

DAVID A. ZEBER)
2424 Edgewater Dr.)
Vermilion, Ohio 44089)

and)

CHARLES E. HERDENDORF)
585 West Shore Blvd.)
Put-in-Bay, Ohio 43456)

and)

JAMES O'CONNOR)
4269 Lake Rd.)
Sheffield Lake, Ohio 44054)

and)

JOHN HERRINGTON)
5055 Providence Dr. #310)
Sandusky, Ohio 44870)

and)

LEMARR L & PATRICIA J FRENCH)
30333 Lake Shore Blvd.)
Willowick, Ohio 44095)

and)

NEAL OSCAR LUOMA)
5605 Lake Road)
West Ashtabula, Ohio 44004)

and)

TIMOTHY AND KIMBERLY)
ROSENBERG)
33066 Lake Road)
Avon Lake, Ohio 44012)

vs.)

STATE OF OHIO, DEPARTMENT OF)
 NATURAL RESOURCES)
 c/o Sam Speck, Director)
 1930 Belcher Dr. Bldg. D3)
 Columbus, Ohio 43224)
)
 and)
)
 SAM SPECK, DIRECTOR)
 Ohio Department of Natural Resources)
 1930 Belcher Dr. Bldg. D3)
 Columbus, Ohio 43224)
)
 and)
)
 STATE OF OHIO)
 c/o Robert Taft, Governor)
 77 South High Street, 30th Floor)
 Columbus, Ohio 43215-6117)
)
 ALSO SERVE:)
 JIM PETRO)
 ATTORNEY GENERAL)
 30 East Broad Street)
 Columbus, Ohio 43215-3428)

PARTIES

1. This action arises from the actions and threats to act of the Ohio Department of Natural Resources (“ODNR”), purporting to act on behalf of the State of Ohio, by which the ODNR has unconstitutionally and unlawfully asserted ownership and possession of the private property of Ohio citizens abutting Lake Erie. Among other things, the ODNR has arbitrarily and abusively forced, and continues to threaten to force, private land owners to lease from ODNR portions of the land owners’ own private property. ONDR has intentionally and willfully misrepresented to property owners and to the public that the state of Ohio owns their property, and ODNR has persisted in this campaign of falsehoods despite knowing that it is in conflict with all Ohio law and with published opinions of the Attorney General of Ohio. This action seeks to affirm the private property rights of Ohio citizens and to terminate ODNR’s confiscation and

attempted confiscation of private property in violation of Ohio law and the constitutions of Ohio and the United States.

2. Relator/Plaintiff Ohio Lakefront Group, Inc. (“OLG”) is a duly formed non-profit corporation, which represents, and most of whose members are, owners of real property abutting Lake Erie. Several of OLG’s members reside in Lake County and own property in Lake County that is the subject of this action. A copy of OLG’s purposes is attached as Exhibit A hereto and made a part hereof.

3. Robert Merrill and all other named individual plaintiffs are owners of record of real property abutting Lake Erie. Mr. Merrill’s property is located in Lake County, and the property of the other individual plaintiffs is located in Lake, Ashtabula, Cuyahoga, Lorain, Ottawa, Erie, Sandusky or Lucas Counties as reflected in the caption.

4. The named relators/plaintiffs and the putative class are collectively identified as “Plaintiffs.”

5. Respondents/Defendants are the ODNR, its Director, Sam Speck, and the State of Ohio (collectively “ODNR”).

BACKGROUND

6. The first section of the first article of the Bill of Rights of the Ohio Constitution proclaims the inalienable right of people in this state to acquire, possess, and protect property. The Ohio Constitution further prohibits the state from taking private property for a public use without first paying compensation to the property owner. The United States Constitution contains equivalent provisions.

7. Legal title to many parcels of real property abutting Lake Erie have been held in private ownership since before Ohio was admitted into the Union as a state in 1803. Since that time, Ohio law has recognized and protected the inalienable property rights of those holding legal title to these parcels, known as “upland” or “littoral” owners.

8. For over 200 years, Ohio law has recognized the property rights of littoral owners, both with regard to the ownership in fee simple of the upland property as defined by the owner’s deed or original patent and also as to the rights — know as littoral rights — these property owners have to access and use the adjoining waters of Lake Erie. Ohio law also has long recognized that the lakeward property line of a littoral owner whose ownership extends to the shore of Lake Erie is a “moveable freehold” in that it can move

either lakeward or landward by virtue of accretion, erosion, or reliction. The property owned by littoral owners abuts the submerged lands of Lake Erie, title to which, together with the waters of Lake Erie and their contents, is held in trust for the benefit of the people of Ohio for the public uses of navigation, water commerce and fishery.

9. This concept of trust ownership by the state of the waters of Lake Erie and the soil beneath currently is codified in Section 1506.10 of the Ohio Revised Code and is expressly made subject to the property rights of littoral owners. That section also designates ODNR “as the state agency in all matters pertaining to the care, protection, and enforcement of the state’s rights designated in this section.”

10. Under cover of its “coastal management program,” ODNR has abused its authority by willfully ignoring the boundary between private and public ownership fixed by Ohio law.

11. ODNR recently has asserted and continues to assert and maintain that the state of Ohio owns all land lakeward of “ordinary high water mark” or “OHW,” which for administrative convenience the ODNR currently defines as wherever the U.S. Army Corps of Engineers defines Ordinary High Water for purposes of federal law (currently, a fixed line running at 573.4 feet above International Great Lakes Datum (1985)). Thus, contrary to established Ohio law, ODNR has sought and continues to seek to exercise all property rights of fee ownership as to all property lakeward of OHW, regardless of whether that property is submerged and regardless of whether that property is privately owned.

12. As a result, ODNR has forced some littoral owners wishing to use their private property located below OHW to lease this land — which is owned in fee by the littoral owners — from the state. Littoral owners are required to pay real estate taxes based upon the whole of their privately owned fee, even the portion which ODNR has confiscated for its own purposes and “leased back” to the littoral owner. Except pursuant to a lease, the issuance and terms of which are wholly within the power of ODNR, ODNR maintains that no littoral owner may make use of its own property, or exclude others from its property, as long as that property lies below OHW.

13. ODNR's actions have thrown doubt upon the littoral owners' title to their properties and has prevented some of them from obtaining title insurance for their private property located below OHW but landward of the state's actual fee ownership.

CLASS ALLEGATIONS

14. Plaintiffs bring this action as a class action on behalf of themselves and all other members of a Class defined as the approximately 15,500 private littoral owners of parcels of real property abutting Lake Erie within the State of Ohio.

15. The members of the Class are so numerous that the joinder of all individual members is impracticable.

16. The questions of law and fact as to the legal boundary between private property and public trust ownership of the submerged soils of Lake Erie are common to the Plaintiffs constituting the Class in this case.

17. The claims of the Plaintiffs are typical of the claims of the Class, and ODNR's defenses are typical of the defenses pertinent to all of the members of the Class.

18. Plaintiffs will fairly and adequately protect the interests of the Class.

19. The prosecution of separate actions by individual members of the Class would create the risk of adjudications with respect to individual members of the Class which would as a practical matter be dispositive of the interests of the other members not named parties to the adjudication or substantially impair or impede their ability to protect their interests.

20. ODNR has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate declaratory relief and associated injunctive relief with respect to the Class as a whole.

21. Adjudication of this case as a class action will facilitate judicial economy, and will address issues of concern involving multiple jurisdictions, thereby reducing the state's costs in defending the unlawful and improper actions of ODNR described above.

COUNT I **Declaratory Judgment**

22. The facts alleged in paragraphs 1 through 21 of this Complaint are realleged and incorporated herein by reference.

23. An actual controversy exists over the respective rights of Plaintiffs and the state of Ohio as trustee of Lake Erie and its submerged lands.

24. In particular, ODNR contends, and Plaintiffs dispute, that the state of Ohio holds title to all lands located below the administratively arbitrary line of OHW.

25. Plaintiffs contend, and ODNR disputes, that Plaintiffs' private property rights and title are defined by Ohio law, their deeds, and original patents if any.

26. Plaintiffs further contend, and ODNR disputes, that ODNR is unlawfully and unconstitutionally asserting and exercising ownership rights over real property that is not part of the public trust lands.

27. Plaintiffs further contend, and ODNR disputes, that ODNR's policy is directly contrary to Ohio law, including O.R.C. § 1506.10 and 1506.11.

28. ODNR contends, and Plaintiffs dispute, that Plaintiffs are prohibited from using any land located below OHW, regardless of fee ownership of that land, unless and until Plaintiffs agree to pay ODNR to lease that land from ODNR.

29. Each of ODNR's contentions is erroneous and contrary to Ohio law.

30. Each of Plaintiffs' contentions are valid and correct under Ohio law.

31. An actual and justiciable controversy exists as to the invalidity or validity of each of the contentions above, which controversy directly affects OLG, on behalf of and as representative of its members, and the other Plaintiffs, including, without limitation, the ownership, use and enjoyment of their privately owned real property, as protected by Article I, Section 19 of the Ohio Constitution and the Fifth Amendment to the U. S. Constitution.

32. Pursuant to Ohio Revised Code Chapter 2721, Plaintiffs are entitled to an order of this Court declaring that:

a. Plaintiffs own fee title to the lands located between OHW and the actual legal boundary of their properties, as defined by Ohio law (including the rules of accretion, erosion and reliction), their deeds, and their original patent if any;

b. The interest of the state as trustee over the public trust applies to the waters of Lake Erie and does not apply to or include non-submerged lands;

c. ODNR lacks authority to compel Plaintiffs, or any one of them, to lease back property already owned by them;

d. Any current submerged land lease between ODNR and any of Plaintiffs is declared void and invalid as to any land below OHW but owned by Plaintiffs, but shall remain in full force and effect as to any remaining lands.

33. Pursuant to R.C. § 2721.09, Plaintiffs request that the Court grant further relief, including injunctive relief, as necessary to carry out its declaratory judgment.

COUNT II

Mandamus/Inverse Takings Compensation

34. The facts in paragraph 1 through 33 of this Complaint are realleged and incorporated herein by reference.

35. ODNR's arbitrary and capricious assertion of ownership and exercise of ownership rights over the lands owned by Plaintiffs at and below OHW constitutes an unconstitutional temporary taking of those lands, and Plaintiffs have a clear right to receive compensation from ODNR for such taking or appropriation pursuant to Article I, Section 19 of the Ohio Constitution and the Fifth Amendment to the U.S. Constitution.

36. Plaintiffs have no plain and adequate remedy in the ordinary course of law to require ODNR to compensate them fairly for the losses they have incurred as a result of ODNR's uncompensated taking of their privately-owned real property.

37. ODNR is under a clear legal duty to commence appropriation proceedings in the Probate Court of the respective counties in which the respective properties owned by Plaintiffs are located to determine the amount of compensation due to each of the Plaintiffs for the real property temporarily taken and for damage to the residue of their respective real properties.

COUNT III

(In the Alternative)

Mandamus/Inverse Takings Compensation

38. The facts in paragraph 1 through 37 of this Complaint are realleged and incorporated herein by reference.

39. In the alternative, if ODNR is entitled to take and appropriate the lands owned by Plaintiffs below OHW, then Plaintiffs have a clear right to receive compensation from the state of Ohio for such takings or appropriation pursuant to Article

I, Section 19 of the Ohio Constitution and the Fifth Amendment to the U.S. Constitution, as a consequence of ODNR's taking of the real property owned by Plaintiffs without any compensation.

40. Plaintiffs have no plain and adequate remedy in the ordinary course of law to require ODNR to compensate them fairly for the losses they have incurred and will incur as a result of ODNR's uncompensated taking of their privately owned real properties.

41. If ODNR is entitled to take and appropriate Plaintiffs' lands owned below OHW, ODNR is under a clear legal duty to commence appropriation proceedings in the Probate Court of the respective counties in which the respective properties owned by Plaintiffs are located to determine the amount of compensation due to each of the Plaintiffs for the real property taken and for damage to the residue of their respective real properties.


PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court grant the following relief:

- 1) Pursuant to Ohio Civil Rule 23, certify this case as a class action and certify that the class shall include each and every owner of a parcel of privately owned real property abutting Lake Erie located within the State of Ohio, unless such owner opts out of the class if permitted and to the extent permitted by law;
- 2) On Count I, a declaratory judgment that:
 - i) Plaintiffs own fee title to the lands located between OHW and the actual legal boundary of their properties, as defined by Ohio law (including the rules of accretion, erosion and reliction), their deeds, and their original patent if any;
 - ii) The interest of the state as trustee over the public trust applies to the waters of Lake Erie and does not apply to or include non-submerged lands;
 - iii) ODNR lacks authority to compel Plaintiffs, or any one of them, to lease back property already owned by them;

- iv) Any current submerged land lease between ODNR and any of Plaintiffs is declared void and invalid as to any land below OHW but owned by Plaintiffs, but shall remain in full force and effect as to any remaining lands.
- 3) On Count II, a writ of mandamus compelling and ordering ODNR to commence appropriation proceedings in the Probate Court of the respective counties in which the respective properties owned by Plaintiffs are located to determine the amount of compensation due to each of the Plaintiffs for the real property temporarily taken and for damage to the residue of their respective real properties.
- 4) In the alternative, on Count III, a writ of mandamus compelling and ordering ODNR to commence appropriation proceedings in the Probate Court of the respective counties in which the respective properties owned by Plaintiffs are located to determine the amount of compensation due to each of the Plaintiffs for the real property taken and for damage to the residue of their respective real properties.
- 5) An award of Plaintiffs' attorneys' fees and costs.
- 6) Any other relief that this Court deems equitable, proper, necessary, or just.

Respectfully submitted,



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Counsel for Relators/Plaintiffs

ARTICLES OF INCORPORATION OF
OHIO LAKEFRONT GROUP, INC.
AN OHIO NON-PROFIT CORPORATION

We, the undersigned, acting jointly as incorporators of a corporation under the Ohio Nonprofit Corporation Law, Sections 1702.01 et seq. of the Revised Code of Ohio, do adopt the following Articles of Incorporation for such corporation:

ARTICLE I. NAME

The name of the corporation shall be Ohio Lakefront Group, Inc.

ARTICLE II. PRINCIPAL OFFICE

The place in Ohio where the principal office of the corporation is to be located is the City of Lorain, Lorain County.

ARTICLE III. NONPROFIT STATUS

The corporation is a nonprofit corporation as defined in Section 1702.01(C) of the Revised Code of Ohio. As such, it is not formed for the pecuniary gain or profit of, and its net earnings or any part thereof is not distributable to, its members, directors, officers or other private persons except as specifically permitted under the provisions of the Ohio Nonprofit Corporation Law.

ARTICLE IV. PURPOSE

(a). The specific and primary purposes for which this corporation is organized are to preserve and enhance the Lake Erie shoreline; to advocate reasonable goals for Ohio Coastal Management; to represent the rights and interests of lakefront property owners and residents as true stewards of Lake Erie shoreline with respect to international, federal, state, municipal and other governmental programs and regulation; to represent the knowledge and experience of lakefront property owners who have the most direct personal stake in rule-making and legislation for Ohio Coastal Management and other governmental programs; to protect the lakefront owners from laws or regulation that unfairly burdens their property or littoral rights; to inform lakefront owners and other interested citizens relating to issues affecting Coastal Management, littoral rights, erosion, lake levels, engineering and related issues; and to inform and involve the public in the decision-making process relating to Coastal Management, water quality and other issues affecting Lake Erie.

(b). The general purposes for which this corporation is organized are to perform research, publish materials; bring, maintain, defend or support litigation; appear before

legislative and regulatory bodies; and hold civic and educational forums relating to Ohio Coastal Management and shoreline issues; to employ staff, consultants and others to perform the required tasks; and to raise, obtain and spend funds in pursuance of these purposes and for all other lawful purposes.

(c). This corporation is formed and shall be operated for scientific, research, civic, public informational, lobbying, and political purposes. No part of the net earnings shall inure to the benefit of any member, director or officer of the corporation except as provided by law.

(d). This corporation shall have and exercise all authority conferred upon nonprofit corporations under the laws of Ohio generally, and specifically as provided in Section 1702.12 of the Ohio Nonprofit Corporation Law, provided, however, that this corporation has no authority to engage in any activity that in itself is not in furtherance of its purposes as set forth in subparagraphs (a) through (c) of this Article IV.

ARTICLE V. FIRST BOARD OF DIRECTORS

The following persons (not less than three) shall serve the corporation as directors until the first annual meeting or other meeting called to elect directors:

Name	Post Office Address
1. Adrian Betleski	1723 E. Erie Ave. Lorain, Ohio 44052
2. David Carek	4635 Edgewater Dr. Sheffield Lake, Ohio 44054
3. L. Scot Duncan	P.O. Box 1320 Sandusky, Ohio 44870
4. Jo-Ann Dyson	26902 Lake Rd. Bay Village, Ohio 44140
5. Barbara Evans	1801 East Erie Ave. Lorain, Ohio 44052
6. James O'Connor	4269 East Lake Road Sheffield Lake, Ohio 44054
7. Wally Paine	33344 Lake Road Avon Lake, Ohio 44012
8. Keith Rader	5823 October Lane Madison, Ohio 44057
9. Homer S. Taft	29404 Lake Road Bay Village, Ohio 44140
10. Anthony Yankel	29814 Lake Road Bay Village, Ohio 44140
11. Joseph Zieba	3248 W. Erie Ave. Lorain, Ohio 44053

ARTICLE VI. DURATION

The period of the corporation's duration is perpetual.