

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

STATE OF OHIO EX REL.)	CASE NO. 04CV001080
ROBERT MERRILL, TRUSTEE, <i>et al.</i> ,)	
)	JUDGE EUGENE A. LUCCI
Plaintiffs-Relators,)	
)	
vs.)	
)	PLAINTIFF OLG'S BRIEF
STATE OF OHIO, DEPARTMENT OF)	REGARDING CLASS ISSUES
NATURAL RESOURCES, <i>et al.</i> ,)	
)	
Defendants-Respondents.)	

The Ohio Lakefront Group, Inc. ("OLG") submits the following comments regarding class issues as directed by the Court's July 26, 2012 Order:

1) Does a certified class exist and is it maintained at this stage of the proceedings as to Count One of the First Amended Complaint?

Yes. The Court certified a class in 2006 for the purpose of addressing Count I of the First Amended Complaint, as requested by the Joint Stipulation of the parties.¹ Among other things, the State stipulated, and the Court's Order found, that OLG and the other class representatives would adequately and fairly represent the class and that their claims were typical of the claims of the class.

2) If it no longer exists or is no longer maintained, when did it cease to exist or be maintained?

Not applicable.

3) If it still exists and is maintained, when will it cease to exist or be maintained?

The class certified for the purpose of addressing Count I of the First Amended Complaint exists and is maintained at least until such time as the State has provided relief to the class as directed by this Court.

To the extent Count II of the First Amended Complaint seeks a declaration that the State's assertion of ownership up to the Ordinary High Water Mark constitutes an

¹ Order Certifying Class Action on Count One of the First Amended Complaint in Case No. 04-CV-001080 (June 9, 2006); Notice of Joint Stipulation to Class Certification on Count One of the First Amended Complaint in Case No. 04-CV-001080 (June 8, 2006).

unconstitutional temporary taking against all owners of littoral property bordering Lake Erie, the class that would be certified for resolution of that issue would have the exact same members as the class currently certified for Count I, *i.e.* all littoral property owners bordering Lake Erie. Thus, the class certified for Count I could be maintained through the conclusion of Count II of the First Amended Complaint. The relief sought in Count II does not change the analysis, as a writ of mandamus is in the nature of an injunction, albeit mandatory rather than prohibitory, and thus subject to certification on a class-wide basis under Rule 23(B)(2).

4) Regardless of the answers to the foregoing, will a certified class be sought to be maintained as to Counts Two and/or Three of the First Amended Complaint?

If the Court decides not to continue with the existing class, then OLG and the other class representatives intend to seek re-certification of the same class for purposes of Count II of the First Amended Complaint, but not for Count III. As noted above, Count II is the mandamus remedy for the State's unconstitutional temporary taking of private property. Count III was pled in the alternative as the remedy if the Court had determined that the State was entitled to take Plaintiffs' private property to Ordinary High Water Mark. Because the Court determined that the State was not so entitled, Count III has been rendered moot.

5) If a class is sought as to Counts Two and/or Three of the First Amended Complaint, how will it be certified, potential members notified, maintained, and/or members subclassified, and the issues common to the class and individual to the members adjudicated?

Again, the Court could continue relying on the existing class for resolution of the above noted portion of Count II of the First Amended Complaint, as both classes would consist of the same members and focus on relief, either declaratory or injunctive, that fits within the scope of Rule 23(B)(2). The State could either stipulate to the continuation of the class for resolution of Count II, or present briefs explaining its opposition on the law. OLG does not envision any discovery being necessary to resolve certification again, as it here depends on the same factual conditions – numerosity, typicality, commonality and adequacy of representation – already stipulated to with regard to Count I.

The Court's June 14, 2012 Case Management Order set an October 19, 2012 deadline for Plaintiffs to move for class certification on Count II of the First Amended Complaint.² If the

² Class briefing should not affect resolution of other issues pending before the Court, including the pending motion for fees.

Court does not continue the existing class, but instead requires new briefing, Plaintiffs suggest that the schedule be as follows:

- Plaintiffs' motions for class certification due September 18, 2012.
- Defendants Oppositions due October 18, 2012.
- Plaintiffs' replies due November 19, 2012.

Plaintiffs do not believe that sub-classes will be necessary.

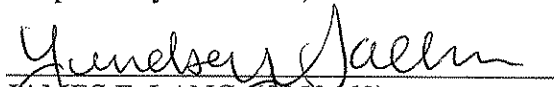
Regardless of whether the Court continues with the existing class, or has Plaintiffs file new motions, Plaintiffs recommend that class notification occur for Count II in the same manner as occurred in 2006 for purposes of the Count I class.

The question presented in Count II of the First Amended Complaint is whether the State's claim of public trust ownership to Ordinary High Water Mark, whether made through general public statements, in specific lease negotiations or by other means in between, took Plaintiffs' private property in violation of Article I, Section 19 of the Ohio Constitution and the Fifth Amendment of the U.S. Constitution. This question can be adjudicated on a class-wide basis. If the Court determines for the class that the State committed a constitutional violation, then the Court would issue a writ of mandamus compelling the State to commence proceedings for each affected property owner to determine the amount of just compensation to be awarded.

6) When and how, procedurally, will this occur?

See response to #5, above.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing **BRIEF OF PLAINTIFF OLG REGARDING CLASS ISSUES** was served, via e-mail and regular U.S. Mail, upon the following, this 2nd day of August, 2012:

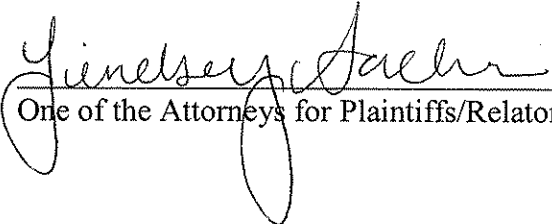
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