IN THE OHIO COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY

STATE OF OHIO EX REL. ROBERT MERRILL, TRUSTEE, *et al.*, Plaintiffs-Appellees/ Cross-Appellants.	)	CASE NO. 2008-L-008
vs.	)	Appeals from the Court of Common Pleas Lake County, Ohio Case No. 04-CV-001080
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, *et al.*, Defendants-Appellants/ Cross-Appellees.	)	

OHIO LAKEFRONT GROUP'S APPELLEE AND CROSS-APPELLANT BRIEF

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I. STATEMENT OF THE CASE

The Ohio Lakefront Group (collectively hereinafter "OLG") is a duly formed non-profit corporation which represents, and most of whose members are, owners of littoral property on Lake Erie. (First Amended Complaint at ¶ 2.) OLG and several of its members owning property adjoining Lake Erie filed this class action lawsuit against the Ohio Department of Natural Resources ("ODNR") and the State of Ohio ("State") (collectively, the "State") on May 28, 2004. OLG amended the Complaint on July 2, 2004. On December 15, 2004, the Trial Court denied the State's motion to dismiss and scheduled a hearing on OLG's motion to certify a class for March 4, 2005. The State waited until February 23, 2005 – only nine days before the class certification hearing – to file its responsive pleading, which included a counterclaim against OLG and other class plaintiffs and meritless cross-claims against the United States of America and the United States Army Corps of Engineers. On June 8, 2006, after the case was removed to federal court, and then remanded after dismissal of the "claims" against the United States and the Army Corps of Engineers, the State agreed to stipulate with OLG to class certification on three agreed questions of law.

The Trial Court certified the class, and those three questions of law, on June 9, 2006. The Order asked:

> **First,** "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 now artificially filled' in R.C. 1506.11' and 'natural shoreline' in R.C. 1506.10 and 1506.11[?]"
>
> **Second**, "If the furthest 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[?]"

> **Third**, "What are the respective rights and responsibilities of the class members, the State of Ohio, and the people of the State in the 'territory'[?]" (*See* Td. 123 at pp. 2 and 3, attached in Appendix A.)

Thereafter, the Trial Court allowed two groups of intervenors. Homer Taft and Scott Duncan, members of the class, were given leave to intervene in August 2006. On January 10, 2007, the Trial Court also granted the motion of the National Wildlife Federation and the Ohio Environmental Council ("Intervening Defendants") to intervene in the action.

In the first half of 2007, the parties then fully briefed their own separate motions for summary judgment on each of the three certified questions. On July 13, 2007, having reviewed OLG's briefs, ODNR at the direction of Ohio Governor Ted Strickland withdrew its opposition to OLG's claims and retained separate counsel to represent it in the Trial Court. The Ohio Attorney General Marc Dann, however, elected to continue pursuing the claims that the State owned all littoral property bordering Lake Erie lakeward of the ordinary high water mark, as fixed by the U.S. Army Corps of Engineers for its regulatory purposes at the elevation 573.4 ft. IGLD (1985) ("State's OHW").

On December 11, 2007, the Trial Court entered an order denying the State's motion for summary judgment and granting OLG's motion in part. (Td. 183, attached in Appendix A.) In sum, the Trial Court rejected the State's contention that the ordinary high water mark was the boundary between the public trust territory and private property rights, and thus also rejected the State's OHW as the physical location of that boundary, but then also rejected that the boundary sits at the ordinary low water mark.[1] It held instead -- as the prior Ohio Attorney General and current Lieutenant Governor had similarly opined to ODNR in 1993 -- that the water's edge was the proper legal boundary. (*See, e.g.* Td. 183, p. 69.) This appeal and cross-appeal followed.

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[1] OLG believes, and moved the Trial Court to find, that the boundary sits at the low water mark, not the ordinary low water mark. The distinction between the two is a matter of time frame -- years for ordinary low versus current or daily for the plain low -- as explained in more detail *infra*.

II. STATEMENT OF FACTS RELEVANT TO THIS APPEAL

In the mid-1990's, ODNR began requiring littoral landowners to enter into submerged land leases with the State to use land located below the ordinary high water mark ("OHWM") - a mark which ODNR then arbitrarily set at an elevation of 573.4 feet IGLD (1985). ODNR had not previously required submerged land leases for property located below the State's OHWM. Littoral landowners rightly saw this as an attack on their established and previously unchallenged property rights. This current position, pursued by the Attorney General but no longer supported by ODNR (*see supra* Section I), is but one of many taken by the State in the recent past. Those positions, and their application on the non-tidal Lake Erie, undermine the position of the State on appeal.

1. First, Low Water

In the 1970's, the State through the Department of Public Works ("DPW")[2] took the position that the Low Water Datum or mean low water defined the shoreline of Lake Erie and, thus, the boundary between public and private properties. Initially, the Director of DPW declared that "the boundary line between Claimants' property and the waters and bed of Lake Erie adjacent to Claimants' property is coincident with the shoreline of Lake Erie, established at 568.6 feet above sea level at Father's Point, Quebec (Low Water Datum, or low water level of Lake Erie)." *Rheinfrank v. Gienow*, 1973 Ohio App. LEXIS 1671, * 12 (Franklin Cty. App. 1973); *See* Herdendorf Aff. ¶ 4. Later, while on appeal, the Director and the Ohio Attorney General submitted a court stipulation and sworn affidavit stating that the boundary of Lake Erie could be determined using "mean low water" as an appropriate boundary instead of Low Water

[2] ODNR did not exist until 1949 and did not oversee the public trust "territory" until 1989. *See* R.C. Section 1506.10. Prior to that, the Department of Administrative Services ("DAS"), and before it the Department of Public Works, were responsible for overseeing the waters of Lake Erie. *See* former statutes Ohio Revised Code Section 123.03, 1989 and 1949 versions, included respectively in Td. 165, Exhibit 6 pp. 135 and 149, and attached hereto in Appendix B, along with all other statutes cited herein.

Datum. *Rheinfrank v. Gienow*, 1973 Ohio App. LEXIS 1543, *3 (Franklin Cty. App. 1973); Herdendorf Aff. ¶ 5. Whether "mean" or "datum," the State indisputably held the position in the 1970's that the boundary of the "territory" lay at a relatively fixed line of low water.[3]

2. Then, Where Land and Water Meet

In the late 1970s, while drafting Ohio's Coastal Zone Management Program, ODNR described the boundary of the public trust territory as the line "where land and water meet." According to ODNR, this line -- "where land and water meet" -- was "normally used to determine where the state's rights over the bed of Lake Erie begin." (*See* Td. 165 at Exhibit 3 (Public Review Draft, *Coastal Zone Management Program*, 1979 at p. 99).) Although ODNR found this boundary to be the most practical and easiest to determine, it also noted then that this moveable boundary was difficult to administer.

Later, after ODNR assumed oversight over the "territory" under R.C. 1506.10, it approached then Ohio Attorney General Lee Fisher for clarification on the proper boundary of the public trust "territory," asking if littoral property owners held title "to the ordinary low water mark," a nod to at least the prior, if not then, position of the State. *See* Ohio Attorney General Opinion No. 93-025, 1993 Ohio AG LEXIS 27 (1993). As ODNR had done fourteen years earlier, Attorney General Fisher opined that a "littoral owner along Lake Erie holds title to the extent of the natural shoreline" which he defined as "the edge of a body of water[.]" *Id.* at *11 and 16. He then specifically opined that land lying between the shoreline and the ordinary high water mark belongs to the littoral owner and not to the State. *Id.* at * 1, 15.

[3] DPW informed littoral property owners in the 1970s that the boundary of the public trust "territory" lay at 568.6 ft IGLD (1955) or the low water mark as set by the IGLD 1955 data. (*See* Td. 165 at Exhibit 2 (10/12/1970 letter from R. Weisent for DPW to E. Feick).)

ODNR did not challenge the Attorney General's opinion, and adopted it as its own for several years, at least until 1997. (*See* Td. 165, at Exhibit 4 (*Combined Coastal Management Program & Final Environmental Impact Statement for the State of Ohio*, U. S. Dep't of Commerce and ODNR (March 1997) Part II at Chapter 9, page 12); *see also* Td. 165, at Exhibit 5 ("Where the Water meets the Land," *Coastal Permits and Lease Booklet*, ODNR).)

3. Now, the Ordinary High Water Mark

Up through July 2007,[4] ODNR rejected these previous positions by it, its predecessor trustee DPW and the Attorney General and publicly imposed an administrative boundary set by the United States Army Corps of Engineers at 573.4 ft. IGLD (1985) as the boundary between the "territory" and private littoral lands. ODNR did not engage in rule-making to set this boundary, nor did it issue any formal orders declaring the same. More importantly, ONDR did not ask the General Assembly to shift the boundary from the shoreline to ODNR's OHWM, as ODNR itself believed was its only recourse in 1979 for redefining the shoreline of Lake Erie.

Rather than seek guidance, or engage in any public process, ODNR simply sent out materials, in hard copy and on the internet, stating that the boundary lies at "the ordinary high water mark[.]" It also then started, without explanation, requiring littoral owners to enter into "Submerged Lands Leases" with the State of Ohio to place private improvements on "land lakeward of where Ordinary High Water (573.4 feet International Great Lake Datum, 1985) intersects the natural shore." (*See* Td. 165 at Exhibit 5 "(Where the Water meets the Land," *Coastal Permits and Lease Booklet*, Ohio Coastal Management Program, ODNR).)

In July 2007, ODNR had a change of heart, however, and pursuant to Governor Strickland's new policy withdrew from this dispute saying it would honor landowners' deeds until and unless directed to do otherwise by the judiciary. ODNR no longer takes a position on

[4] As noted, ODNR is no longer pursuing this dispute.

the location of the boundary of the public trust "territory." Former Attorney General Marc Dann elected to maintain, on behalf of the State of Ohio alone and despite the Governor's changed policy, the position ODNR no longer supports.

4. "Ordinary High Water" Does Not Apply to a Non-Tidal Body of Water Like Lake Erie Where Water Levels Fluctuate Unpredictably

An OHWM has little practical application to Lake Erie. With regard to tidal bodies of water, "ordinary" high or low water originally referred to the daily range of water levels during "neap" or "ordinary" tides when the sun and moon are on opposite sides of the earth and, thus, result in tides with a lesser range. *See Teschenmacher v. Thompson*, 18 Cal. 11 (1861). A more modern view was first described in *Borax Consol., Ltd. v. Los Angeles*, 296 U.S. 10 (1935), as associating "ordinary high water" with "mean high water" and defining mean high water as the average elevation of all the high tides occurring over a period of 18.6 years (the full lunar cycle).

The elevation of Lake Erie typically is reported in reference to Low Water Datum or Chart Datum, which defines the boundaries of Lake Erie within which navigation and water commerce may safely proceed. (*See* Td. 165 at Exhibit 1 (Affidavit of Charles E. Herdendorf, Ph.D. ("Herdendorf Aff.") at ¶ 3 and Exh. B thereto at p. 2-3).) In the 1970s, this boundary was set at an elevation of 568.6 feet International Great Lakes Datum ("IGLD") (1955), and was later revised to the currently-used boundary of 569.2 feet IGLD (1985). *Id.*

An OHWM was first established for Lake Erie in 1974 by the United States Army Corps of Engineers in order to determine the limit of its regulatory jurisdiction over navigable waters of the United States. *Id.* at p. 3. The Corps of Engineers fixed OHWM at 4.2 feet above Low Water Datum as "simply a convenient way of relating things to a common elevation." *Id.* OHWM IGLD (1985), which continues to be 4.2 feet above Low Water Datum, was

implemented by the Corps of Engineers in 1992 based on Lake Erie water levels for the years 1982-88, when water levels were at an historic high. *Id.* at pp. 2, 3.

Of course, these definitions have no utility when describing the water levels of Lake Erie, which lacks discernable tidal variation. Daily tides on Lake Erie are negligible. *Id.* at p. 7. Although there are noticeable seasonal fluctuations, with the lake level tending to be lowest in the winter and highest in the late spring or early summer, these fluctuations are erratic and are not a predictor of the water levels for the next season. *Id.* at p. 6. Based on measurements kept since 1860, the monthly average lake levels have remained within a range of nearly six feet from the lowest levels recorded in the 1930s to the highest levels recorded in the 1980s. *Id.* at p. 2.

Thus, OHWM is not a current, consistent, or accurate measure of Lake Erie's shoreline.

III. THE STANDARD OF REVIEW

A. Summary Judgment Reviewed *De Novo*.

The Court reviews a summary judgment *de novo*, "as it only involves questions of law." *Bischoff v. Mentor Exempted Vill. Sch. Dist.*, 2007 Ohio 6155, *P14 (Lake Cty. App. 2007). (affirming both grant of summary judgment to cross-appellee and denial of summary judgment to appellant on claim involving statutory interpretation). In reviewing the Judgment Entry, this Court should affirm if "the decision of the lower court ... can be supported on any theory." *Immediate Disposal, Inc. v. Brimfield Bd. Of Zoning App.*, 1993 Ohio App. LEXIS 1881, *7 (Portage Cty. App., Mar. 31 1993) (appellate court affirmed decision of trial court for different reasons). "It is a well-settled principle that the failure to bring the issue to the trial court's attention by objection or otherwise constitutes a waiver and such issue may not be raised on appeal." *Peters v. Ashtabula Metro. Hous. Auth.*, 89 Ohio App. 3d 458, 463 (Ashtabula Cty.

App. 1993); *see Sivazlian v. Lanese*, 2000 Ohio App. LEXIS 5916, *13 (Lake Cty. App. Dec. 15, 2000) (failure to argue zoning code violation to trial court waived argument on appeal).

Because the Trial Court followed well-settled law and was not presented with one of the positions now argued by the State (the State's new Rule 56(f) claim), it did not err in ruling on the summary judgment motions and then rejecting the OHWM or 573.4 ft IGLD (1985) as the location of the public trust boundary, and rightly found the public had no public trust right to walk over privately-owned shores.

IV. ARGUMENT

The State focuses on federal law, including one unsound holding, and ignores Ohio law in a bold attempt to fabricate a right to walk the shores of Lake Erie up to the State's boundary for the "territory" -- the ordinary high water mark ("OHWM"). Federal law does not discuss the right of the public to walk the shores of Lake Erie, or any of the Great Lakes. Ohio law, however, does. On many occasions, people have argued that their public rights in Lake Erie go beyond the actual waters to shores or uplands. Without exception, the Ohio Supreme Court has turned them down. *See, e.g. Sloan v. Biemiller*, 34 Ohio St. 492, 516-17 (1878) (affirming the right of the shore owner to restrict the use of the shore); *Bodi v. The Winous Point Shooting Club*, 57 Ohio St. 629, 630 (1897), *affirming in part*, *Winous Point Shooting Club v. Bodi*, 10 Ohio Cir. Dec. 544, 20 Ohio C.C. 637, 1895 Ohio Misc. LEXIS 451 (Ottawa Cty. App. 1895) (affirming injunction against persons "from entering upon any of said *lands*, *shores*, marshes and islands" privately owned by the Winous Point Shooting Club for the purposes of fishing and hunting (emphasis added)); *see* 1895 Ohio Misc. LEXIS 451 at *19-20 (Supreme Court's modification of prior decision at 57 Ohio St. 629). The principle is clear in Ohio: private

landowners have the right to exclude others from their shore, *i.e.*, the land bordering, but not currently beneath, the waters of Lake Erie.

This principle undercuts each of the State's positions on appeal. The public has no uniform right to occupy the shores of Lake Erie. Nor can the boundary of the "territory" be the OHWM, as such a line would exclude the shore from private ownership. Nor, then, can the physical location of the boundary be drawn at any approximation of that line on Lake Erie, be it 573.4 ft IGLD (1985) or any other elevation. Applying this established principle, as further discussed below, the Court should reject the State's appeal.

A. First Assignment of Error

The Trial Court Did Not Err in denying the State's Motion for Summary Judgment or in Granting in Part OLG's Motion for Summary Judgment. (T.d. 183)

Issue Presented for Review

First Question of Law (T.d. 123)

1. The Furthest Landward Boundary of the "Territory" is Not the OHWM, and in Setting a Boundary Below that Mark, the Trial Court Did Not Rule Contrary to Law or Create an Unlawful Taking of Private Property or Abdication of the Public Trust.

a. Because Ohio Has Properly Exercised Its Discretion under the Equal Footing Doctrine in Setting the Public Trust Boundary Below the OHWM, the Court Should Affirm

Quoting the United States Supreme Court, the State claims that the main issue for the Trial Court, and now this Court, "is not what rights the State has accorded private [land] owners in lands which the State holds as sovereign; but, rather, how far the State's sovereign right extends under the equal-footing doctrine and the Submerged Lands Act." (State's Brief at 11 (quoting *Oregon ex rel. State Land Bd. V. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 369 (1977).) This rhetorical question, so claims the State, is a "long-settled principle of federal law." (*Id.*)

The State could not be more wrong. The quotation relied upon by the State is not a holding of *Oregon*, but is instead a prior holding from *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), which the Court then proceeded to reverse. In an explanation that flattens the State's case, the U.S. Supreme Court held:

> "Our analysis today leads us to conclude that our decision to apply federal common law in *Bonelli* was incorrect. ... Our error, as we now see it, was to view the equal-footing doctrine enunciated in *Pollard's Lessee v. Hagan* as a basis upon which federal common law could supersede state law in the determination of land titles. Precisely the contrary is true[.]"

It is unfathomable that the State missed this reversal. Indeed, the State's misplaced reliance on *Oregon* is emblematic of the State's misplaced and erroneous reliance on the "equal footing" doctrine as the foundation of its appeal. As such, the Trial Court had no difficulty recognizing, and rejecting, the many failings in the State's arguments.

Without the federal common law to rely upon, the State has no argument. As affirmed in *Oregon*, and exemplified in over one hundred years of other U.S. Supreme Court cases, the "equal footing" doctrine does not create a uniform, federal common law boundary across each of the states' public trust lands, but instead recognizes the inherent right of all states to define the boundary between their public trust "territory" and private rights through their own common law, and at a line different from the State's purportedly universal OHWM.[5]

For example, in 1877 the U.S. Supreme Court stated that "[i]f [the states] choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." *Barney v. Keokuk*, 94 U.S. 324, 338 (1877). In 1891, the U.S. Supreme Court issued the first of three consistent, contemporaneous opinions on the states'

[5] Indeed, the "equal footing" doctrine is derived implicitly from the 10th Amendment to the United States Constitution, which reserves to the States all powers not delegated to the United States. *See Pollard's Lessee v. Hagan*, 44 U.S. 212, 229 (1845). Thus, the "equal footing" doctrine protects state's rights; it does not create a federal common law of property to supplant state law.

definitional authority, noting "but it depends on the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised." *Hardin v. Jordan*, 140 U.S. 371, 382 (1891). In 1894, in *Shively* – the "seminal" public trust case according to the State – the U.S. Supreme Court stated, "the later judgments of this Court clearly establish that the title and rights of riparian or littoral proprietors in the soil below high water mark of navigable waters are governed by the local laws of the several states[.]" *Shively v. Bowlby*, 152 U.S. 1, 41 (1894). And in 1900, the Supreme Court, with regard to the delineation of the territory that states hold in the public trust, stated that "this, too, is a question of local law with regard to which the decisions of state courts are conclusive." *Illinois Cent. R.R. Co. v. Chicago*, 176 U.S. 646, 659 (1900). Later, in 1935, the United States Supreme Court, citing to *Barney*, *Shively* and *Hardin*, stated that the "rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law." *Borax*, 296 U.S. at 22. Finally, and more recently, in 1977 the U.S. Supreme Court cited with favor the ruling of *Shively* above and stated that the petitioner's efforts to apply the "equal footing" doctrine to force a federal common law boundary – the same application urged here by the State – would be "perverse" and "may result in property law determinations antithetical to the desires of that State." *Oregon*, 429 U.S. at 375, 378. For over one hundred years, the U.S. Supreme Court has consistently rejected federal authority and recognized each state's separate authority to set its own boundary for its public trust "territory."

Nothing the State presents -- in either the federal Submerged Land Act, the opinion in *State v. Cleveland & Pittsburgh R.R. Co.*, 94 Ohio St. 61 (1916) or the wording in Ohio's Fleming Act -- alters this well-worn line of case law.

Though the State sees the Submerged Lands Act as evidence that Congress confirmed a uniform boundary at the OHWM for all states, that Act expressly recognizes to the contrary that each state may have defined its "territory" differently. (*See* State's Brief at p. 13.) In Section 1311, subparts (1) and (2), the Act provides that title, ownership and certain other rights in the lands below the OHWM are thereafter "recognized, confirmed, established, and vested in and assigned" *either* to the respective states *or* to "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[.]" This language both acknowledges the fact of private ownership of lands below the OHWM and affirms the propriety of state action granting ownership of such lands.[6] *See Oregon*, 429 U.S. at 372 n. 4 (noting on the Submerged Lands Act that "the effect ... was merely to confirm the States' title to the beds of navigable waters within their boundaries as against any claim of the United States ... nothing in the Act in any way mandates, or even indicates, that federal common law should be used to resolve ownership of lands[.]"); *see also* Ohio AG Opinion, 1993 Ohio AG LEXIS 27, at *1, 15 (finding under Submerged Lands Act that land lying between the shoreline of Lake Erie and the OHWM belongs to littoral owner and not State). Thus, the Submerged Lands Act is further evidence that Ohio, like other states, has the authority to set the boundary of the "territory" below the OHWM.

Nor does *State v. Cleveland & Pittsburgh* -- the State's "landmark public trust doctrine decision" -- lend further support. (State's Brief at p. 13.) To the contrary, it too undermines the State's theory. While the Ohio Supreme Court did call on the legislature to protect the public trust in that decision, the Court also called on it to "in a spirit of justice and equity, provide for the protection and exercise of the rights of the shore owners." *State v. Cleveland & Pittsburgh*,

[6] *See also* 33 CFR 329.11(a)(2) – "Ownership of a river or lake bed or of the lands between high and low water marks will vary according to state law[.]"

94 Ohio St. at 84 (emphasis added). Moreover, in affirming the Court of Appeals, the Court was affirming a decision that embraced an exclusive right to the shore as follows:

> "The riparian proprietor, whose title stops at the shore line, owns in fee to that line. There can be no passing from the water upon his land with his consent ... his immemorial right has always been to prevent the public coming upon his private property without his consent, either from a highway or the water."

State v. The Cleveland-Pittsburgh Ry. Co., 1914 Ohio Misc. LEXIS 163, *35-36, 21 Ohio C.A. 1, **18-19 (Cuyahoga Cty. App. Dec. 7, 1914) (emphasis added). Aside from the fact that it never endorsed the State's rejected federal boundary of ordinary high water, the Ohio Supreme Court thus acknowledged two important points: (1) that private interests owned the shore and (2) that there was a need for the legislature to protect those private interests in the shore, one of which presumably included the Court of Appeals' "immemorial" right to exclude others.

Even the State's tortured parsing of Ohio's Fleming Act offers no relief. The State sees two phrases in the Fleming Act -- "do now belong" and "have always belonged" -- as proof that Ohio followed non-existent instructions from *State v. Cleveland & Pittsburgh* to set the boundary in 1917 at the OHWM retroactively to the State's admission in 1803. (State's Brief at 14.) Though conceding that the Fleming Act "codified" Ohio's common law, the State resorts to legal riddles. Contrary to its strained logic, the phrases "do now belong" and "have always belonged" are not code for the failed, federal common law boundary purportedly set out in the State's "equal footing" cases. They simply show that the General Assembly intended "shoreline" to mean what dictionaries and Ohio cases had consistently said -- the line where the waters meet the shore.

Moreover, if the State's argument is logically extended, it would result in reversal of Ohio's unbroken string of riparian decisions. In relying upon a handful of U.S. Supreme Court decisions -- instead of Ohio law -- to define the extent of the public trust in Ohio, the State

necessarily claims title to OHWM of all shores of navigable waters, and soils under them, including rivers and streams. However, under Ohio common law, the riparian property owner (*i.e.*, an owner of property bordering on rivers, streams and inland lakes), with one exception holds title to the center of the stream or lake. *Gavit v. Chambers*, 3 Ohio 495, 496 (1828); *cf. Lembeck v. Nye*, 47 Ohio St. 336 (1890), syll. ¶2. The exception is the Ohio River, where the riparian property owner holds title to low water. *Lessee of Blanchard v. Porter*, 11 Ohio 138, 144 (1841). A boundary at OHWM, as manufactured by the State for purposes of this dispute, would conflict with every one of these decisions and offends the principles of *stare decisis*.

For all of these reasons, the Trial Court did not err but was squarely within the main of Ohio common law and the "equal footing" doctrine in rejecting the State's utterly untenable position that federal common law dictates the OHWM as Ohio's boundary for the "territory."

b. The Trial Court Did Not Err in Looking to Dictionary Definitions and Ohio Common Law for the Meaning of the Term "Shoreline."

The State next claims, in what becomes a pattern of overlapping arguments, that the Trial Court erred both in ignoring its failed, federal common law and in then favoring dictionary definitions and Ohio common law as sources of meaning for the term "shoreline." (State's Brief at pp. 15-16.) The State's redundant reliance on its failed, federal common law theory is reason alone to reject this argument *in toto*. (*See supra*.) Regardless, and though OLG too takes some issue with the precise boundary set by the Trial Court (*see infra* First Cross-Assignment of Error), the Trial Court did not err in relying on these other, authoritative sources.

Common usage, derived from dictionaries, is the first start for statutory interpretation. *See State ex rel. Celebrezze v. Board of Cty. Comm. Of Allen Cty.*, 32 Ohio St. 3d 24, 27 (1987) (holding "any item left undefined by statute is to be accorded its common, everyday meaning" and relying on definition of "balance" from dictionary); *see also Eastman v. State of Ohio*, 131

Ohio St. 1, 5-7 (1936) (relying on definitions of "insolvent" from dictionaries). The State apparently agrees with the principle, but prefers to focus again on the terms "do now belong" and "have always belonged" rather than the real term at issue: "shoreline."[7] (*See* State's Brief at p. 17.) The modern and historical dictionary definitions of "shoreline" provided by OLG remain undisputed by the State, and thus govern the interpretation here (as explained in more detail *infra* in OLG's First Cross-Assignment of Error) in that none describe the "shoreline" as synonymous with the OHWM. Remarkably, the State claims that the landward boundary of the "territory" is unambiguous, but fails to explain why the Trial Court erred in following the unambiguous definition of the "territory" in R.C. 1506.11 as including only those lands "presently" underlying the waters of Lake Erie -- a clear reference to a water's edge boundary

In the absence of such an undisputed, common usage, technical usage from both "administrative construction" and "common law" can also guide interpretation. *See* R.C. §§ 1.49(D) (common law) and 1.49(F) (administrative construction). Again, the State does not take issue with the principle, only the application. (*See* State's Brief at p. 15, citing to *Bresnik v. Beulah Park Ltd. P'ship*, 67 Ohio St. 3d 302, 303 (1993) (noting that the "common-law right to exclude has long been a fundamental tenet of real property law"). Yet, the Trial Court had no obligation to recognize then non-existent law, later expressly rejected by the U.S. Supreme Court, and thus properly looked at Ohio's administrative construction and Ohio's common law (including the admonition in *State v. Cleveland & Pittsburgh* to protect the "shore owners") for further guidance in interpreting the term "shoreline."

Without transition or logic, the State ends by suggesting that Ohio common law set the "shoreline" at the top of the shore. (State's Brief at p. 18.) For support, the State cites just two

[7] The words "do now belong" and "have always belonged" refer to the effect of the statute itself, *i.e.* it is retroactive, and not the description of the "territory." *See* R.C. 1506.10. "Territory" is defined separately in R.C. 1506.11 where the words "do now belong" and "have always belonged" cannot be found.

cases, one Ohio and one federal. As OLG (and the United States Supreme Court) has made clear, federal common law has no bearing here. (*See supra.*) The State's one federal case does not as the State suggests define, let alone mention, the term "uplands," though it does hold, in a note that resonates with OLG, that "it is the interest of the community that all lands should have an owner, and most convenient that insensible additions to the shore should follow the title to the shore." *See Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 191 (1890) (emphasis added). The State's one Ohio case, *State v. Cleveland & Pittsburgh*, does not as already explained set the boundary of the public trust "territory" at OHWM. Indeed, if the "shore" is, as the State has conceded, the land between ordinary high and low waters (*see* T.d. (State's Opp'n) at p. 8, n.2), the "shoreline" cannot sit at the ordinary high water line as there would by simple logic be no "shore" or "shore owners" for the Court to protect. By suggesting to the contrary, and specifically that the Ohio Supreme Court spoke in vain of "shore owners," the State further strains its credibility and fails, utterly, to provide any evidence of error.

c. The Trial Court Ruled in Accordance with the "Clearly Established Law" of Ohio in Rejecting the State's Failed, Federal Boundary of the OHWM.

As it did with federal law, the State again misstates and mistakes Ohio authority in attempting to prove error. The fact alone that the Trial Court relied on four independent sources of authority in rejecting the State's OHWM boundary -- (1) Ohio Supreme Court precedent, (2) ODNR rules, (3) Ohio Attorney General Opinions and (4) traditional property rights -- demonstrates the strength of its decision. Regardless, the State cannot show error in even one, let alone all four, of these bases and thus fails to establish grounds for reversal.

First, the Ohio Supreme Court has on a number of occasions affirmed private title in lands that as a matter of fact sit below the State's OHWM. *Hogg v. Beerman* represents the most straightforward example, as the Supreme Court actually affirmed title to land then under the

waters of East Harbor, a harbor connected with Lake Erie. *Hogg*, 41 Ohio St. 81. Though the State distinguishes the waters in *Hogg* as mere marshy wetlands and not technically part of Lake Erie (a logic it fails to apply to the decidedly dry shore below its imaginary line), that characterization does not change the fact that the submerged lands at issue sat below any OHWM and were indisputably affirmed as private lands.

After simple analysis of the facts, the other two cases attacked by the State -- *State ex rel. Duffy* and *State ex rel. Squire* -- show the same.

In *State ex rel. Duffy v. Lakefront East Fifty-Fifth Street Corp.*, 137 Ohio St. 8 (1940), the Court determined that a littoral property owner and not the State held title to accreted land measuring 1,000 feet by 700 feet. *Id.* at 11-13. According to the State's understanding of accretion, land only "accretes" to littoral property if it is above its OHWM, 573.4 feet IGLD (1985). (*See* State's Brief at 21, citing to *Jefferies*, 134 U.S. 178.) Yet, the 700,000 square feet of accreted land at issue in *Duffy* could not have been located above the State's OHWM given the lake's water levels during the period at issue, 1898 to 1938. The accreted land in *Duffy* contained approximately "200,000 cubic yards of drifted sand and soil" (*Duffy*, 137 Ohio St. at 12), which, figured against a 700,000 square foot base, meant the accreted land rose less than four inches in height on average above then existing water levels. According to facts introduced by the State, water levels at that time never reached 573.4 ft. IGLD and were typically at least two feet and occasionally more than four feet lower. (*See* T.d. 174, at State's Appx. A.) Thus, *Duffy* affirmed private title in these accreted lands, despite the fact that those lands sat several feet below the State's ordinary high water boundary.

State ex rel. Squire v. Cleveland, 150 Ohio St. 303 (1948), allows an even simpler analysis. *Squire* involved the respective rights of littoral property owners and the city of

Cleveland to use artificial fill placed in the shallow waters of Lake Erie beyond the natural shoreline as it existed in 1914. *See id.* at 317, 318-19. The trial court found that the natural shoreline there was the shoreline of Lake Erie as surveyed in 1914. *Id.* at 317. According to State's facts, as noted above, the monthly mean elevation of Lake Erie in 1914 was two to three feet below the State's OHWM. (*See* T.d. 174 at Exhibit A.) Thus, the "natural shoreline" that the *Squire* decision enforced sat, as it did in *Duffy*, well below the State's proffered OHWM.

These Ohio Supreme Court cases -- *Hogg, Duffy* and *Squire* -- show on their face and in hindsight that enforcing the State's OHWM now would violate property rights affirmed in these rulings. Thus, the Trial Court did not err.

Second, the State claims that ODNR rules do not preclude a "shoreline" at OHWM. Trying to undermine the two rules cited on the "shore" and "shoreline," which relate to R.C. 1506.06, the State impliedly concedes that ODNR has not actually issued a rule defining "shoreline" under R.C. 1506.10 or 11. (*See* State's Brief at 21-23.) It then baldly suggests, like it did with *Jefferis*, that because the "shoreline" is the "line of intersection of Lake Erie with the beach or shore" it must be the OHWM. As the Trial Court found, that illogical reading would eliminate the "shore" altogether. (*See* T.d. 183 at p. 55.) Finishing its section on administrative construction, the State turns to regulations regarding everything other than the "shoreline" -- from "surface waters" to "sediment" to the ultimately self-serving "high water mark." (State's Brief at p. 22-23.) Those rules address regulatory issues, not ownership, and do not define, let alone mention, the "shoreline." In the end, the only cited rules that define the "shore" or "shoreline" -- OAC 1501-6-10(T) and (U) -- show that the "shoreline" cannot be the OHWM.

Thirdly, and most incredibly, the State refuses to admit that the 1993 Ohio Attorney General Opinion advised, as the Trial Court found, that "the ordinary high water mark can not be

the boundary of Lake Erie[.]" (State's Brief at p. 23.) As noted, the Attorney General stated that a "littoral owner along Lake Erie holds title to the extent of the natural shoreline" which he defined as "the edge of a body of water[.]" *See* Opinion, 1993 Ohio AG LEXIS 27 at *11 and 16. He then opined that the land "above the natural shoreline up to the ordinary high water mark" belonged to the private littoral owner and not to the State. *Id.* at *15. Accordingly, the "shoreline" is not the same as, but lies below, the OHWM and lands below the OHWM belong in private hands. The Trial Court did not err in relying on this plain language.

Fourth, the State claims the Trial Court erred in finding that a boundary at OHWM would violate property rights including: (1) the right to own the shore and (2) the right of direct access to the waters. (State's Brief at 24, citing T.d. 183, pp. 57-58.) As it did with *Oregon*, the State has again apparently ignored the express holdings of the relevant authority.

With regard to the shore, the Ohio Supreme Court has on at least two occasions explicitly affirmed the title of private persons to their shores in Erie, Sandusky and Ottawa Counties. *See Sloan*, 34 Ohio St. at 516 (affirming the right of the "proprietors of the shore" of Cedar Point in Erie County to grant or deny persons access to the shore, *i.e.* the lands between ordinary high and low water marks); *Bodi*, 57 Ohio St. at 630 (affirming private ownership of and right to exclude others from its "shore" and other lands in the west end of Sandusky bay in Ottawa and Sandusky Counties). These decisions focus on the "shore" itself and admit of no ambiguity.

With regard to direct access, both the Ohio and U.S. Supreme Court have recognized the importance of that right. *See Lamb v. Rickets*, 11 Ohio 311, 314 (1842); *Massachusetts v. New York*, 271 U.S. 65, 93 (1926) (noting no public rights in the shore). In both cases, the Courts refused to construe grants "to" the shore or lake as excluding ownership of the shore itself because that exclusion would prevent direct access to water. As both reasoned, such a

construction would "contravene public policy and defeat the intention with which such conveyances are normally made" -- to allow direct access to the water. *Massachusetts*, 271 U.S. at 93; *see Lamb*, 11 Ohio at 314.

Thus, the Trial Court did not err in finding that a boundary drawn at the OHWM would conflict with these and other long-settled, common law property rights.

d. The State's Ordinary High Water Boundary Violates its "Moveable Freehold" Theory.

OLG does not disagree with a "moveable freehold" theory like that put forward by the State. And it too takes issue, like the State, with the Trial Court's "water's edge" boundary as inconsistent with that theory, though on vastly different grounds. *(See infra*, First Cross-Assignment of Error). OLG finds absolutely no alignment, however, between any "moveable freehold" theory and a boundary at the fixed line of horizontal elevation promoted by the State.

Though the State claims that the OHWM can move by virtue of "gradual, natural, long-term processes" (State's Brief at p. 25), its own facts show otherwise. The State's OHWM -- 573.4 ft IGLD (1985) -- has only been recalculated once in the span of a half century. (*See* T.d. 166 at Appx. C, (internet page entitled "Why was a revised datum required" at p. 1 stating "first common datum was IGLD 1955" and that datum has been revised once as IGLD 1985 datum).) According to the State's facts, 573.4 ft IGLD (1985) is based on a seven-year survey from 1982 through 1988 during which Lake Erie experienced near record high water levels. (*See* T.d. 166 at Appx. H (internet page entitled "Great Lakes Water Levels").) In actuality, the "long-term annual average" water level on Lake Erie is nearly two feet below the State's 573.4 ft IGLD (1985) elevation. (*See id.*) Thus, 573.4 ft IGLD (1985) absurdly fixes the near record as the "ordinary" and ignores all daily, monthly and yearly trends from at least the last twenty years.

That long failure to adjust the State's OHWM runs afoul of common sense. *See U.S. v. Marion L. Kincaid Trust*, 2006 U.S. Dist. LEXIS 88250, *32 (E.D. Mich. Nov. 3, 2006) (noting

IGLD elevation for Lake Michigan "defies the plain meaning of the term ordinary"). It also shows that the State's boundary fails to react to change as it should under its "moveable freehold" theory. Though tidal waters approach the OHWM twice a day, Lake Erie water levels do not, and may not approach ordinary high water for days, weeks, months or even years. (*See supra.*) A boundary that does not reflect the practical differences between tidal and Lake Erie waters, or compensate for the actual, long term gap growing between the water and the land, does not describe a "moveable freehold." Even the State's cases (*see, e.g., Jefferis*, 134 U.S. 178), recognized accretions as land when formed over seventeen years. (State's Brief at p. 25.)

The State's remaining patchwork of arguments regarding the OHWM are circular and specious and deserve no further response. (*See* State's Brief at pp. 27-30.) In essence, the State contends that the water's edge cannot work as the boundary because it would mean the State is either abandoning the "territory" or engaging in a taking of private property whenever the actual water level, respectively, falls below or rises above the OHWM. The State continues over four pages with a parade of horribles, not once citing to any authority, legal or otherwise, to drive home this point. (*Id.*) OLG need only counter such circular and hyperbolic reasoning by demonstrating, as it has throughout, that the underlying premise is wrong.

Second Issue Presented

Second Question of Law (T.d. 123)

2. 573.4 Ft. IGLD (1985) Is Not a Proper Elevation for Locating the OHWM.

a. The Trial Court Properly Rejected the State's OHW as an Invalid Rule in Conflict With the State's Own Facts.

To establish error on the Second Question of Law, the State claims among other things that the 573.4 ft. IGLD (1985) elevation is essentially the State's "administrative interpretation" or "administrative construction" of the boundary of the "territory" and thus deserves deference.

(*See, e.g.,* State's Brief at p. 37.) This position lacks merit, has no foundation in the record and raises an insuperable bar, despite any other justification, to the State's favored elevation.

The State's determination that the OHWM should be drawn on Lake Erie shores at 573.4 ft. IGLD is not an "interpretation" of the term "shoreline." No dictionary of common usage points to 573.4 IGLD (1985) as the definition of "shoreline" or any other term at issue from R.C. 1506.10 or R.C. 1506.11. The State itself describes 573.4 ft. IGLD as a "determination" of the current OHWM on Ohio's Lake Erie shore. (*See* State's Response to Req. Admit No. 14.) Thus, 573.4 ft. IGLD relates at most to "ordinary high water," an interpretation itself and not one of the terms at issue.

573.4 ft IGLD (1985) is instead a "rule, regulation or standard" per R.C. 119.01. In its Answer, the State admits that it needed a process to set the OHWM, that Ohio law was "silent as to a preferred process by which to locate the natural location of the ordinary high water mark of Lake Erie," and that it decided to "rely upon federal law" to fill that void. (Td. 74, at ¶¶38, 39.) The State also views this "determination" as a purported standard of uniform applicability. (Td. 74, at ¶¶ 43, 44.) Courts find administrative decisions such as this, with uniform application to all impacted, to be a "rule" not an interpretation. *See Condee v. Lindley*, 12 Ohio St. 3d 90, 92 (1984) (informal policy was a rule because it was "uniformly applied"); *see also Livisay v. Ohio Bd. Of Dietetics*, 73 Ohio App. 3d 288, 290-91 (Franklin Cty. App. 1991) (position taken "in the guise of interpretation" but "designed to have general and uniform application" is a rule). Most importantly, the governing statute over ODNR's authority expressly provides that:

> "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 [R.C.]."

R.C. 1506.10. Thus, to the extent ODNR ordered the use of 573.4 ft. IGLD (1985) in the care, protection or enforcement of the State's rights in the territory, it was a "rule."

As a "rule," the State's 573.4 ft IGLD (1985) boundary was subject to, but did not comply with, the rule-making requirements in R.C. 119.03 *et seq*. *See Condee*, 12 Ohio St. 3d at 92 (affirming invalidity of informal policy set without compliance "with statutory rulemaking procedures"); *see also Livisay*, 73 Ohio App. 3d at 291 (affirming invalidity of rule for failure to comply with the rule-making requirements). There are simply no facts showing that the State engaged in any policy or rule-making procedures to set the boundary of the territory at that line. *See* R.C. 119.03 *et seq*. Thus, this rule is invalid, deserves no deference and was properly rejected by the Trial Court as a matter of law.

Aside from having no means here to overcome this legal impediment, the State already undermined its own summary judgment motion by itself raising genuine issues of material fact on this point. (*See* T.d. 166 at 22-24.) In front of the Trial Court, the State claimed the ordinary high water mark must be a "long term average," "routinely recalculated" and targeted to "even out periodic outlier cycles of lower and higher water years." (*Id.* at pp. 23-24.) The State's documents show that the 573.4 feet IGLD line is based on record data from 1982 to 1988, that it has only been adjusted once in 53 years and is not consistent with long term mean water levels of Lake Erie. (*Id.* at Appx. C and H, *discussed supra*.) Thus, the facts put in the record by the State do not simply raise issues of fact about, but indeed contradict the claim that this elevation is in any way, let alone per the State's view, "ordinary." In rejecting the State's proffered elevation based on the State's own facts (*see, e.g.,* T.d. 183 at 58-59), the Trial Court did not err but instead offered an independent, supporting basis for its already proper holding.

Third Issue Presented

Third Question of Law (T.d. 123)

3. The Trial Court Did Not Err in Declaring the Rights of the Parties in the "Territory."

a. & b. Because Ohio Recognizes a Private Owner's Right to Exclude Others from his or her Shore, the Trial Court Properly Held that Plaintiffs Can Exclude Others from their Lands Below the OHWM Down to the Water's Edge.

The State again engages in circular reasoning in support of its position on the third question of law and appears to forget that the purpose of this litigation was to determine the location of the public trust boundary. As before, OLG takes issue with the State's underlying assumption that the boundary of Ohio's Lake Erie public trust "territory" sits at the OHWM. Ohio law stands uniformly to the contrary.

The real issue on this Third Question, as even admitted by the State, is whether the public has the right to walk on the lands below the OHWM. (State's Brief at 43.) The answer is no. The Ohio Supreme Court rejected this precise position over one hundred years ago when it held in *Sloan* that there are no public rights to the shore. *See Sloan*, 34 Ohio St. at 516-17. It held then that the "proprietors of the shore" – the littoral property owners – have the complete authority to exclude or permit other persons to walk, land, fish etc. from the shore. *Id.* That decision has never been called into question and stands to this day as an affirmation of the exclusive rights of littoral property owners to shores abutting their land and as a complete rebuttal to the State's claim.

It is telling that the State, like Intervening Appellants in their opening brief, makes absolutely no reference to *Sloan* on this point. *Sloan* involved a dispute over rights in the shores of Lake Erie and examined restrictions in a deed to Cedar Point. Though acknowledging the public right of fishery in the waters of Lake Erie, and thus rejecting private restrictions in that deed against the right to fish from the water, it found no similar public right with respect to the shore, and thus upheld private restrictions against the use of the shores for fishing, landing and other activities. It concluded directly that the grantee "can land on or occupy the shore for no

other purpose." *Sloan*, 34 Ohio St. at 516 (emphasis added). The Court even noted that the grantee had trespassed against the grantor in using the shore for such prohibited purposes. *Sloan*, 34 Ohio St. at 517. The Supreme Court spent two full pages of its seven page opinion explaining that use of the shore is a matter of contract between private property owners, not a matter of public right like fishery. For the State to suggest otherwise that this is a question of "first impression," in the face of this direct precedent, is inappropriate and no basis for reversing the Trial Court.

Nor does *Sloan* stand alone on this point. In *Bodi*, a dispute over rights in the waters and lands of Sandusky Bay, the Ohio Supreme Court affirmed with modification a judgment for a hunting club claiming title to lands in the westerly end of the bay. *Bodi*, 1895 Ohio Misc. LEXIS 451, *20 (Ottawa Cty. App. July 1897) (emphasis added) (containing mandate from Supreme Court dated Oct. 5, 1897 modifying Supreme Court's prior decision on case found at 57 Ohio St. 226, 233 (1897)). That judgment "perpetually enjoined [defendants] from entering upon any of said lands, shores, marshes and islands therein, for any of the purposes aforesaid or any other purpose whatsoever, without the consent of the plaintiff" and "perpetually enjoined [defendants] from ever claiming or asserting any right to enter or be upon said lands, marshes, islands ... and shores[.]" Most importantly, the judgment decreed, and the Ohio Supreme Court affirmed, that "plaintiff's title in and to all of said lands, marshes, shores [and] islands ... is hereby forever quieted[.]" *Id.* Thus, *Bodi*, like *Sloan*, involved a dispute over the use of the shores and, like *Sloan*, affirmed the title and right of the shore owner to exclude others from his shores.

Other lower court cases are to the same effect, including the appellate decision affirmed in the State's oft-cited *State v. Cleveland-Pittsburgh* Ohio Supreme Court decision. *See Miller*

v. Foos, Case No. E-80-29, 1980 Ohio App. Lexis 12470, at *9 (Erie Cty. App. Oct. 10, 1980); *State v. Cleveland-Pittsburgh Ry. Co.*, 21 Ohio C.A. 1 (Cuyahoga Cty. App. 1914) (noting that proprietor's "immemorial right has always been to prevent the public coming upon his private property without consent, either from a highway or the water."), *aff'd*, 94 Ohio St. 61 (1916); *Cleveland v. Cleveland C.C. & St. L. Ry.*, 19 Ohio Dec. 372, 376, 8 Ohio N.P. (n.s.) 457 (Cuyahoga Common Pleas 1909) (noting no public access at properties abutting Lake Erie). Even the United States Supreme Court, in discussing littoral property adjoining the non-tidal waters of Lakes Ontario and Erie, has agreed that "there are no public rights in the shores of non-tidal waters." *Massachusetts v. New York*, 271 U.S. 65, 93 (1926).

Sloan, *Bodi* and numerous other decisions preclude the State from establishing any vested public right in the shore or any further reason for reversing the Trial Court.

c. The Trial Court did not Err in Generally Describing the Rights of the Parties.

The State also complains that the Trial Court declined the invitation to declare the rights of all parties in the "territory." The State's brief complaint lacks any citation to authority, ignores the positions taken by the Trial Court (*see* T.d. 185 at pp. 59-60 and 73-75) and is no basis for reversal. Simply put, the Trial Court agreed that littoral rights can, as the State argues here, be described generally, but concluded that the application of such rights to particular owners and parcels was best left to resolution of specific disputes (T.d. 185 at p. 60.)

B. Second Assignment of Error

The Trial Court Did Not Err in Finding that the Requirements For Summary Judgment in Favor of OLG Were Met.

Issue Presented

Nothing Required The Trial Court to Provide Notice before Considering Facts in Ruling as the State Itself Made No Motion for a Continuance But Instead Offered Facts in its Briefing.

The State claims the Trial Court erred in ruling on the motions for summary judgment without first giving "notice" and "opportunity" to the parties for them to "present proper, authenticated evidence for summary judgment." (State's Brief at p. 48.) Essentially, the State seeks a retroactive continuance provided for in Rule 56(f) giving them additional time to gather facts and respond to the motions. "A party who fails to seek such relief [a Rule 56(f) motion] does not preserve his right to challenge the adequacy of discovery upon appeal." *MacConnell v. Safeco Property*, 2006-Ohio-2910, P51 (Montgomery Cty. App. 2006). The State failed to seek this relief below and cannot do so now. *See id.*; *see also State Farm Mut. Auto. Ins. Co. v. King*, 2006-Ohio-336, P22-24 (Warren Cty. App. 2006) (court did not abuse discretion in granting summary judgment motion without allowing for the taking of additional depositions when neither party had sought such relief under Rule 56(f)). Furthermore, the State actually did provide authenticated evidence in support of not just its motion, but its opposition to plaintiffs' motions, and its replies below.[8] (*See* T.d. 166, 174 and 181, and the voluminous appendices thereto.) Thus, in failing to seek the relief, of which it had already and ironically availed itself, the State highlights no grounds for error.

V. CROSS-APPEAL

Though the Trial Court did not err in rejecting the OHWM as the boundary of the territory, or in rejecting a public right to walk the shore, it did err in two respects. First, the Trial Court erred in rejecting low water as a reference line long acknowledged in words and effect as the boundary of the public trust "territory," in favor of the water's edge. Other than a difference in the applicable period of reference -- instantaneous versus day-to-day -- these lines are practically the same and recognized as such by Ohio courts. Second, the Trial Court erred in

[8] Moreover, the parties did not, as the State claims, stipulate with regard to class certification that "there were no facts in dispute." (*Compare* State's Brief at p. 45 *with* T.d. 122.)

trying to universally reform the deeds of littoral property without accounting for long-settled understandings and statutory issues. On these issues, as further explained below, the Trial Court should be reversed.

A. First Cross-Assignment of Error

The Trial Court Erred in Finding that the Boundary of the Territory is Not the Low Water Mark (Td. 183, p. 69)

Issue Presented For Cross-Appeal

Because Both the Common Meaning, and Common Law Interpretations, of the Shoreline Set it at Low Water, the Trial Court Erred.

In setting the boundary of the "territory," which the General Assembly describes as the "natural shoreline," the Trial Court rejected the low water mark understood through common usage and from common law and instead set the boundary at the "water's edge." (Td. 183 at p. 69.) The "water's edge" is a term little used in Ohio common law to describe the shoreline. It is, however, synonymous with low water. Thus, the Trial Court should have embraced low water as the equivalent of its choice, and as representative of both common usage and Ohio common law. By rejecting the low water mark, the Trial Court turned an otherwise subtle distinction between terms into an unnecessary, material error.

As noted, common usage is the first start for statutory interpretation. *See State ex rel. Celebrezze*, 32 Ohio St. 3d at 27 (holding "any item left undefined by statute is to be accorded its common, everyday meaning" and relying on definition of "balance" from Black's Law Dictionary); *see also Eastman*, 131 Ohio St. at 5-7; *cf. DLZ Corp*, 102 Ohio App. 3d at 780 ("we initially look to common dictionary definitions to assist in determining the meaning"). In the absence of a common definition, technical usage -- both "administrative construction" and "common law" -- guides interpretation. *See* R.C. §§ 1.49(D) (common law) and 1.49(F)

(administrative construction). Both sources indicate here that the "shoreline" in R.C. 1506.10 and 1506.11 means the boundary of the "territory" is the low water mark.

1. Common Usage Sets the "Shoreline" at the Low Water Mark.

For common usage, Merriam Webster online defines the "shoreline" as "the line where a body of water and the shore meet" (emphasis in original). In 1916, the year before the language in 1506.10 was first adopted by the General Assembly, Webster's New International Dictionary similarly defined the "shoreline" as the "line of contact of a body of water with the shore." Turning thus to the "shore," Black's Law Dictionary, Webster's 1916 version and the 1878 American Dictionary, authored by Noah Webster, all define the "shore" (described synonymously, and respectively, as "shore," "foreshore" and "sea-shore") as the land between low and high water marks.[9] Even the State agrees with this definition. (See T.d. 174 at p. 8, n.2.) Consequently, 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.

2. There Is No Current Administrative Construction for the "Natural Shoreline."

As noted, ODNR has abandoned the OHWM and no longer has a position with regard to the location of the "natural shoreline." (*See supra*, Section I.) Although the State, through the Attorney General, continues to dispute the location of the boundary, and the deeds of littoral property owners, he is not vested with statutory authority to determine that boundary. ODNR alone possesses that authority. *See* R.C. 1506.10. Thus, there simply is no current administrative construction of the "natural shoreline." Accordingly, the Attorney General's

[9] These dictionary definitions are consistent with definitions adopted by Ohio courts and administrative agencies for the same. *See Busch v. Wilgus*, 1922 Ohio Misc. LEXIS 272 at *14, 24 Ohio N.P. (n.s.) 209 at *217 (Logan Cty. Common Pleas, 1922) (noting the "term 'shore' includes and designates the land lying between the high and low water mark"); *see also* O.A.C. 1501-6-10(U) *and* O.A.C. 1501-6-10(T) discussed *supra*.

position on the boundary in this appeal -- the abandoned OHWM -- has no added weight here as an administrative construction.

3. Ohio Common Law Puts the "Natural Shoreline" at the Low Water Mark

Interpreting the "natural shoreline" to be the low water mark, as common usage dictates, fits perfectly with Ohio common law. *See Nelson v. Carter*, 1994 Ohio App. LEXIS 4549, *6 (Franklin Cty. App., 1994) (affirming ruling by trial court, in granting summary judgment, "that it was completely without authority to issue a declaration of plantiff's rights . . . which conflicted with the interpretation" of a statute as expressed by the Supreme Court).

Reading the exact same language at issue here, now used in R.C. § 1506.10 but then in R.C. § 123.03,[10] the Ohio Supreme Court interpreted the boundary between the "territory" and littoral property owners as the "low water line of Lake Erie." *Mitchell v. Cleveland Elec. Ill. Co.*, 30 Ohio St. 3d 92, 94 (1987) (citing to R.C. § 123.03, now R.C. § 1506.10). A court of appeals, drawing on *Mitchell*, and itself interpreting R.C. § 123.03, similarly noted that the littoral boundary extends to the "shoreline," thus including the "beach" and not the water. *Wheeler v. City of Port Clinton*, 1988 Ohio App. LEXIS 3702, *3-4 (Ottawa Cty. App. Sept. 16, 1988). By including the beach as part of the littoral property, the court implicitly acknowledged the low water mark as the boundary. *Id.* at *3.

The Trial Court attempted to distinguish both *Mitchell* and *Wheeler* as cases not actually "holding" that the boundary of the "territory" was the low water mark.[11] (*See* Td. 183 at p. 51, 52.) Both cases, however, involved claims of premises liability against municipalities for

[10] Former R.C. § 123.03 was not substantively amended with regard to describing the "territory" when it became R.C. § 1506.10. The only substantive change concerned the replacement of DAS with ODNR as the overseer of the "territory." (*See* Td. 165, Exhibit 6 (copies of the statutes showing the revisions as signed by Governor Celeste in 1988).)

[11] The fact that the parties in *Mitchell* were in agreement (*see* Td. 183 at p. 51) comes as no surprise and rather confirms that the people of Ohio have long understood, even apart from dictionary definitions, that the boundary of Lake Erie is the low water mark.

injuries occurring in Lake Erie. *See e.g. Mitchell*, 30 Ohio St. 3d at 93. Both courts had to make a holding on the boundary of the municipalities' premises before they could analyze the issue of liability. *See e.g. Mitchell*, 30 Ohio St. 3d at 95 ("we must decline to extend Avon Lake's duty to the decedents beyond the corporate limits or control of the municipality"). In so doing, each held, either explicitly or practically, that the boundary fell at the low water mark. Thus, the Trial Court wrongly suggests that neither case had a reason to, or seriously considered, the boundary prescribed in the statute.

Moreover, these statutory interpretations in *Mitchell* and *Wheeler* hit the same line as the practical, common law interpretations decided nearly a century earlier that private persons own the land down to the low water mark. *See, e.g. Sloan*, 34 Ohio St. at 517-17; *Bodi*, 1895 Ohio Misc. LEXIS 451, *20. Both of those cases affirmed private ownership of the shores of Lake Erie. Thus, both pre and post-statute, courts in Ohio agree that the boundary of the public trust "territory" rests at low water mark.

4. The Trial Court's Line - Water's Edge - Comports with Low Water Mark.

Though the Trial Court attempts to make a distinction between low water and the water's edge, it is a distinction without significant difference. For over a century, Ohio common law has equated low water mark with the "water's edge," "margin" or "edge of the water." *See Lembeck v. Nye*, 47 Ohio St. 336, 349-51 and syllabus ¶ 2(b) (1890) (deciding extent of title in deed granting land to the "margin" of a non-navigable lake). The contemporaneous, Ohio precedent on the boundary of the "territory" -- *Sloan v. Biemiller* -- set the boundary at "the line at which the water usually stands when free from disturbing causes." *Sloan*, 34 Ohio St. 492 at Syll. ¶4. Legally, *Sloan* described a line set at the edge of the water when undisturbed, similar to the Trial Court's ruling. Factually, however, that line traced the lower edge of the shore, otherwise

known as the low water mark, an essential fact for the Court to affirm private ownership, and exclusive control, of the shores of Cedar Point. Thus, *Sloan* did in practice what *Lembeck* did explicitly -- equating the water's edge with the low water mark. The Trial Court should have recognized the two lines as one, but erred in finding otherwise.

The main difference between the holdings of *Sloan*, the Trial Court and the State lies in their temporal frame of reference. As explained in the Statement of Facts *supra*, the OHWM in tidal waters reflects tidal variations over an 18.6 year period. The OHWM previously used by ODNR relied on an 8 year period of data from 1982-1988. (*See supra*, Section II, p. 7.) *Sloan* did not adopt an "ordinary" line in that sense, *i.e.*, one fixed for an extended period and based on an average drawn from years of prior data. Nor did it adopt an instantaneous line like that described by the Trial Court. Instead, *Sloan* adopted a line based on day-to-day, practical observations, one that discounts the short term effects of storms, floods and other similar disturbing causes, but then recognizes the prevailing, day-to-day, location of the shoreline. Fixed lines drawn from years of prior data, while similarly discounting disturbing causes, give no effect to the practical, day-to-day location of the water and thus no guidance to the public or littoral landowners in their unavoidably practical exercise of their separate rights to the actual water and the actual shore. An instantaneous line, though giving guidance, makes no provision for disturbing causes, and thus runs afoul of the long-term/short-term dichotomy described in the doctrines of erosion, avulsion, reliction and submergence. The Trial Court should have recognized the impact of these differences and drawn its line accordingly.

Both common and technical usages dictate that the boundary of the "territory" sits at the low water mark. In setting the boundary at the "water's edge" and simultaneously rejecting the low water mark, the Trial Court turned a fine line into an unacceptable and unsupportable gap.

For all these reasons, this Court should reverse the Trial Court's judgment to the extent it rejects a boundary at the day-to-day low water mark.

B. Second Cross-Assignment of Error

The Trial Court Erred In Reforming All Littoral Property Deeds to the Water's Edge. (Td. 183, p. 74)

Issue Presented for Cross-Appeal

Reforming Deeds to the "Water's Edge as It Existed When the Deed was Filed" Would Violate Settled Property Rights Under both Ohio Supreme Court Decisions and Federal Law and Would Conflict with the Language of Section 1506.11

None of the parties requested the Trial Court to reform littoral property deeds. In choosing to do so, the Trial Court overturned long-settled understandings of ownership drawn from Ohio common law and the federal Swamp Land Act of 1850. It also contradicts the description of the "territory" set out in R.C. 1506.11, which includes lands which were "artificially filled" at some point in the past. Thus, in uniformly reforming the deeds, the Trial Court exceeded its authority, erred in its reasoning, and should be reversed.

At a minimum, littoral property owners hold title to the water's edge as found by the Trial Court. However, certain littoral property owners, including many on what is viewed now as dry land in Sandusky and Cleveland, hold title to land that was submerged when given. As noted above, the Ohio Supreme Court has expressly affirmed the title of littoral landowners in truly submerged lands in East Harbor. *See Hogg*, 41 Ohio St. 81. It later acknowledged that the City of Sandusky had historically conveyed title to "water lots" beyond the shoreline and refused to challenge that practice. *See, e.g. State ex rel. Crabbe v. The Sandusky & Mansfield & Newark RR Co.*, 111 Ohio St. 512, 518-20 (1924); *cf. Cleveland v. Cleveland C.C. & St. Ry.*, 19 Ohio Dec. at 376 (1909) ("lots along Lake Street butted in the lake, so that the only place that access to the lake was had was at the confluence of the Cuyahoga river with the lake, along this sandy

strip of land called Bath street"). The Trial Court should have followed the guidance of the Ohio Supreme Court in *State ex rel. Crabbe* "that a situation thus existing for substantially 70 years should not be disturbed[.]" By holding otherwise, and disturbing the settled property rights of many, the Trial Court erred.

Other issues further complicate the Trial Court's effort to draw a uniform border. First, the Trial Court itself questioned, alluding to the federal Swamp Lands Act of 1850, whether "some of the land along the shore of Lake Erie is swampland which may be owned by individuals or other persons, free of the restrictions of the public trust." (Td. 183 at p. 60 n. 104.) Next, R.C. 1506.11 expressly includes lands that were "artificially filled" in the "territory." By ordering that all deeds be reformed to the water's edge "at the time the deed was filed," the Trial Court's order fails to take into account the impact of prior artificial fill. Finally, the Trial Court itself held, on several occasions, that certain questions raised by the parties were incapable of resolution on a class-wide basis. The boundary of individual deeds was one of those questions. (Td. 183 at pp. 60, n. 104, 69 and 71-74.)

Thus, for all these reasons, the Trial Court's order of uniform reformation constituted error and should be reversed.

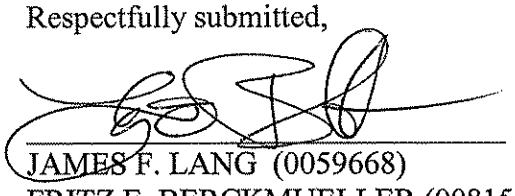
VI. CONCLUSION

The State asks this Court to reverse the established course of Ohio law and divest littoral property owners of their shores, but sets out no valid reason for doing so. Indeed, the State's critical, starting proposition - that the boundary of the "territory" is determined by federal, not state, law - rests on a holding expressly reversed in the cited case. To the contrary, it is Ohio, not federal, law that sets the boundary of Ohio's public trust "territory" in Lake Erie. Ohio has set that boundary at the low water mark, or the line where the water rests when undisturbed.

These are the holdings of the Ohio Supreme Court, made in different centuries, but reflecting the same point - that littoral property owners on Lake Erie own the land from the OHWM down to the low water mark, otherwise known as the "shore." They, like all other private landowners across Ohio, have the right to exclude the public, both by virtue of their title and as a matter of express Supreme Court precedent. Public access can be had at the many public beaches and miles of public shores. It does not require, as the State urges, resuscitation of reversed holdings, rejection of established law or disturbance of long-settled private expectations. For all these reasons, described above, the Court should deny the State's assignments of error, accept OLG's and modify the Trial Court's opinion appropriately (1) to reflect a boundary at low water, synonymous with water's edge and consistent with Ohio law and (2) to recognize that, under circumstances such as those discussed above, littoral property owners may own property beyond the water's edge, which requires flexibility in deed interpretation and should be reserved for future, individualized proceedings.

Dated: May 28, 2008

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing **OHIO LAKEFRONT GROUP'S APPELLEE AND CROSS-APPELLANT BRIEF** was served, via e-mail and regular U.S. Mail, upon the following, this 28th day of May, 2008:

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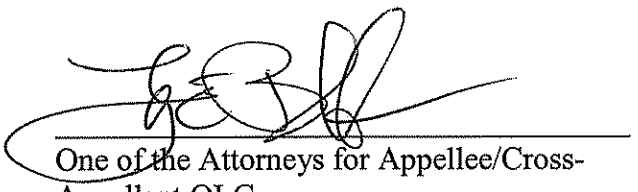

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