for purposes of Count II pending resolution of Count I given that a decision in favor of ODNR on Count I would render Count II a nullity. After additional discovery on the merits and the filing of competing motions for summary judgment, the trial court awarded summary judgment in favor of the Class Plaintiffs on Count I and rejected ODNR's claim of public ownership to the OHWM. This Court eventually agreed that ODNR acted contrary to long-established Ohio law with regard to all Class Plaintiffs by claiming public

[1] This is not the first time ODNR has taken private property without justification and without compensating the private property owners. *See, e.g., State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235; *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St.3d 1, 2002-Ohio-6716, 780 N.E.2d 998.

ownership of all shorelands to the OHWM. *State ex rel. Merrill v. Ohio Dep't of Natural Resources*, 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935.

On remand, the trial court certified, for purposes of the mandamus claim, the same class that had previously been certified for Count I. In doing so, the trial court recognized that the claim asserted in Count II is dependent upon and derivative of Count I, and that both claims turn on the same, single issue: ODNR's unlawful claim of ownership to privately-owned lakefront property. The Eleventh District Court of Appeals agreed with this analysis, and affirmed the class certification as to Count II. The court of appeals' decision breaks no new ground and does not present any issues of great importance requiring review by this Court.

A. Whether a Rigorous Analysis is Required for Each Claim for Which Class Certification is Requested is Not a Matter of Great General or Public Interest.

The first proposition raised by ODNR in its appeal to this Court – that a rigorous analysis is required for each claim for which class certification is requested – does not present a matter of great general or public interest under the circumstances of this case. It is in fact well-established under Ohio law that such rigorous analysis is required for each claim. *See, e.g., Hamilton v. Ohio Savings Bank,* 82 Ohio St.3d 67, 694 N.E.2d 442 (1998). The appellate court below fully recognized that the trial court was required to conduct a rigorous analysis of the seven requisite factors for class certification. *State ex rel. Merrill v. State*, 11th Dist. No. 2012-L-113, 2014-Ohio-1343, ¶ 13. The question before the appellate court was whether the seven factors were satisfied given the unique circumstances of this case. The court of appeals' decision to affirm the certification order is necessarily limited to the peculiar facts before it and presents no question of great general or public interest.

In its attempt to manufacture a matter of great general or public interest, ODNR misrepresents the substance of the court of appeals' decision. Specifically, ODNR erroneously

states that the court of appeals upheld the trial court's certification of a class on the mandamus claim based solely on its prior certification of the same class for purposes of the declaratory judgment claim, and without finding that the trial court engaged in the requisite rigorous analysis. ODNR accordingly contends that the court of appeals' approval of the class certification amounts to a finding that no rigorous analysis is required where the class to be certified on one claim was previously certified for purposes of a different claim.

However, the court of appeals did not hold that anything less than a rigorous analysis is required for all claims for which certification is sought. Instead, it found that the trial court satisfied its obligation to engage in a rigorous analysis with respect to the mandamus claim, and fully explained the bases upon which it reached that conclusion. *See id.* at ¶¶ 14-16. The court of appeals' decision therefore in no way conflicts with this Court's holding in *Hamilton*, nor does it create an "exception" to the requirement of a rigorous analysis as ODNR contends. ODNR's interpretation of the court of appeals' decision is simply wrong and ignores the facts of this case.

The specific issue raised by ODNR is also relevant only in unique cases such as this, where (1) after extensive class discovery, a trial court has certified a class for purposes of a single declaratory judgment claim while reserving certification on other claims until a later time; (2) the class plaintiffs have prevailed on the merits of the declaratory judgment claim after conducting fact discovery and after all parties filed competing motions for summary judgment; and (3) a series of appeals has resulted in a remand to the trial court for further proceedings on a claim that is directly related to and dependent upon the initial declaratory judgment claim.

This unique procedural posture is not at all typical of class action litigation, as most courts addressing class actions do not certify a class for purposes of less than all claims asserted by the parties (and typically have no reason to do so). This fact alone severely limits the

universe of cases in which the circumstances giving rise to the instant appeal would occur; ODNR's sweeping statement that its first proposition will affect "all current and putative class action litigants" is accordingly untrue, as only a small subset of would-be class action litigants, if any, will have occasion to even consider this issue.

B. Certification of a Class for Purposes of a Mandamus Claim Under Ohio Civ. R. 23(B)(2) is Not a Matter of Great General or Public Interest.

It is well-established under Ohio law that a landowner's remedy for a purported taking is an action in mandamus to compel the commencement of appropriations proceedings. *State ex rel. Gilmour Realty, Inc. v. City of Mayfield Heights*, 119 Ohio St.3d 11, 2008-Ohio-3181, 891 N.E.2d 320, ¶ 14. The only question raised by ODNR is whether that particular remedy – a writ compelling the commencement of appropriations proceedings – can be sought in the context of a class action under Civ. R. 23(B)(2). This is not a question requiring this Court's review.

1. Classes are Regularly Certified for Actions in Mandamus or Seeking Mandatory Injunctive Relief.

As discussed below in rebutting the merits of ODNR's second proposition of law, the overwhelming weight of authority affirms that a mandamus action can be certified under Civ. R. 23(B)(2). It is well-established that a writ of mandamus is the equivalent of a mandatory injunction issued to a private individual. *See, e.g., Snelling & Snelling, Inc. v. ARICO, Inc.*, 83 Ohio App.3d 89, 95, 613 N.E.2d 1107 (10th Dist. 1993). Thus, courts around the country have certified classes for purposes of mandamus actions under Civil Rule 23(b)(2). *See, e.g., Linquist v. Bowen*, 633 F. Supp. 846, 860 (W.D. Mo. 1986), *aff'd*, 813 F.2d 884 (8th Cir. 1987).[2] This issue is not novel, and Ohio courts do not require any further clarification from this Court.

[2] *See Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59, ¶ 17 n. 4 ("federal authority is an appropriate aid to interpretation of [Ohio Civil Rule 23(B)(2)].").

ODNR incorrectly claims that the court of appeals' decision creates a split between the Eleventh and Tenth Districts as to whether an action in mandamus may in fact be certified as a class action under Rule 23(B)(2). There is, however, no such split in authority. The Tenth District did not hold in either of the two decisions cited by ODNR that Civil Rule 23(B)(2) can never be used to certify a mandamus action. Rather, the court held *State ex rel. Dorris v. Wilkins*, 10th Dist. No. 80AP-876, 1981 Ohio App. LEXIS 12915 that it lacked original jurisdiction over the matter because the petitioner's mandamus claim sought injunctive and declaratory, rather than mandamus, relief. In *State ex rel. Ash v. Aggrey*, 10th Dist. No. 77AP-61, 1977 Ohio App. LEXIS 7576, the court held that because the relief requested by the purported class representatives – a writ ordering the Director of Public Welfare to establish mandatory minimum allowances under Revised Code Chapter 5113 – would naturally benefit all qualified recipients, certification of a class of all qualified beneficiaries was unnecessary. The court commented in each case that Civil Rule 23(B)(2) might be inappropriate for certifying a mandamus action on a class-wide basis, but those comments are *dicta* and conflict with the great weight of legal authority.

2. No Undue Burden Will be Imposed on Taxpayers or Ohio Courts.

In a further attempt to manufacture a matter of great general or public interest, ODNR contends that the trial court's certification of a class on the mandamus claim will impose "significant" costs and burdens on taxpayers and on Ohio's courts if the relief requested by the Class Plaintiffs through that claim – commencement of appropriations proceedings – is granted on a class-wide basis. This is incorrect for several reasons. First, the mandamus action itself will not impose any additional cost or burden on taxpayers or Ohio courts – any costs or burdens that may be imposed will result from the appropriation proceedings ODNR will be ordered to commence if the Class Plaintiffs prevail on their mandamus claim. Second, there is no certainty

that the commencement of such proceedings will require any litigation at all. ODNR must, prior to filing a petition for appropriation, obtain a survey of real property to be appropriated and provide the owner "with a written good faith offer to purchase the property." R.C. § 163.04. To the extent there are in fact "thousands of property owners . . . who have no belief that they have suffered a taking," as ODNR contends, those owners can simply accept the State's offer. Similarly, property owners who are willing to forgo compensation altogether may do so.

In addition, ODNR's suggestion that taxpayer funds and judicial resources would be conserved if the thousands of Class Plaintiffs were to file individual mandamus actions runs counter to logic. Forcing the Class Plaintiffs to maintain individual actions would mean that thousands of individual mandamus actions would be necessary to determine whether the commencement of each individual appropriations proceeding is proper. Logically, one mandamus action that resolves this issue on a class-wide basis would be more efficient than the thousands of separate lawsuits that could otherwise result. Perhaps ODNR's fear mongering results from ODNR's aggressive approach to inverse appropriation actions, as evidenced by the on-going saga of the Grand Lake St. Marys litigation, with ODNR anticipating that it will litigate against every property owner. But such a result would be by ODNR's choice and would not result necessarily from the resolution of the Class Plaintiffs' inverse condemnation claim on a class-wide basis.

3. The Court of Appeals' Decision Does Not Conflict with *Cullen*.

Finally, ODNR argues that the court of appeals' class certification "casts doubt" on this Court's holding that an action for monetary relief may not be certified pursuant to Civ. R. 23(B)(2). *See Cullen v. State Farm Mutual Auto. Ins. Co.,* 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614. However, ODNR appears to be confused that the mandamus action is an action for damages. It is not. As discussed below in response to ODNR's second proposition, the

mandamus relief requested is equitable in nature, as the Class Plaintiffs seek only an order directing ODNR to commence appropriation proceedings for the taking by ODNR's actions of each Class Plaintiff's property so that Class Plaintiffs, in separate proceedings, may be properly compensated as mandated by the Ohio Constitution. No monetary damages will be awarded to the Class Plaintiffs in the course of the mandamus action. There is accordingly no conflict with *Cullen*.

II. ODNR'S FIRST PROPOSITION IS BASED ON A FALSE READING OF THE COURT OF APPEALS' DECISION; THERE IS NO QUESTION THAT A RIGOROUS ANALYSIS IS REQUIRED FOR ALL CLAIMS, AND THE COURT OF APPEALS FOUND THAT REQUIREMENT TO BE SATISFIED.

While Appellees do not dispute that a rigorous analysis is required for all claims for which class certification is required, ODNR's first proposition is based on its incorrect assumption that the court of appeals ignored the requirement that a rigorous analysis be conducted when it evaluated the trial court's certification of a class for the mandamus claim. Yet the court of appeals did in fact consider the scope of the trial court's analysis in certifying a class for purposes of Count II, and properly found that the trial court had satisfied the rigorous analysis requirement with respect to the mandamus claim. *See* Opinion, pp. 6-7. ODNR's first proposition accordingly raises a non-issue – a rigorous analysis is required, and was conducted.

ODNR nevertheless goes to some length to argue that the commonality and typicality requirements of Rule 23(A) were not satisfied at the trial court level with respect to the mandamus claim, and that the lower courts would have discovered this had a rigorous analysis been conducted. This argument is irrelevant, as ODNR's first proposition is limited to the legal question of whether a rigorous analysis is required for all claims to be certified, which it is. ODNR has not asserted, as one of its propositions of law, that the trial court erred in finding that a class could be certified for purposes of the mandamus claim. ODNR also cannot demonstrate

that the requisite elements for class certification were not met, or that the trial court abused its discretion in finding, as a factual matter, that they were. *See Hamilton v. Ohio Sav. Bank*, 82 Ohio St. 3d 67, 70, 1998-Ohio-365, 694 N.E.2d 442 (a trial court's certification of a class will not be disturbed absent an abuse of discretion).

A. The Class Plaintiffs' Claims Are Sufficiently Similar to Satisfy the Commonality Requirement.

ODNR's admission that the commonality requirement for class certification was satisfied with respect to Count I is strong evidence that it was also satisfied for Count II, as the mandamus claim is derivative of and wholly dependent upon the declaratory judgment claim.[3] Further, there are in fact elements common to each of the Class Plaintiffs' mandamus claims – namely, ODNR's interference with each Plaintiff's rights to exclude others from their property. *See Eastwood Mall, Inc. v. Slanco*, 68 Ohio St.3d 221, 223, 1994-Ohio-433, 626 N.E.2d 59 (the right to exclude others from one's property is an essential property right). As the trial court determined in a December 11, 2007 Order, "littoral property owners have the right to exclude others from using the shore down to the water's edge." ODNR willfully violated that right with regard to all Class Plaintiffs.

The single case relied on by ODNR for the proposition that commonality does not exist because determination of whether a taking has occurred involves a "highly individualized fact inquiry" did not involve a class action, and is cited completely out of context. *See Kermetz v. Cook-Johnson Realty Corp.*, 54 Ohio App. 2d 220 (10th Dist. 1977). The court in that case merely referenced the fact-intensive nature of a takings inquiry for the purpose of explaining that

[3] Through Count I, the Class Plaintiffs successfully sought a declaration that ODNR's assertion of title to the Class Plaintiffs' property was unlawful. Count II seeks an order directing ODNR to commence the corresponding remedy – an appropriation action – for each wronged property owner.

its decision was consistent with previously-decided cases, given that those cases were factually distinguishable. *Id.* at 228. While the physical character of properties may vary, ODNR's taking to OHWM applied universally to all Class Plaintiffs. Class treatment is appropriate because all property owners have in common the question of whether ODNR's actions caused a taking to OHWM to occur.

While ODNR points out that some Class Plaintiffs have submerged land leases while others do not, this point also does not defeat the validity of the class certification on grounds of commonality. Should the trial court find it necessary, for purposes of deciding the merits of the mandamus claim on remand, to divide the Class Plaintiffs into subclasses consisting of (1) those Class Plaintiffs with submerged land leases, and (2) those Class Plaintiffs without leases for purposes of determining whether a taking occurred, it could certainly do so. *See Estate of Reed v. Hadley*, 163 Ohio App. 3d 464, 476-477, 2005-Ohio-5016, ¶32, 839 N.E.2d 55 (4th Dist.) (noting that "subclasses may be redefined by the trial court as a class action proceeds . . . the court could redefine the subclasses according to the contract each sub-class signed."); *OHA: the Ass'n for Hosps. & Health Sys. v. Dep't of Human Servs.*, No. 99-01233, 2004-Ohio-3810, ¶16, 2004 Ohio Misc. LEXIS 380, *10-11 (Ct. Cl., June 25, 2004) (observing that "at some point in the future it may be necessary to amend the class to sever these two parties into individual sub-classes; however, that question can be addressed at a later date.").

B. The Class Representatives' Claims are "Typical" of the Other Class Plaintiffs' Claims.

With respect to the typicality requirement, ODNR admits that typicality is satisfied "where there is no express conflict between the representatives and the class." *Warner v. Waste Management, Inc.*, 36 Ohio St.3d 91, 98, 521 N.E.2d 1091 (1988). Yet ODNR again fails to explain how this requirement was not fulfilled here. The fact that the Class Representatives do

not have submerged land leases does not create a conflict between their interests and those of the other class members, and ODNR has not argued that it does.

ODNR also ignores the fact that, prior to the trial court's certification of a class with respect to Count I, the Class Representatives filed a motion seeking to join over 100 individual property owners (many of whom in fact had submerged land leases) as named plaintiffs in the event that a class was not certified with respect to either Count I or Count II. That motion was never ruled on; therefore, even if the trial court's certification of a class for the mandamus claim were reversed on grounds of typicality, the trial court would have before it a motion that, if granted, would effectively remedy any purported issue with respect to typicality. ODNR's argument regarding typicality is accordingly futile and unavailing.

C. The Class Representatives Adequately Represent the Interests of the Class.

Finally, although ODNR references the "adequacy" requirement of class certification, it does not argue that the Class Representatives are unable to adequately represent the interests of the other class members, and also fails to explain how the interests of any of the Class Representatives are "antagonistic" to those of other class members. *See Warner v. Waste Management, Inc.*, 36 Ohio St.3d 91, 98, 521 N.E.2d 1091 (1988). Indeed, ODNR expressly stipulated in 2006 that the Class Representatives could adequately represent all Class Plaintiffs who had been forced to enter into leases with ODNR for purposes of the declaratory judgment claim, which ODNR obviously was aware involved disputes over submerged land leases. Given the stipulation, ODNR cannot reverse course and argue that the Class Representatives are incapable of representing those same Class Plaintiffs with respect to Count II, as the Class Plaintiffs' ability to even assert such a claim is directly derived from the Class Plaintiffs' success on Count I.

III. ODNR'S SECOND PROPOSITION DISREGARDS WELL-ESTABLISHED PRINCIPLES OF OHIO LAW; CERTIFICATION OF A CLAIM FOR WRIT OF MANDAMUS PURSUANT TO RULE 23(B)(2) IS PROPER.

As a preliminary matter, ODNR's failure to object at the trial court level to the certification of a class under Rule 23(B)(2) for purposes of the mandamus claim should preclude ODNR from raising any argument that certification was improper on appeal. *See State v. Williams*, 51 Ohio St. 2d 112, 364 N.E.2d 1364, para. one of the syllabus (1977) (appellate court need not consider error which a party could have called to trial court's attention but did not)).

Further, despite ODNR's assertion that certification of a class seeking mandamus relief under Rule 23(B)(2) is improper, ODNR supports this proposition only with *dicta* from two unreported decisions – *State ex rel. Ash v. Aggrey*, 10th Dist. No. 77AP-61, 1977 Ohio App. LEXIS 7576 and *State ex rel. Dorris v. Wilkins*, 10th Dist. No. 80AP-876, 1981 Ohio App. LEXIS 12915. As discussed above, the holdings of *Wilkins* and *Aggrey* do not support ODNR, and ODNR's misguided interpretation of these decisions runs counter to a basic premise of Ohio law – that a mandamus action is the functional equivalent of a claim for injunctive relief directed toward a public official. *See State ex rel. Walters v. City of Bellevue*, 113 Ohio App. 455, 458, 178 N.E.2d 600 (6th Dist. 1961) ("a mandatory injunction is in its nature a mandamus when directed to particular officers.").

ODNR's argument also runs counter to the language of Civil Rule 23(B)(2) itself, which specifies that a class may be certified under that section where a defendant has "acted ***or refused to act*** on grounds generally applicable to a class" (emphasis added). The proper remedy for a refusal to act by a public official is an action in mandamus. *See State ex rel. Burton v. Smith,* 118 Ohio App. 248, 250, 194 N.E.2d 70 (4th Dist. 1962) (the purpose of a writ of mandamus is to compel action). As Rule 23(B)(2) contains no exception for claims brought against public officials, the rule is by its very language applicable to mandamus actions.

A. Courts Around the Country Agree that Certification of a Class Under Civ. R. 23(b)(2) for Purposes of a Mandamus Claim is Proper.

Ample authority from federal courts instructs that a mandamus action to compel governmental action is appropriate for class certification. Federal courts applying Rule 23 of the Federal Rules of Civil Procedure have repeatedly certified mandamus actions and mandatory injunction claims seeking to compel action under section (b)(2) of that rule. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (U.S. 1979) (affirming nationwide class certified under Rule 23(b)(2) for purposes of § 1361 mandamus action); *M.A. v. Newark Public Schools*, No. 01-3389, 2009 WL 4799291, *12 (certifying a class for purposes of claim seeking to compel action by school officials under Rule 23(b)(2)); *Santillan v. Ashcroft*, No. C-04-2686, 2004 WL 2297990, *12 (N.D. Cal. 2004) (certifying action to compel issuance of lawful permanent residents' adjusted legal status as class action under Rule 23(b)(2)); *Lifestar Ambulance Service, Inc. v. U.S.*, 211 F.R.D. 688, 690 (M.D. Ga. 2003), *rev'd on other grounds*, 365 F.3d 1293 (11th Cir. 2004) (certifying mandamus action as class action under Rule 23(b)(2)); *Linquist v. Bowen*, 633 F. Supp. 846, 860 (W.D. Mo. 1986), *aff'd*, 813 F.2d 884 (8th Cir. 1987) (certifying mandamus claim for payment of social security benefits under Rule 23(b)(2) and observing that "Rule 23(b)(2) has been used as a basis for class certification in other cases challenging the policies of procedures of governmental agencies"); *Gregory v. Hershey*, 51 F.R.D. 188, 189 (E.D. Mich. 1970) (certifying action and issuing writ of mandamus to compel issuance of fatherhood deferments to selective service registrants as class action under Rule 23(b)(2)). *See also Amen v. Dearborn*, 532 F.2d 554, 556 (6th Cir. 1976) (noting that the trial court certified a class made up of six subclasses for purposes of a reverse condemnation action).

ODNR's position regarding certification of a class in a mandamus action is untenable in light of the wealth of authority.

B. The Class Plaintiffs Are Not Seeking Monetary Damages; Certification is Appropriate under Civ. R. 23(B)(2).

Finally, ODNR's attempt to frame the mandamus claim as an action seeking monetary damages is again unavailing. Contrary to ODNR's suggestion that the only relief sought through the mandamus claim is monetary compensation, it is undisputed that monetary relief cannot and will not be awarded as a direct result of the trial court's determination on the mandamus claim. At most, a favorable ruling on the mandamus claim will result in a series of appropriations proceedings to be commenced by ODNR; such proceedings, which would then take place entirely outside the context of the instant action, may or may not result in an award of compensation. The likely result of a favorable ruling on the mandamus claim is that ODNR will be compelled to fulfill its statutory obligation under R.C. § 163.04 to pay fair market rental value to thousands of property owners for ODNR's taking of their property in the 2000s. Such payments will not be awarded in the mandamus action, but in the appropriations proceedings the Class Plaintiffs seek to compel through the mandamus action. Further, any payments received by the Class Plaintiffs in those proceedings will be in the form of compensation for ODNR's taking of property, as opposed to money damages. Whether or not property owners receive such compensation as a collateral result of the mandamus claim is irrelevant to the class certification question, as the relief requested through the mandamus action is purely equitable in nature.

IV. CONCLUSION

ODNR has not raised an issue of public or great general interest, and its propositions of law do not warrant or require review by this Court. For the foregoing reasons, Class Plaintiffs/Appellees respectfully request that this Court decline to exercise jurisdiction.

Respectfully submitted,

JAMES F. LANG (0059668)
(Counsel of Record)
FRITZ E. BERCKMUELLER (0081530)
LINDSEY E. SACHER (0087883)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114
(216) 622-8200
(216) 241-0816 (fax)
jlang@calfee.com
fberckmueller@calfee.com
lsacher@calfee.com

Counsel for Class Plaintiffs/Appellees

CERTIFICATE OF SERVICE

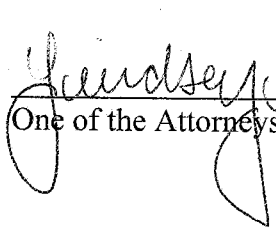
A copy of the foregoing was served, via e-mail and regular U.S. Mail, upon the following, this 13th day of June 2014:

Anne Marie Sferra
Daniel C. Gibson
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
(614) 227-2300
(614) 227-2390 (fax)
asferra@bricker.com
dgibson@bricker.com

Counsel for Defendants/Appellants State of Ohio, Ohio Department of Natural Resources, and the Director of Ohio Department of Natural Resources

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

L. Scot Duncan
1530 Willow Drive
Sandusky, Ohio 44870
scotduncan@alum.mit.edu



One of the Attorneys for Class Plaintiffs/Appellees