

**IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO**

STATE OF OHIO EX REL.,)	
ROBERT MERRILL, TRUSTEE, et al.,)	Case No. 04CV001080
)	
Plaintiffs-Relators,)	Judge Eugene A. Lucci
)	
vs.)	
)	
STATE OF OHIO, DEPARTMENT)	<u>OHIO LAKEFRONT GROUP, INC.’S</u>
OF NATURAL RESOURCES, et al.,)	<u>STATEMENT OF REMAINING</u>
)	<u>CLAIMS AND ISSUES</u>
Defendants-Respondents.)	

Plaintiff Ohio Lakefront Group, Inc. (“Plaintiff”), on behalf of its members and other class representatives, and pursuant to the Court’s October 14, 2011 Order, submits the following description of claims and issues which remain pending and require determination or resolution by this Court. As the Court noted in its December 11, 2007 Order regarding Summary Judgment:

“[T]here remain several important issues to be resolved by this court. Among those issue are questions regarding whether any of the plaintiffs-relators has been unconstitutionally deprived of property without due process of law and without reasonable compensation. If any of the plaintiffs have been unlawfully deprived of their property, then the court must decide what the reasonable value of that property deprivation was. In the process of making those findings, the court may also be called upon to make specific findings with regard to the nature and extent of the littoral rights of the named plaintiffs-relators. All of these issues will depend upon the validity of the court’s rulings in the class action portion of this case.”

With those principles in mind, and the more recent order of the Court, Plaintiff submits the following:

1. Plaintiff's Count I, entitled "Declaratory Judgment," remains pending in part and requires resolution by the Court. Plaintiff requests that the Court issue a judgment making the declarations as set out in Count I, namely:

- a. ODNR lacks authority to compel Plaintiffs, or any one of them, to lease back property already owned by them as specified in their deeds, including without limitation lands lost due to avulsion and thus subject to reclamation by the owner;
- b. 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.

As provided in paragraph 33 of Plaintiffs' First Amended Complaint, the Court should grant further injunctive relief as necessary to carry out its judgment. This claim presents pure questions of law. Plaintiff does not believe there is a dispute as to these declarations. Plaintiff will not need discovery or a hearing to resolve this claim.

2. Plaintiff's Count II, entitled "Mandamus/Inverse Takings Compensation," involves issues of temporary takings and seeks an order requiring ODNR to commence appropriation proceedings. The claim remains pending and requires resolution by this Court. It presents mixed issues of fact and law. The parties do not agree on Plaintiff's entitlement to relief. Plaintiff will need discovery and a hearing to proceed to resolution of this claim.

3. To resolve Count II, Plaintiff also requires a more detailed, legal description of the natural shoreline from this Court. Plaintiff believes the following description is consistent with the ruling of the Supreme Court and its partial affirmance of the holding of the Court of Appeals.

"The natural shoreline is a moving boundary located at the line where the water would be on any given day, between the ordinary high and low water marks, except for natural disturbances such as storm surges, wind tides, seiches and harbor resonance. The natural shoreline is not an "ordinary" water line or a fixed line of elevation. The line moves throughout the year based on seasonal variations in lake levels. The line also moves based on long term changes to the land caused by erosion and accretion and long term changes to water levels caused by submergence and reliction. In other words, the natural shoreline is the line between what is usually non-submerged land and what is usually submerged land on any given day."

This issue involves pure questions of law. Plaintiff does not know whether the State is in agreement. Plaintiff does not require any discovery or evidentiary hearings on this issue.

4. To resolve Count II, Plaintiff also requires a statement regarding the presumptions that will apply in each appropriation proceeding with regard to determinations of property boundaries, including the natural shoreline. Plaintiff believes the following description is consistent with the ruling of the Supreme Court.

“Property descriptions in deeds of littoral owners are presumptively valid, including without limitation metes and bounds descriptions. The presumption that deeds are valid is only the first step in determining the location of the natural shoreline for a particular property, which must also include a presumption that any shore recession was caused by avulsion. When land abutting Lake Erie is stripped away by avulsion, the natural shoreline remains fixed at its last location prior to the avulsion and the littoral owner may reclaim all land so lost between the water’s edge and the natural shoreline. Thus, the presence of fill also is not determinative of the natural shoreline because fill placed landward of the natural shoreline is privately owned and does not affect the natural shoreline. As a result, ODNR’s use of aerial photographs to determine the natural shoreline at a given point in time lacks any sound basis because it fails to account for avulsive losses.”

This issue too involves pure questions of law. Plaintiff does not know whether the State is in agreement, although ODNR stated in its Motion for Summary Judgment filed in this proceeding that, when past avulsion is at issue, “the State of Ohio, through its Department of Natural Resources, resolves any doubt on these issues in favor of the applicant – the upland owner.” Mot. SJ, p. 31. Plaintiff does not require any discovery or evidentiary hearings on this issue.

5. To resolve Count II, Plaintiff also requires a statement regarding the right of the public in privately-held, non-submerged lands. Plaintiff believes the following description is consistent with the ruling of the Supreme Court.

“There are no public trust rights on privately held non-submerged land, including the right to walk.”

This issue too involves pure questions of law. Plaintiff does not know whether the State is in agreement. Plaintiff does not require any discovery or evidentiary hearings on this issue.

6. Counterclaims filed by the State, ODNR and NWF/OEC sought declaratory judgments related to the Ordinary High Water Mark. All were resolved contrary to the State, ODNR and NWF/OEC. There are no remaining issues with regard to these counterclaims.

7. On October 14, 2011, Plaintiff filed a Renewed and Supplemented Motion for Fees. That Motion remains pending and requires resolution by the Court. Plaintiff previously

agreed that the schedule for the State's response to this Motion would be an issue for determination during the December 2, 2011 case management conference.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing OHIO LAKEFRONT GROUP, INC.'S STATEMENT OF REMAINING CLAIMS AND ISSUES was served, via email and regular U.S. mail, upon the following, this 14th day of November, 2011:

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