



JAMES F. LANG (0059668)  
Counsel of Record  
FRITZ E. BERCKMUELLER (0081530)  
Calfee, Halter & Griswold LLP  
1400 KeyBank Center  
800 Superior Avenue  
Cleveland, OH 44114  
216-622-8671  
216-241-0816 (fax)  
jlang@calfee.com  
fberckmueller@calfee.com

*Attorneys for Plaintiffs-Appellees*

HOMER S. TAFT (0025112)  
20220 Center Ridge Road, Suite 300  
P.O. Box 16216  
Rocky River, Ohio 44116-0216  
440-333-1333  
440-409-0286 (fax)

*Intervening Plaintiff-Appellee and Cross-Appellant, Pro Se*

L. SCOT DUNCAN (0075158)  
1530 Willow Drive  
Sandusky, Ohio 44870  
419-627-2945  
419-625-2904 (fax)

*Intervening Plaintiff-Appellee, Pro Se, and Counsel for Intervening Plaintiff-Appellee, Darla J. Duncan*

RICHARD CORDRAY (0038034)  
Attorney General of Ohio  
BENJAMIN C. MIZER (0083089)  
Solicitor General  
STEPHEN P. CARNEY (0063460)  
Deputy Solicitor  
CYNTHIA K. FRAZZINI (0066398)  
JOHN P. BARTLEY (0039190)  
Assistant Attorneys General  
30 East Broad Street, 17th Floor  
Columbus, Ohio 43215  
614-466-8980  
614-466-5087 (fax)

*Attorneys for Defendants-Appellant and Cross-Appellee State of Ohio*

KATHLEEN M. TRAFFORD (0021753)  
PORTER WRIGHT MORRIS & ARTHUR  
41 S. High St.  
Columbus, Ohio 43215  
614-227-1915  
614-227-2100 (fax)  
ktrafford@porterwright.com

*Special Counsel for Defendant-Appellants, State of Ohio, Department of Natural Resources, and Sean Logan, Director*

NEIL S. KAGAN  
National Wildlife Federation  
Great Lakes Natural Resource Center  
213 West Liberty Street, Suite 200  
Ann Arbor, Michigan 48104  
734-887-7106  
734-887-7199 (fax)

PETER A. PRECARIO (0027080)  
326 South High Street Annex, Suite 100  
Columbus, Ohio 43215  
614-224-7883  
614-224-4510 (fax)

*Attorneys for Intervening Defendants-Appellants and Cross-Appellees, National Wildlife Federation and Ohio Environmental Council*

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## I. INTRODUCTION

The Ohio Department of Natural Resources (“ODNR”) declared that Robert Merrill and thousands of others who own real property abutting Lake Erie (“Class Plaintiffs”) do not own all of their deeded property and would have to lease it from ODNR. This was an astounding claim to all littoral<sup>1</sup> property owners, whose deeds extend at least to water’s edge or to Lake Erie at low water in a chain of title dating back in many cases to before statehood. ODNR claimed that, under federal law as decreed in *Shively v. Bowlby* (1894), 152 U.S. 1, the state of Ohio took title as trustee to Lake Erie and all other navigable bodies of water below the Ordinary High Water Mark (“OHWM”) upon obtaining statehood in 1803. Based on this newly-discovered theory, ODNR arrogantly claimed that the Class Plaintiffs’ deeds simply did not matter and that Ohio law simply did not matter. What mattered, according to ONDR, was its belief that Ohio took title in 1803 of all lands below OHWM,<sup>2</sup> which ODNR then proceeded to define as where a line of elevation of 573.4 feet IGLD (1985) intersects with the shore. ODNR claimed title to these lands regardless of whether they were presently underlying the waters of Lake Erie.

The Class Plaintiffs, many of whom banded together to form the Ohio Lakefront Group, believed that their deeds and Ohio common law and statutory law did matter. As this Court recently observed, property rights in Ohio are “derived fundamentally from a higher authority and natural law.” *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 362, 2006-Ohio-3799, ¶ 35.

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<sup>1</sup> “Littoral” relates to property bordering an ocean, sea or lake, while “riparian” relates to property bordering a river or stream. (Appx. 11.)

<sup>2</sup> ODNR went so far as to file what it improperly styled as a “counterclaim” against the United States and the U.S. Army Corps of Engineers on the cockeyed theory that, if the Class Plaintiffs were challenging this federal grant, the original grantor should be a party. (Appx. 75-83.) Following removal to federal court under 28 U.S.C. § 1442 and nearly a year of delay and added costs, Judge Oliver threw out these claims and dismissed the United States and U.S. Army Corps as parties. *State ex rel. Merrill v. State of Ohio* (N.D. Ohio Feb. 14, 2006), Case No. 1:05-cv-00818-SO, slip op. at 1-2, 10.

They are “so sacred that they could not be entrusted lightly to ‘the uncertain virtue of those who govern.’” *Id.* (citations omitted). “The rights related to property, *i.e.*, to acquire, use, enjoy, and dispose of property, . . . are among the most revered in our law and traditions. Indeed, property rights are integral aspects of our theory of democracy and notions of liberty.” *Id.* ¶ 34 (internal citation omitted). The power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundles of property rights. See *Eastwood Mall, Inc. v. Slanco*, 68 Ohio St. 3d 221, 223 (1994). As discussed below, the decisions of Ohio courts governing navigable waters, the soil beneath, and the adjacent shore have consistently affirmed the sacred right of property owners to make productive use of all land to the greatest extent possible.

Ohio’s courts from the early days of statehood to the present have always understood that Ohio is not handcuffed by federal law but, quite to the contrary, has a right to define ownership of its shorelands and navigable lake and river beds in a manner that protects and promotes private property rights, while also permitting public use of navigable waters. Ohio’s courts and legislature have never claimed public ownership to OHWM of *any* of the lands adjoining Lake Erie and the state’s many other navigable bodies of water. Promoting efficient commerce has always been paramount, which meant ensuring private ownership and use of all lands not submerged by the waters of Lake Erie (and some lands that were), while ensuring that Ohio’s goods could get to market across Ohio’s navigable waters. Instead of using OHWM as a boundary for Lake Erie, Ohio has used various terms to describe the same practical, easily-identifiable line that separates the water from the land: the “natural shoreline” or “the line at which the water usually stands when free from disturbing causes” or “the line where land and water meet” or simply “the water’s edge.” Indeed, because the State’s public trust interest in Lake Erie is directly tied to and dependent upon navigation over its waters, Ohio’s agencies have

on occasion used the line of effective navigation, which is called Low Water Datum, as the boundary of Lake Erie.

This lawsuit is the direct result of the last forty years of massive regulatory expansion of government and the government's attempts to fund that expansion. As part of ODNR's implementation of its coastal management programs in the late 1990s, it realized that one of the easiest ways to regulate Lake Erie's shores and beaches, and to receive lease payments from littoral property owners, was to take ownership of Lake Erie's beaches and then lease them back to their prior owners under state-imposed conditions. ODNR asked the Attorney General in 1993 whether it could do this, and the Attorney General definitively said no. *See* 1993 Op. Att'y Gen. No. 93-025, 1993 WL 465002 (1993). Undeterred, ODNR went ahead several years later and claimed title to these lands, but it later determined during the summer of 2007 that its reliance upon *Shively v. Bowlby* was misguided. ODNR did not seek a stay of either court decision below, and has used the water's edge as the public trust boundary since being told to do so by the trial court in late 2007. Although ODNR has not appealed from the trial court's or appeals court's determinations that OHWM is not the boundary of the public trust, the Attorney General has done so. This in itself has led to needless confusion because, although the State holds public lands in trust, the statutory agent representing and enforcing the State's trust interest is ODNR, not the Attorney General.

It is time to put an end to the confusion created by ODNR's short-lived policy and the Attorney General's refusal to accept the Eleventh District Court of Appeals' reaffirmation of nearly 200 years of Ohio common law and statutory law. It is not this Court's role to radically rewrite that law. Class Plaintiffs respectfully ask that this Court affirm the Eleventh District's Opinion in all respects.

## II. STATEMENT OF THE FACTS

The waters of Lake Erie are rarely so high as to reach the OHWM. The trial court record reflects that the usual water's edge of Lake Erie, as measured in terms of the monthly mean elevation since 1860, has reached the extreme height of the OHWM only briefly in the early 1950s, early 1970s, mid-1980s and late 1990s. (Class Supp. 91-94.)<sup>3</sup> The long-term (since 1960) mean monthly elevation of Lake Erie is 571.29 feet IGLD (1985) (Class Supp. 13),<sup>4</sup> so a strip of dry land almost always exists between the natural shoreline of Lake Erie and the OHWM. ODNR's actions resulted in this strip of dry land being claimed as public trust property for the first time in Ohio's history. Although the Attorney General now claims this strip of land has been part of the "submerged lands" of Lake Erie since 1803, there is no reason to believe that this land was *ever* submerged prior to June 1952. (Class Supp. 91-94.) Statements that the OHWM represents the "usual reach of high water established over time"<sup>5</sup> or "lands that are often physically submerged"<sup>6</sup> or "the point at which the water usually touches the land"<sup>7</sup> find no support in the record below.

Littoral property owners have owned this strip of land and put it to economically valuable uses for all of Ohio's recorded history, including pre-statehood. Indeed, ODNR's use of the OHWM was a radical departure from established precedent, which had consistently limited the State's public trust interest in the waters of Lake Erie to, not surprisingly, *the waters of Lake*

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<sup>3</sup> References to Appellant's Supplement are to "Supp. \_\_\_\_" and to Class Appellees' Supplement are to "Class Supp. \_\_\_\_." References to Class Plaintiffs' Appendix are to "Class Appx. \_\_\_\_."

<sup>4</sup> See also Class Supp. 94 (showing 1850-2002 mean as 571.28 feet). Two vertical feet can equate to many horizontal feet of shore, particularly in the relatively flat western basin.

<sup>5</sup> Merit Brief of Defendant-Appellant-Cross-Appellee State of Ohio ("State Br.") at p. 8.

<sup>6</sup> *Id.* at p. 21.

<sup>7</sup> *Id.* at p. 23.

*Erie.* ODNR's adoption of the OHWM represented the first time in Ohio history that the public trust was extended beyond the water's edge up onto what littoral property owners dating back to Moses Cleaveland considered to be privately held land.

Littoral landowners viewed this as an attack on their established and previously unchallenged property rights. They commenced this legal action in 2004 to force ODNR off their deeded properties and back to the water.<sup>8</sup> On June 15, 2006, the trial court certified a class of "all persons, as defined in R.C. 1506.01(D), excepting the State of Ohio and any state agency as defined in R.C. 1.60, who are owners of littoral property bordering Lake Erie (including Sandusky Bay and other estuaries previously determined to be a part of Lake Erie under Ohio law) within the territorial boundaries of the State of Ohio." (Appx. 118.) Pursuant to a stipulation of the parties, the trial court found that the following questions of law were common to the class:

- (1) 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 and now artificially filled" in R.C. 1506.11, and "natural shoreline" in RC. 1506.10 and 1506.11.
- (2) If the furthest landward 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.
- (3) What are the respective rights and responsibilities of the class members, the State of Ohio, and the people of the State in the "territory."

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<sup>8</sup> The class representatives' deeds generally showing the water's edge or shoreline as their deeded boundary with Lake Erie are part of the record as attachments to the First Amended Complaint. *See* Td. 33.

(Appx. 118-19; *See* Appx. 121-24 for R.C. §§ 1506.10, .11.) The issue presented was the “furthest landward boundary” of the public trust territory to leave open the option for one or more class members to argue in the future, based on the specific characteristics of their property and deed (such as a metes and bounds property description), that the public trust was less extensive as applied to their property.<sup>9</sup>

ODNR relented in the summer of 2007 by recognizing the property owner’s deeds and later by not appealing from the trial court’s and appeals court’s determinations that Lake Erie’s “territory” as defined in R.C. §§ 1506.10 and 1506.11 extends no further landward than the existing water’s edge.<sup>10</sup> (Supp. 4-5.) Attorney Generals Dann through Cordray, however, have continued to claim on behalf of the State of Ohio that the public trust has always extended as far landward as the OHWM. The facts are to the contrary.

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<sup>9</sup> Protecting this option for individual property owners was necessary because of prior Ohio Supreme Court decisions affirming the title of littoral landowners in submerged lands in a harbor of Lake Erie, *Hogg v. Beerman* (1884), 41 Ohio St. 81, and acknowledging that the City of Sandusky had historically conveyed good title to “water lots” beyond the shoreline. *State ex rel. Crabbe v. The Sandusky & Mansfield & Newark RR Co.* (1924), 111 Ohio St. 512, 518-20. *See also* 2000 Op. Atty. Gen. No. 2000-047, at p. 3, fn.3 (“The Ohio Supreme Court has acknowledged that, prior to the admission of the State of Ohio to the Union, the United States conveyed to private owners title to parcels within the territorial boundaries of Lake Erie. . . . In such instances, the court has recognized the private owner’s proprietary title to the land, subject to the public rights of navigation and fishery. *Hogg v. Beerman.*”) The trial court also recognized, in referencing the federal Swamp Lands Act of 1850, “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.” (Appx. 104, fn. 104). The United States Supreme Court affirmed private title in “swamp and boggy land” bordering directly on Lake Erie, which was “sometimes subject to inundations from Lake Erie or the overflow of the adjacent streams, but not permanently covered with water,” in *Niles v. Cedar Point Club* (1899), 175 U.S. 300, 307-9.

<sup>10</sup> ODNR recognizes in its Merit Brief that this Court defined the landward limit of the public trust boundary in *Sloan v. Biemiller* (1878), 34 Ohio St. 492, as the “usual water’s edge,” *i.e.*, the water’s edge when undisturbed by storms and other natural causes. ODNR Merit Br. at p. 13.

**A. Earliest Settlers Take Ownership of Property Along Lake Erie to Water's Edge**

A substantial portion of the shore of Lake Erie was originally part of the Western Reserve, which was formed in 1786 when Connecticut relinquished part of its claim to the Old Northwest but reserved to its own use those lands lying west of the western boundary of Pennsylvania and extending from that line 120 miles west in length and in breadth from 41° north latitude on the south to 42° 2' north latitude on the north. (Class Supp. 75-76. *See also* Appx. 57). As defined, the Western Reserve included a large portion of Lake Erie and its islands, including the Bass islands and Kelley's Island. In 1792, Connecticut transferred the western-most 500,000 acres of the Western Reserve to individuals whose properties had been burned in the Revolutionary War, which territory became known as the Firelands. (Class Supp. 75-76; Appx. 57). In 1795, Connecticut transferred *all* its remaining interest in the Western Reserve to the Connecticut Land Company, which then, for ease of management, placed all lands received in a trust, and to the lesser known Excess Company, which was so named because it acquired so much of those lands of the Western Reserve (minus the Firelands) "as is over and above Three Millions of Acres, *exclusive of the waters of Lake Erie.*" (Class Supp. 70. *See also* Class Supp. 61-62.) None of these transfers was limited by the OHWM of Lake Erie, as would be expected by investors seeking their fortune from these lands.

The City of Cleveland was platted by the Connecticut Land Company in 1796 and again in 1800, which plats show lots along Lake Erie "to the low wave mark at the lake."<sup>11</sup> The "lots

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<sup>11</sup> *Cleveland v. Cleveland C.C. & St. Ry.* (Cuyahoga Common Pleas 1909), 19 Ohio Dec. 372, 376-77, 8 Ohio N.P. (n.s.) 457. The first plat of Cleveland done on October 1, 1796, shows lots running north from Lake Street and Federal Street to the waters of Lake Erie and shows public

along Lake Street butted on 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.”<sup>12</sup> “[N]o part of the city of Cleveland belonging to the public touched upon Lake Erie except over Bath Street.”<sup>13</sup> Augustus Porter, one of the surveyors of the 1796 plat, also platted the Phelps and Gorham purchase along Lake Ontario in 1789, which the United States Supreme Court later determined extended to the water’s edge of Lake Ontario at low water.<sup>14</sup> Historically, platting of lands was not restricted to parcels above OHWM and was not limited to dry ground. In 1818, for example, the city of Sandusky platted “water lots” located mostly north of the shoreline of Sandusky Bay and, thus, in the water.<sup>15</sup>

In 1801, President John Adams issued letters patent confirming title in the grantees and purchasers to the soil of the Western Reserve. (Class Supp. 78-90.) The letters patent confirmed private ownership of *all* of the soil of the Western Reserve and Firelands transferred into private ownership and is not limited to those lands above the OHWM. (*Id.*) There was no confusion in the minds of the first surveyors of the Western Reserve that all lands having potential economic value – *i.e.*, all lands not below the low wave mark of Lake Erie – should be placed in private ownership and that public access to the Lake for bathing and other valuable uses would need to be provided at designated public access points.

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access to Lake Erie at Bath Street (presumably for bathing). (*See also* Class Supp. 63-65 (showing 1796 plat).)

<sup>12</sup> *Cleveland C.C. & St. Ry.*, 19 Ohio Dec. at 376.

<sup>13</sup> *Id.* at 382.

<sup>14</sup> *Id.* at 376; *Massachusetts v. New York* (1926), 271 U.S. 65, 82-83, 93; *Jackson ex dem. Erwin v. Moore* (N.Y.Sup. 1827), 6 Cow. 706. (*See also* Class Supp. 66-67.)

<sup>15</sup> *See State ex rel. Crabbe v. The Sandusky & Mansfield & Newark RR Co.* (1924), 111 Ohio St. 512, 518-20 (also noting at 526 that the Court “concur[s] in the suggestion that a situation thus existing for substantially 70 years should not be disturbed by a writ such as sought in this proceeding”).

**B. General Assembly Makes Clear Beginning in 1917 that Public Trust Does Not Include Dry Shore**

In 1917, The Ohio General Assembly adopted the Fleming Act to define by statute the boundaries of the public trust in Lake Erie. G.C. 3699-a declared in relevant part as follows:

that the waters of Lake Erie within the boundaries of the state together with the soil *beneath* and their contents do now and have always since the organization of the state of Ohio, belonged to the state of Ohio as proprietor in trust for the people of the state of Ohio, subject to the powers of the United States government, the public rights of navigation and fishery and further subject only to the right of littoral owners while said waters remain in their natural state to make reasonable use of the waters in front of or flowing past their lands, and the rights and liabilities of littoral owners while said waters remain in their natural state of accretion, erosion and avulsion.

(Class Appx. 1 (emphasis added).) As defined by the General Assembly in 1917, the public trust thus extended to three items: the waters of Lake Erie, the soil *beneath* those waters, and the contents (i.e., fish) of those waters.

The General Assembly amended this statute in 1955, recodified as R.C. § 123.03, to update it generally to its present language, which defines the public trust territory as the “waters of Lake Erie consisting of the territory within the boundaries of the state, extending from the southerly shore of Lake Erie to the international boundary line between the United States and Canada, together with the soil beneath and their contents.” (Class Appx. 4.) At the same time, the General Assembly further defined the “territory” of the public trust as “the waters and the *lands presently underlying* the waters of Lake Erie and lands formerly underlying the waters of Lake Erie and now artificially filled, between the natural shoreline and the harbor line or the line

of commercial navigation where no harbor line has been established.” (Class Appx. 5.)<sup>16</sup> Again, the public trust includes the water and the lands “presently underlying” the water. Except for artificial fill, which is dealt with separately,<sup>17</sup> land that is not presently underlying the water is not part of the public trust as defined by the General Assembly starting in 1917 and continuing through today.

**C. The State of Ohio Uses Low Water as Public Trust Boundary in 1970s**

In the 1970s, the State through the Department of Public Works (“DPW”)<sup>18</sup> took the conservative position that Lake Erie extended no further landward than the Low Water Datum or line of mean low water.<sup>19</sup> In *Rheinfrank v. Gienow*, a landowner was appealing an order by the Director of DPW which declared in part 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* (Mar. 27, 1973), Franklin App. No. 72AP-298, 1973 Ohio App. LEXIS 1671, \*12. (See Class Supp. 2, ¶ 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

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<sup>16</sup> As later amended and recodified as R.C. § 1506.11, the international boundary with Canada was substituted for the harbor line. (See Class Appx. 9.)

<sup>17</sup> See discussion of artificial fill, *infra*, under Proposition of Law No. 2.

<sup>18</sup> ODNR did not exist until 1949 and did not oversee the public trust “territory” until 1989. See R.C. § 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 Class Appx. 4-5, 9.)

<sup>19</sup> In response to requests to admit that the State has not created, established or maintained a policy that OHWM was the appropriate standard to establish the shoreline of Lake Erie at any time between 1803 and 1973, ODNR responded that it has no knowledge and could not respond. (Class Supp. 96-97.) Thus, there is no record evidence that OHWM is the “traditional” rule in Ohio.

water” as an appropriate boundary instead of Low Water Datum. *Rheinfrank v. Gienow* (May 8, 1973), Franklin App. No. 72AP-298, 1973 Ohio App. LEXIS 1543, \*3. (See Class Supp. 2-3, ¶ 5.) In other contexts, 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. (Class Supp. 25.) This position, of course, protected the economic interests of littoral property owners in the highest and best use of their deeded property.

**D. Between 1979 and 1997 the State of Ohio Affirms that Public Trust Does Not Extend Landward of Water’s Edge.**

In the late 1970s, while drafting Ohio’s Coastal Zone Management Program, ODNR correctly 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.” (Class Supp. 28, 35.) Although ODNR found this boundary to be the most practical and easiest to determine, it also noted, in a statement foreshadowing ODNR’s brief love affair with the OHWM some twenty years later, that this moveable boundary was difficult to administer. Thus, it proposed working with DAS to recommend legislation that would *reset* the public trust boundary to a “static” line of elevation such as low water datum, the mean water level or ordinary high water. (Class Supp. 34-35.) Remarkably, the Coastal Zone Management Program was signed by ODNR’s then-director, Robert Teater (Class Supp. 28), who has joined an amicus brief arguing that the public trust boundary is *not* the line where land and water meet.

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.<sup>20</sup> See 1993 Op. Att’y Gen. No. 93-025, 1993 WL 465002. As ODNR had done fourteen years earlier, the Attorney General 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 \*2, 4. He then specifically opined that land lying between the shoreline and the OHWM belongs to the littoral owner and not to the State. *Id.* at \*1, 5. ODNR did not challenge the Attorney General’s opinion,<sup>21</sup> and in fact adopted it as its own for several years, at least until 1997. (See Class Supp. 36 (defining, in 1997, “beach” as area between water’s edge and ordinary high water and stating that public only has access to those public beaches owned by the state or local governments and “private shoreland recreational facilities open for public use.”))

**E. ODNR Claims Public Trust Extends to Ordinary High Water Mark**

Over the next ten years (up until July 2007), ODNR rejected these previous positions – taken 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 as the property 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 public trust boundary from the shoreline to the OHWM, as ODNR itself believed it should do in 1979.

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<sup>20</sup> Although ODNR’s then-Director Frances Buchholzer sought and received this opinion in 1993, the amicus brief she joined herein fails to mention it.

<sup>21</sup> All documents created or relied upon by ODNR that refer or relate to this 1993 opinion appear to have been discarded and no longer exist. (Class Supp. 98.)

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 public trust boundary is the OHWM. (See Class Supp. 38-54.)<sup>22</sup> It then started 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.” (Class Supp. 44.)

In July 2007, ODNR had a change of heart, however, and pursuant to Governor Strickland’s new policy withdrew from this dispute by saying it would honor landowners’ deeds as presumptively valid until and unless directed to do otherwise by the judiciary. (Supp. 4-5.) ODNR stated at that time that “[r]ecognizing the presumptive validity of the lakefront owners’ deeds will not undermine ODNR’s ability to manage coastal lands so as to protect Lake Erie as an important public resource.” (Supp. 5.) ODNR chose not to appeal from the trial court’s determination that the furthest landward boundary of the public trust is the water’s edge, and chose not to appeal from the appeals court’s holding that this boundary is the “line of actual physical contact by a body of water with the land *between high and low water mark* undisturbed and under normal conditions.” (Appx. 30 (emphasis in original).) In contrast, then-Attorney General Marc Dann and his successors have elected to maintain this appeal.

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<sup>22</sup> In response to a request to admit that the State had never used the OHWM as the natural shoreline of Lake Erie prior to 1997, ODNR identified only its reference in 1979 to the OHWM as one of the options which would be more administratively convenient than the existing boundary of water’s edge. (Class Supp. 35, 95.) ODNR says it does not know when it first started requiring submerged lands leases for property lakeward of the OHWM. (Class Supp. 99.)

**F. The Trial Court and Appeals Court Decisions Recognize that Lake Erie's "Usual" Water's Edge Slowly Fluctuates Day by Day.**

Lake Erie lacks discernable tides. (Class Supp. 17.)<sup>23</sup> Nevertheless, the water level of Lake Erie does fluctuate over short periods and long periods. (Class Supp. 16.) Short-term fluctuations are caused by a tilting of the lake surface by wind or by atmospheric pressure differentials, which can produce storm surges, wind tides, seiches or harbor resonance. (*Id.*) These fluctuations occur for periods from a few seconds to several days. (*Id.*) For approximately eighty percent of the time, however, the lake surface is calm with less than 0.5 foot waves. (Class Supp. 17-18.)

Long-term fluctuations are related to volumetric changes in the lake and are caused primarily by variations in precipitation, evaporation and tributary runoff. (Class Supp. 16.) The lake level tends to be higher in the spring because of high spring runoff and low evaporation, and lower in the fall and winter because of high evaporation and low runoff. (*Id.*) Importantly, "seasonal fluctuations vary widely and erratically from year to year, so that one season's mean water level is not a valid predictor of the next season's mean water level." (*Id.*) Thus, there is no "usual" long-term water's edge, as evidenced by no recorded measurement of the water level reaching the State's favored OHWM prior to 1973, except for one month in 1952. (Class Supp. 92-93.) For Lake Erie, the usual water's edge is easily observed over the short-term as the line where the water intersects the shore when undisturbed by short-term fluctuations.

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<sup>23</sup> The trial court and appeals court had the benefit of a detailed review of Lake Erie's physical processes and hydrologic character provided by Dr. Charles E. Herdendorf, a Certified Professional Geologist and Emeritus Professor of Limnology and Oceanography in the School of Earth Sciences, The Ohio State University. (Class Supp. 1-2, 5-24.)

With regard to the public's use of the waters of Lake Erie, the boundary of Lake Erie traditionally has been 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. (Class Supp. 13.) In the 1970s, this boundary was set at an elevation of 568.6 feet International Great Lakes Datum ("IGLD") (1955), and was later revised in 1992, using 1982-88 data, to the currently-used boundary of 569.2 feet IGLD (1985). (*Id.*)

The United States Army Corps of Engineers first established an OHWM for Lake Erie in 1974 in order to define the limit of its regulatory jurisdiction over navigable waters of the United States. (*Id.*) No OHWM was defined between 1803 and 1974. The Corps fixed OHWM at 4.2 feet above Low Water Datum as "simply a convenient way of relating things to a common elevation." (*Id.*) The fixed line of elevation now claimed by the State to be the OHWM boundary that has existed since 1803 was actually established by the Corps in 1992 and continues to be 4.2 feet above Low Water Datum. (*Id.*) Although Class Plaintiffs are not contesting the Corps' use of this line of elevation to define its *regulatory* jurisdiction, there is no record evidence that the OHWM is a current, consistent or accurate measure of the shoreline of Lake Erie or the usual water's edge for purposes of defining the essential right of property ownership.

### **III. LAW AND ARGUMENT**

The Court should affirm the decision of the court of appeals in all respects. The appeals court did not err in finding that the Attorney General lacks the authority to enforce the state's rights in the public trust territory when the ODNR, which has been statutorily delegated this authority, was not itself doing so. The appeals court also did not err in holding that the public trust extends no further landward than the natural shoreline, which it defined, consistent with this

Court's opinion in *Sloan v. Biemiller* (1878), 34 Ohio St. 392, as "the line of actual physical contact by a body of water with the land *between the high and low water mark* undisturbed and under normal conditions." (Appx. 30 (emphasis in original)).

**Proposition of Law No. 1.**

**The State's public trust interest in Lake Erie extends no further landward than the natural shoreline, which is the line of actual physical contact by the waters of Lake Erie with the shore – the land between high and low water marks – when undisturbed and under normal conditions. The public trust does not extend over the strip of dry land bordering Lake Erie between the usual water's edge and ordinary high water mark and, thus, the public has no right to engage in navigation, water commerce, fishery or recreation on this dry land without the consent of the littoral owner. (*Sloan v. Biemiller* (1878), 34 Ohio St. 392, syll. ¶¶ 4 and 5, followed and affirmed).**

The appeals court did not err in rejecting the State's claim (as advanced here by the Attorney General but not by ODNR) that it took title to the submerged lands of all navigable waters of the state up to OHWM under Roman law, English law and the Equal Footing Doctrine. (State Br. at 23-28.) The State does not explain why it believes early Ohioans, who had just broken the yoke of the English sovereign and set out to make their fortune off the plentiful natural resources of the Ohio wilderness, would willingly adopt an archaic law that stripped them of their private property rights and prevented them from fully utilizing all the useful and productive lands of Ohio.<sup>24</sup> The extent to which Roman emperors and English kings claimed title to tidal seas and the adjoining shores means little here, but *why* this claim was made provides helpful context. Indeed, although ignored by the State, the quotation in the State's brief from *Shively v. Bowlby* (1894), 152 U.S. 1, 11, explains why tidal shore lands are not privately owned:

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<sup>24</sup> The trial court extensively addressed the American view of sovereignty (Appx. 48-50) and the primacy of private property rights in the American system (Appx. 104-06).

[B]oth the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. *Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement;* and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects.

As the State helpfully states in its Brief, these shore lands are "always or usually underwater." (*Id.* at 24). The shores of English seas were covered twice daily by the tide and, thus, were incapable of productive use in private hands.

The shores of the navigable waters of Ohio are easily distinguishable from those held by the English kings. First, of course, no sovereign has laid claim to them until the Attorney General assisted ODNR in doing so in the late 1990s. Second, Ohio's shore lands, whether bordering Lake Erie or its navigable in-land lakes, rivers and streams, have never been covered by twice-daily tides. As a result, these lands have always been considered to have economic value and are quite capable of "ordinary and private occupation, cultivation and improvement." *Shively*, 152 U.S. at 11. No Ohio landowner in the late 1700s or thereafter would have believed that the English king or the United States government could rip these lands from private, productive uses. Likewise, no Ohio landowner would have given a second thought to the idea that a strip of dry land that is seldom if ever covered by the waters of Lake Erie would be reserved for all time for the public's use for navigation, water commerce and fishery. You can't ship goods to eastern markets in a boat grounded on the dry shore.

**A. The Appeals Court Correctly Determined that State Law, Not Federal Law, Determines the Scope of the Public Trust in Navigable Waters**

The appeals court did not err in finding that "state law determined the scope of the public trust in land beneath navigable waters in this country." (Appx. 24.) The "equal footing"

doctrine relied upon by the State and the Intervening Appellants does not create a federal common law boundary for all of the states' public trust lands, but instead recognizes the inherent right of each state to define the boundary between their public trust "territory" and private rights through their own common law, and at a line different from the purportedly universal OHWM. 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* (1845), 44 U.S. 212, 229. Thus, the "equal footing" doctrine protects state's rights; it does not create a federal common law of property to supplant state law.

The United States Supreme Court has always recognized that the states, including Ohio, each received upon their admission to the Union the full authority to define on their own the dividing line between the public trust "territory" and private littoral land. For example, in 1877, the 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* (1877), 94 U.S. 324, 338. In 1891, the U.S. Supreme Court issued the first of three consistent, contemporaneous opinions on the states' 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* (1891), 140 U.S. 371, 382. In 1894, 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*, 152 U.S. at 41. 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 Central Railroad Co. v. Chicago* (1900), 176 U.S. 646, 659.

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 Consolidated, Ltd. v. Los Angeles* (1935), 296 U.S. 10, 22. In 1977, the 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 and Intervening Appellants – would be “perverse” and “may result in property law determinations antithetical to the desires of that State.” *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.* (1977), 429 U.S. 363, 375, 378. Most recently, the U.S. Supreme Court held that “state law defines property interests, including property rights in navigable waters and the lands beneath them.” *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection* (2010), 560 U.S. \_\_\_, 130 S.Ct. 2592, 2597.

The patchwork of state laws applicable to the Mississippi River provides an informative example of how each state has determined the extent of the public trust in this great inland body of water. Mississippi distinguishes between the eminently navigable, but non-tidal, Mississippi River, to which the riparian property owner holds title to center or thread, and the tide lands of the Gulf of Mexico in which the public trust extends to OHWM. *State ex rel. Rice v. Stewart* (1938), 184 Miss. 202, 184 So. 44, 47-49. Kentucky and Minnesota also extend private title to the center of the Mississippi. *Wilson v. Watson* (1911), 144 Ky. 352, 138 S.W. 283, 286; *Schurmeier v. St. Paul & P.R. Co.* (1865), 10 Minn. 82, 1865 WL 43, \*9-10. In Tennessee, the state holds the bed of the river in trust, and the banks above low water are privately held. *Tennessee v. Muncie Pulp Co.* (1907), 119 Tenn. 47, 104 S.W. 437, 450. Missouri would appear to use water’s edge. *Cooley v. Golden* (1893), 117 Mo. 33, 23 S.W. 100, 105. Iowa and Arkansas favor high water mark as the boundary of the public trust. *McManus v. Carmichael*

(1856), 3 Iowa 1, 23; *Wallace v. Driver* (1896), 61 Ark. 429, 33 S.W. 641, 643. In each case, the common law of the state developed to suit the particular needs of that state, and no state gave any thought to the absurd concept recently developed by the Ohio Attorney General that federal law mandates extension of the public trust to OHWM in all cases.

Indeed, if the State and Intervening Appellants were correct that all states obtained title over navigable waters under the “equal footing” doctrine, then all prior decisions of this Court and other Ohio courts would have stated that the state has held title since 1803 to the beds and banks of all navigable bodies of water within Ohio’s border up to the OHWM of each. As discussed below, this clearly is not the case. In fact, no Ohio court has ever used the OHWM as a boundary of any navigable body of water in Ohio. Instead, Ohio’s common law developed in a manner that zealously protected the rights of Ohio’s landowners to make use of all economically productive property while reserving to the public the right to navigate on all navigable waters.

**B. Ohio Common Law and Statutory Law Limits the Furthest Landward Boundary of the Public Trust to the Usual Water’s Edge When Undisturbed in Order to Protect and Promote Private Ownership of Productive Property.**

**1. *Gavit v. Chambers* (1828), 30 Ohio 495.**

The first dispute that reached the Ohio Supreme Court involving the ownership of the shore and bed of a navigable body of water was *Gavit v. Chambers* (1828), 3 Ohio 495, which involved the Sandusky River. The question presented was, “has the proprietor of lands, bounded on a navigable stream, a separate and individual interest or property in any portion of the bed of the river?” *Id.* at 496. Under the argument now advanced by the State and Intervening Appellants, the answer is “no, Ohio took title to the OHWM of all navigable bodies of water.” Indeed, this is exactly what the defendants argued: as a navigable body of water, the river’s bed was not subject to private ownership. *Id.* The Court, however, soundly rejected the defendants’

arguments and came down strongly on the side of private property ownership. The Court noted that a river consists of water, bed and banks, and held as follows: “He who owns the lands upon both banks, owns the entire river, subject only to the easement of navigation, and he who owns the land upon one bank only, owns to the middle of the river, subject to the same easement.” *Id.* at 498. Thus, only twenty-five years after Ohio became a state, the Ohio Supreme Court recognized that riparian owners hold title to the banks of navigable waters in Ohio and, with regard to navigable rivers and streams, further held that the bed also is privately owned.<sup>25</sup> The Court weighed the public trust interest in navigation against the sacred private property rights of landowners, and determined that the public trust requires no more than an easement of passage across navigable waters.

Importantly, the State agrees that, except for Lake Erie, the OHWM is *not* the furthest landward boundary of the public trust for any navigable body of water in Ohio. According to the State, “the parties do not dispute, and there is no issue before the Court, that the lands beneath Ohio’s rivers, streams and other bodies of water may be privately owned.” (State’s Brief in Opp. at 18, T.d. 174.) Lake Erie is the only navigable body of water in Ohio for which the State claims the public trust extends to the OHWM. The State’s position is simply that Lake Erie is different – it is a “wholly public” watercourse whereas all other navigable bodies of water are “quasi-public” watercourses. (*Id.* at 16-17.) Incredibly, the State fails to grasp the significance of Ohio common law establishing different rules for navigable bodies of water. If the State were

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<sup>25</sup> In some other states, the law of those states is that the state owns the land beneath all navigable rivers and streams up to the low or high water mark. *See, e.g., Shively*, 152 U.S. at 52 (under Oregon common law, the state holds title to both bed and banks of Columbia River); *Adirondack League Club Inc. v. Sierra Club* (N.Y. App. Div. 1994), 201 A.D.2d 225, 233 (state’s public interest extends to high water mark on navigable river); *Dyer v. Hall* (Ind. App. 2010), 928 N.E.2d 273 (riparian owner on the Ohio river holds exclusive title to the low water mark).

correct that Ohio took title to all navigable bodies of water up to OHWM in 1803 pursuant to a federal grant under the “equal footing” doctrine, then there would be no Ohio common law distinguishing between “quasi-public” and “wholly public” watercourses. The bed and banks of all navigable watercourses, under the State’s federal grant theory, would be owned by it and burdened by the public trust.<sup>26</sup> But this is not Ohio law, and a decision adopting the Attorney General’s federal grant theory would reverse two centuries of Ohio law.

The State’s admission proves the fallacy of its federal grant theory, and it eviscerates the State’s argument that Class Plaintiffs must prove by the clearest evidence that the State transferred title of the Lake Erie shore to them after 1803. (State Br. at 28-30). As the State has admitted, there was no federal grant to the state of Ohio of all navigable bodies of water up to OHWM. The question is not whether the State transferred title *en mass* to all littoral property owners after 1803 of part of the public trust territory, but at what line Ohio common law first established the furthest landward extent of that territory.<sup>27</sup> *Gavit* and its progeny<sup>28</sup> make clear

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<sup>26</sup> The Attorney General cited below to a common pleas court decision – *Pollock v. Cleveland Ship Bldg. Co.* (Cuyahoga Common Pleas 1895), 2 Ohio Dec. 305, 1 Ohio N.P. 296 – for the distinction between quasi-public and wholly-public watercourses. That decision limits public ownership of wholly-public watercourses to the bed and makes no mention of the banks or shore. *Id.* On appeal, the Ohio Supreme Court held that the defendant was trespassing upon the river bank of the plaintiff, “the title to which is not qualified by any right of the public.” *Pollock v. Cleveland Ship Bldg. Co.* (1897), 56 Ohio St. 655, 673. The bank of the Ohio River above low water mark also is not common to the public. *Lessee of Blanchard v. Porter* (1841), 11 Ohio 138, syll.

<sup>27</sup> After the public trust boundary is established, then individual transfers of submerged lands lakeward of that boundary may be governed by the rules discussed in 2000 Op. Att’y Gen. No. 2000-047. That opinion relied upon the Attorney General’s earlier determination in 1993 Op. Atty. Gen. No. 93-025 of the natural shoreline as the water’s edge, not the ordinary high or low water mark. 2000 Op. Att’y. Gen. No. 2000-047, at pp. 2-3. Thus, the 2000 opinion dealt with grants of submerged lands beyond the water’s edge.

<sup>28</sup> See, e.g., *June v. Purcell* (1881), 36 Ohio St. 396, syllabus (holding that the principle decided in *Gavit* is an established rule of property under Ohio common law).

that there is no presumption in Ohio of state ownership of the banks or shores of navigable bodies of water. To the contrary, the presumption applied early in Ohio was that private property should be protected to its fullest extent, while making reasonable accommodation for public navigation, water commerce and fishery.

While the State complains about “the unintended surrender of valuable public resources” to littoral owners (State Br. at 29-30), the State ignores that the only recognized public rights were of navigation and fishery – these are water rights, not land rights.<sup>29</sup> Class Plaintiffs are not contesting water rights in this lawsuit, only the attempt to extend those rights beyond the water itself. The valuable public resources are the water, the soil beneath the water and its contents, not the adjoining shore. The dry shore had value then, and continues to have value today, when privately held, which is why, as the Court held in *Sloan v. Biemiller, infra*, Ohio common law protects private ownership of the shore.

## 2. *Sloan v. Biemiller* (1878), 34 Ohio St. 492.

With *Gavit* as background, the dispute between two landowners on Cedar Point – Sloan and Biemiller – over use of the waters and shore of Sandusky Bay can more easily be understood. Sloan owned most of Cedar Point, which was “mostly a sand beach,” and conveyed approximately 16 acres of that beach to Biemiller. *Sloan*, 34 Ohio St. at 492-96. However, Sloan reserved to himself certain property rights in the acreage he transferred to Biemiller. The deed reserved to Sloan the right to fish in the waters adjoining this acreage (both the bay and the lake) and the exclusive right to use the premises for fishing purposes. *Id.* at 494-95. The deed

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<sup>29</sup> Navigation itself was promoted as the instrument of commerce. “In other words, navigation is the means by which commerce is accomplished, and it is for the purpose of aiding commerce that navigation is encouraged and protected.” *Pollock*, 56 Ohio St. at 669.

also provided that Biemiller could not sell or remove sand from the premises. *Id.* After Biemiller took fish from Lake Erie and Sandusky Bay and his fishermen accessed these waters from the premises, Sloan attempted to enforce the deed restrictions by telling Biemiller two things: you can't take fish from the water off this property, and you can't carry seines and fishing tackle to and from the beach. Sloan argued that his reservation of these rights was consistent with *Gavit* and his private property rights; Biemiller countered that he could exercise the public right of fishery in Lake Erie and its bays. *Id.* at 495.

The question of where Biemiller and his fishermen could exercise their public right of fishery was squarely before the Court, which held that Sloan's attempt to prevent Biemiller from fishing in the waters of Lake Erie was "inoperative" because the right to fish is not limited to "the proprietors of its shores." *Id.* syll. ¶¶ 2, 5. It's a public right exercised in public waters. The Court determined that Sloan lacked the ability to restrict Biemiller's use of the adjoining waters because *Gavit* cannot practically be applied to large freshwater lakes – there is no flow of the tide and no thread of the stream out to which private ownership can extend. *Id.* at 512 (quoting *The Canal Commissioners v. The People* (N.Y. 1830), 5 Wend. 423).

Because the *Gavit* rule did not apply, the Court had to draw the line between Sloan's private property rights and Biemiller's public right of fishery. The Court referenced the decisions of several states finding that private ownership of the shore of large inland lakes extends either to the ordinary low-water mark or to water's edge, with the bed of the lake under public ownership. *Id.* at 512 (citing *The Canal Commissioners v. The People* (N.Y. 1830), 5 Wend. 423 (low water); *State v. Gilmanton* (1838), 9 N. H. 461 (water's edge)). The Court's syllabus adopted the boundary language used in an Illinois case, *Seaman v. Smith* (1860), 24 Ill. 521: "the line at which the water usually stands when free from disturbing causes." *Sloan*, 34

Ohio St. at 513 and syll. ¶ 4. This boundary was not fixed by reference to an illusory federal grant of all lands to OHWM, as the State and Intervening Appellants would have this Court find. Instead, the Court continued its consistent practice of establishing Ohio common law based on whether lands may serve a productive use in private hands.

This is explained in the paragraph the Court excerpted from the *Seaman* opinion, which stated that the OHWM is the appropriate boundary for *tidal* bodies of water because the shore of such tidal bodies lacks value for cultivation or other private purposes. *Id.* at 513 (quoting *Seaman*, 24 Ill. at 524-25). The Great Lakes lack appreciable tides, but the same economic principle can be used to select a reasonable property boundary. As the court observed, “[t]he portion of the soil which is only seldom covered by water may be valuable for cultivation or other private purposes.” *Id.* Lands lakeward of the ordinary high water mark, as described throughout the proceedings on appeal here, are “seldom covered by water” and, thus, are not included in the public trust.

Had the Ohio Supreme Court intended to fix the public trust boundary of Lake Erie at the OHWM, it would have done so by holding that Sloan had no right to restrict Biemiller’s actions lakeward of the OHWM. It did not so hold. Instead, it held that Biemiller could exercise the public right of fishery lakeward of “the line at which the water usually stands when free from disturbing causes.” *Id.* syll. ¶ 4. The Court did not adopt the OHWM as the public trust boundary.

It is possible to argue, as the State has done for the first time in its brief to this Court,<sup>30</sup> that the Court implicitly adopted the OHWM in *Sloan* based solely on the wording “the line at which the water usually stands.” The State’s argument still would fail because the record is clear that the OHWM is not the line where the water usually stands. Regardless, the qualifier “when free from disturbing causes” renders the State’s interpretation untenable. Disturbing causes, such as storms and longitudinal winds,<sup>31</sup> are short-term events and can only impact the usual water’s edge if the timeframe in which “usual” is determined is also short-term. Storms and similar events bear no relation to an *ordinary* high water mark. Last week’s thunder storm over Lake Erie had no impact on the State’s proposed OHWM, which was fixed at a certain line of elevation based upon data from 1982-88 and has not varied since. (Class Supp. 13, 16-17.) If the “line at which water usually stands” could represent the ordinary high water mark, then the Court’s qualifier of “when free from disturbing causes” would be unnecessary. The appeals court below properly defined the furthest landward boundary of the public trust using all parts of *Sloan*’s definition of this boundary.

Notably, the line adopted by the Ohio Supreme Court in *Sloan* – the usual water’s edge unaffected by winds or storms – was not interpreted at the time by the U.S. Supreme Court or other courts as synonymous with the ordinary high water mark. The U.S. Supreme Court cited *Seaman, Lamb v. Rickets* (1842), 11 Ohio 311, and several other state court decisions for the general rule that a conveyance to the “shore” carries to the water’s edge at low water.

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<sup>30</sup> In briefs submitted to the trial court and appeals court, the Attorney General ran away from *Sloan* and rejected any idea that it was applicable to the issue presented.

<sup>31</sup> As ODNR states in its Brief, “disturbing causes” means “storms and other natural causes that could affect the usual water’s edge.” ODNR Br. at p. 13. A discussion of the disturbing causes applicable to Lake Erie that cause short-term oscillations is part of the record below. (Supp. 16-18.)

*Massachusetts v. New York* (1926), 271 U.S. 65, 93. Likewise, a Pennsylvania court cited *Sloan* for the proposition that “[l]ow water-mark is where the water usually stands when free from disturbing causes.” *Sprague v. Nelson* (Erie Common Pleas 1924), 6 Pa. D. & C. 493, 495-96. See also *Delaplaine v. Chicago & N. R. Co.* (Wis. 1877), 42 Wis. 214, 225-26 (citing *Seaman*, among others, and describing as “sound and correct” the decisions “which hold, in reference to such bodies of water, that the riparian proprietor takes only to the edge of the water in its ordinary condition, when unaffected by winds or other disturbing causes . . . , the proprietorship of the bed of the lake being in the state”). The various references to “low water” (not to *ordinary* low water mark) are simply the equivalent of a common sense water’s edge when undisturbed. In fact, only twelve years after *Sloan* was decided, the Ohio Supreme Court treated “margin of the lake,” “low water mark,” “the line where the earth and water meet around the lake” and “the edge of the water” as equivalent terms. *Lembeck v. Nye* (1890), 47 Ohio St. 336, 351 and syll. ¶ 2(b). Any littoral property owner, and any invitee or trespasser, can identify this common sense boundary.

Indeed, the public trust boundary as described in *Sloan* and reaffirmed by the appeals court below serves the public interest by being more easily identifiable than a line of elevation that is a full-employment boon to surveyors.<sup>32</sup> The U.S. Supreme Court made exactly this point when it found, in rejecting the high water mark as a boundary for Lake Ontario, that “[t]he application of that rule to conveyances of land bordering on non-tidal waters is supported by neither reason nor authority. The lack of clear definition, by natural landmarks, of the shore of non-tidal waters, would make its application impracticable.” *Mass. v. New York*, 271 U.S. at 93.

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<sup>32</sup> There is no reason to believe that surveyors of Lake Erie shores ever used anything other than the actual water’s edge as a boundary until after ODNR laid claim to all lands up to OHWM.

This point is manifestly applicable to the OHWM proposed by the State, which requires fixing a horizontal line of elevation by reference to a point in Quebec. (Class Supp. 13.) In contrast, the public trust boundary, whether defined as water's edge at low water or as the usual water's edge when free from disturbing causes, is a boundary that Ohio's littoral property owners could easily discern for all of Ohio's history. The usual water's edge of Lake Erie is free from disturbing causes and can be readily observed some 80% of the time. (Class Supp. 18.) It also is easily apparent to all when the usual water's edge is not free from disturbing causes. And, as discussed above, this boundary preserves the expectations of Ohio's littoral property owners by resulting in productive lands being retained in private ownership.

Returning to the dispute between Sloan and Biemiller, that dispute involved not only Biemiller's right to fish in Lake Erie's waters, but also whether Sloan could restrict Biemiller's use of the sandy beach of Cedar Point for fishery. Under the State's theory, the analysis would be the same because the beach or shore (meaning, the area between water's edge and the ordinary high water mark) would be subject to the same public rights as the waters themselves. However, in *Sloan*, the Court agreed that Sloan could tell Biemiller what he could and could not do on the beach, because this was private property not burdened by the public trust. *Sloan*, 34 Ohio St. at 515-17. Specifically, the Court affirmed Sloan's right to restrict Biemiller from using "either the bay or lake shore . . . to take sand, fish, or carry to and from seines and fishing tackle[.]" *Id.* The Court protected Sloan's private property rights – which include the right to exclude others – between OHWM and the water's edge.

*Sloan* establishes the principle that in Ohio private persons have the right to own the shore of Lake Erie *and* that the public trust does not extend over the shore. From its acceptance of Sloan's deed to the shore, to its express affirmation of his right to grant and reserve rights to

“occupy the shore,” the Ohio Supreme Court never once questioned the propriety of private title to shore lands. *Sloan*, 34 Ohio St. at 515. In the words of *Sloan*, there exists a “proprietor of the shores” who (a) is the “owner of the premises,” (b) can convey “all the estate and interest in the land” and (c) has express authority to “grant” or “reserve” the right to “land on or occupy the shore[.]” *Id.* at 513, 516. No amount of interpretation can diminish the specific import of these holdings or the support they lend to the decision of the court of appeals below.

3. ***Hogg v. Beerman* (1884), 41 Ohio St. 81, and *Bodi v. Winous Point Shooting Club* (1897), 57 Ohio St. 629.**

In the twenty years following *Sloan*, the Ohio Supreme Court affirmed on two separate occasions the title of private persons in lands located in Erie, Sandusky and Ottawa Counties below the ordinary high water mark. In *Hogg v. Beerman* (1884), 41 Ohio St. 81, the Court affirmed title to lands both around *and below* the waters of East Harbor in Ottawa County. East Harbor was a bay of and part of Lake Erie that included at least 1,000 acres under water, and it was included in a pre-statehood grant of 4,120 acres of property. *Id.* at 83-85, 89. If the land beneath East Harbor was not included in the grant, the grantees would be deprived of at least 1,000 acres. *Id.* at 98. Based on these facts, the Court protected the grantees’ private property rights and expectations by holding that “[I]and covered by the water of a navigable land locked bay, or harbor, connected to Lake Erie, may be held by private ownership, subject to the public rights of navigation and fishery, provided the holder derives his title from an express grant made, or sanctioned, by the United States.” *Id.* syll. ¶ 1. Because the grantees owned the land on which the waters of East Harbor rested, they could fill in these waters and make solid ground. *Id.* at 98. If they did so, the public right to fish in the waters would yield to any permanent improvement made. *Id.* at 98-99. *See also State ex rel. Duffy v. Lakefront East Fifty-Fifth Street*

*Corp.* (1940), 137 Ohio St. 8, 12 (affirming private ownership of “200,000 cubic yards of drifted sand and soil” well below OHWM that formed by accretion).

Similarly, the Court in *Bodi v. Winous Point Shooting Club* (1897), 57 Ohio St. 629, 630, *affirming in part and reversing in part, Winous Point Shooting Club v. Bodi* (Ottawa App. 1895), 10 Ohio Cir. Dec. 544, 20 Ohio C.C. 637, affirmed the Winous Point Shooting Club’s private ownership of and right to exclude others from the shore and marshlands in the west end of Sandusky bay in Ottawa and Sandusky counties. The Court agreed with the defendants that they had the rights of navigation and fishery in these waters, which were part of the public bay. *Bodi v. Winous Point Shooting Club*, 57 Ohio St. 226, 233-34. However, the Court affirmed in all other respects the lower court’s order enjoining these defendants from entering upon the shooting club’s “lands, marshes, islands, waters and shores” for any other purpose. *Bodi*, 57 Ohio St. at 630. *See Winous Point*, 10 Ohio Cir. Dec. at 550-51 (setting out terms of injunction and Ohio Supreme Court’s judgment entry). We know that monthly mean elevations of Lake Erie during this time period were close to or below the long-term mean (i.e., about two to three feet below the OHWM) (Class Supp. 94), yet heavy northeast winds, which the court describes as “disturbing causes,” occasionally would submerge these islands and marshes beneath the waters of Sandusky Bay and Lake Erie so that most could be passed over with row boats. *Winous Point*, 10 Ohio Cir. Dec. at 548-49. Although these islands and marshes were well below ordinary high water mark, the shooting club held legal title to them. *Id.* at 549. Thus, the Ohio Supreme Court protected the shooting club’s property rights, which included the right to exclude others from “said lands, shores, marshes and islands.” *Bodi*, 57 Ohio St. at 630. Under the State’s and Intervening Appellants’ theory, these marshes and shores would be thrown open to the public.

4. G.C. 3699-a, R.C. § 723.03-.031 and R.C. 1506.10-.11

As set forth above in the Statement of Facts, the Fleming Act, as originally enacted in 1917, codified the furthest landward boundary of the public trust as the “natural shoreline,” with the public trust applying only to the waters of Lake Erie, the soil beneath, and their contents. The General Assembly did not fix the public trust boundary at the ordinary high water mark of Lake Erie, although the concept of an ordinary high water mark could not have been completely foreign to its members. Instead, the General Assembly declared that the public trust related to and depended exclusively upon the waters of Lake Erie and the soil *beneath* those waters, not its shores. Given that the only public rights described in G.C. 3699-a are “of navigation and fishery,” the reason for the General Assembly’s choice of words is clear – the natural shoreline separates the water from the land, with the public rights exercised only on the water as previously found in *Sloan, Hogg* and *Bodi*.

When this statute was amended and recodified in 1955 as R.C. § 123.03, its intent and scope did not change. The public trust applied to the waters of Lake Erie extending from the “southerly shore” to the border with Canada, “together with the soil beneath and their contents.” The “soil” *beneath* the waters extending *from* the southerly shore does not include the dry shore.<sup>33</sup> As with the original 1917 language, the public trust encompasses three items: the water extending *from* the shore (but *not* including the shore) to the boundary with Canada, plus the soil *beneath* the water and the fish swimming in the water. The “territory” defined in R.C. § 123.031

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<sup>33</sup> In order to include the dry shore, the General Assembly would have had to say “the waters of Lake Erie extending from the ordinary high water mark” or “the waters of Lake Erie extending from the top of the southerly shore.” See also *Mitchell v. Cleveland Electric Illuminating Co.* (1987), 30 Ohio St. 3d 92, 94 (citing R.C. § 123.03 for proposition that “waters of Lake Erie belong to the state of Ohio, and it is undisputed that Avon Lake’s territorial limits extend only to the low water line of Lake Erie”).

and later recodified as R.C. § 1506.11 also makes clear that, unless artificial fill has been placed into the waters of Lake Erie and onto the submerged lands thereof, the public trust applies only to “the waters and the *lands presently underlying* the waters of Lake Erie . . . .” (Class Appx. 5, 9.)

None of the language used by the General Assembly suggests that the public trust extended beyond the water’s edge and onto the dry shore. Thus, that dry shore is not part of the public trust.

The State and Intervening Appellants see the words “do now belong” and “have always belonged” in the Fleming Act as proof that the General Assembly actually intended that “natural shoreline” should mean ordinary high water mark instead of what it is commonly understood to mean. (State Br. at 35-36; Int. App. Br. at 12.) According to them, the General Assembly patched the words “do now belong” and “have always belonged” together as a riddle where the reader would understand the term “shoreline” not as commonly used at that time, but instead as legal code for the decidedly different federally-mandated limit purportedly set out in the State’s and Intervening Appellants’ “equal footing” cases. As they concede, however, the Fleming Act merely codified Ohio’s existing common law (*Id.*), and Ohio’s common law does not support their theory.

The simpler explanation should prevail here, both for those phrases and for “shoreline”: the General Assembly intended “shoreline” to mean what it meant and what Ohio cases had said it meant – the line where the water meets the shore. In 1916, the year before G.C. 3699-a was adopted by the General Assembly, Webster’s New International Dictionary defined the “shoreline” as the “line of contact of a body of water with 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.<sup>34</sup> Thus, the appeals court merely followed common, well-accepted usage in holding that the “shore” is the land between high and low water marks and that the “shoreline” is the line of actual physical contact by a body of water with the land between the high and low water marks. (Appx. 29-30.) The appeals court quite sensibly determined that lands “beneath” and “presently” underlying the waters of Lake Erie is a clear reference to a water’s edge boundary. *See* R.C. §§ 1506.10, .11(A). As the General Assembly stated in G.C. 3699-a, it has always been thus.

Class Plaintiffs agree that the Court’s decision in *State v. Cleveland & Pittsburgh R.R. Co.* (1916), 94 Ohio St. 61, prompted the General Assembly to enact the Fleming Act a year later, but disagree with the convoluted construction given to this history by the State and Intervening Appellants. While the 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.*” *Id.* at 84 (emphasis added). Thus, far from referring to a non-existent federal common law boundary of ordinary high water, the Ohio

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<sup>34</sup> These dictionary definitions are consistent with definitions adopted by Ohio courts and administrative agencies for the same. *See Busch v. Wilgus* (Logan Common Pleas 1922), 24 Ohio N.P. (n.s.) 209, 217 (noting the “term ‘shore’ includes and designates the land lying between the high and low water mark”). They also are consistent with ODNR’s own rules, which define the “shore” as “the land bordering the lake” and the “shoreline” as the “line of intersection of Lake Erie with the beach or shore.” O.A.C. 1501-6-10(T), (U). The “beach” is “a zone of unconsolidated material that extends landward from the shoreline to the toe of the bluff or dune. Where no bluff or dune exists, the landward limit of the beach is either the line of permanent vegetation or the place where there is a marked change in material or physiographic form.” O.A.C. 1501-6-10(E). Thus, the beach extends between the shoreline and what some other states define as the ordinary high water mark. *See United States v. Marion L. Kincaid Trust* (E.D. Mich. 2006), 463 F.Supp.2d 680, 693-94 (discussing various lines for the ordinary high water mark, including “that line below which no terrestrial plant life will grow because of the constant action of the water” and other similar lines).

Supreme Court both acknowledged the fact that private interests *owned* the *shore* and expressed its belief that there was a need for the legislature to protect those *private interests* in the *shore*.

Intervening Appellants mistakenly state that the Ohio Supreme Court held in *Cleveland & Pittsburgh R.R. Co.*, that the state holds land below the OHWM in trust. (Int. App. Br. at 11). In truth, the Court held that “the state holds title to the *subaqueous* land as trustee.” *Id.* at 79 (emphasis added). The Court’s only reference to “high water mark” is in the context of the parties’ briefs, is pure dicta, and is limited by the phrase “subaqueous land.” *Id.* at 69. In its actual holding, the Court stated that the “title and rights of littoral and riparian proprietors in the subaqueous soil of navigable waters, within the limits of a state, are governed by the laws of the state.” *Id.* syll. ¶ 2. The Court not only reaffirmed that the State’s and Intervening Appellants’ federal grant theory is plainly wrong, but saw fit to limit its review to only the *subaqueous* soil of navigable waters. Similarly, the Court describes public trust lands as “the land under the water of Lake Erie,” consistently making the point that public trust lands are subaqueous. *Id.* syll. ¶ 3. The Fleming Act is entirely consistent with the Court’s language in *Cleveland & Pittsburgh R.R. Co.* in that it adopted a public trust boundary that is tied exclusively to the waters of Lake Erie and the soil beneath those waters (*i.e.*, subaqueous).

The State and Intervening Appellants complicate the simple and ignore the obvious in suggesting that the words of the Fleming Act imply the adoption of a federally-mandated boundary fixed at the ordinary high water mark. Common understanding requires no such machinations and rejects the position that the “shoreline” – the line between the water and the shore – sits at the high water mark. The appeals court did not err in rejecting such convoluted speculation.

## 5. Submerged Lands Act

The State and Intervening Appellants rely upon the Submerged Lands Act ("SLA"), 43 U.S.C. §§ 1301-15, as evidence that Congress granted ownership to states of all navigable waters up to OHWM in 1953. (State Br. at 26-27; Int. App. Br. at 19-21.) Yet the language of the SLA clearly recognizes that state law governs ownership of lands below OHWM. Remarkably, the State's briefing in this matter from the trial court through its latest brief filed here has excised the relevant language. Class Plaintiffs suggest that the fallacy of the State's argument becomes apparent upon reading the relevant provision in full.

The SLA was adopted not to grant rights to states but "merely to confirm the States' title to the beds of navigable waters within their boundaries *as against any claim of the United States.*" *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.* (1977), 429 U.S. 363, 372 n. 4 (emphasis added). The federal government's relinquishment of any rights it may have had was broadly written to apply to all lands beneath navigable waters, which included lands covered by nontidal waters up to the ordinary water mark. 43 U.S.C. § 1301(a). Obviously, Congress used the highest possible boundary to ensure that it relinquished any and all possible interests of the United States. Thus, Section 1311(a) of the SLA declares that title and ownership of lands beneath navigable waters are held either by the states or by those persons entitled thereto under the laws of the respective states:

It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States *or 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;*

43 U.S.C. § 1311(a) (emphasis added). Division (b) of this section further provides that the United States “releases and relinquishes unto said States *and persons aforesaid*, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources.” *Id.* § 1311(b)(1) (emphasis added).

The appeals court correctly found that state law governs the determination of ownership of land under the SLA. (Appx. 25, ¶ 81). Indeed, as noted by the appeals court, the U.S. Supreme Court said exactly this in *California ex rel. State Lands Comm’n. v. U.S.* (1982), 457 U.S. 273, 288, which involved California’s claimed ownership of accretions fronting federal uplands along the California coast. Because the United States reserved to itself in the SLA all accretions to federally-owned uplands, California’s claim was rejected. *Id.* at 287. California argued that its laws governing accretion should apply, but the U.S. Supreme Court disagreed:

Finally, California submits that the Act granted title to the State by confirming the title of persons who, on June 5, 1950, were entitled to such lands “under the law of the respective States in which the land is located ....” 43 U.S.C. § 1311(a). This provision means nothing more than that *state law determines the proper beneficiary of the grant of land under the Act*; it is clear that federal law determines the scope of the grant under the Act in the first instance.

*Id.* at 288 (emphasis added); *see also Corvallis Sand & Gravel*, 429 U.S. at 372 n. 4 (“nothing in the Act in any way mandates, or even indicates, that federal common law should be used to resolve ownership of lands.”) Thus, the “title of persons” language makes clear that persons other than the states may own lands beneath navigable waters, and that ownership is determined

by state law. In fact, this language affirms the *propriety* of state common law recognizing ownership of such lands.<sup>35</sup>

The Ohio Attorney General also has reviewed *and rejected* the argument that all lands beneath navigable waters were vested by the SLA in the state of Ohio. *See* 1993 Op. Att’y Gen. No. 93-025, 1993 WL 465002, at \*1, 4-5. After first determining that the “natural shoreline” is equivalent to “water’s edge,” the Ohio Attorney General determined that a littoral owner along Lake Erie is the beneficiary of the SLA’s grant of land lying between the water’s edge and the ordinary high water mark: “The land that lies above the natural shoreline of Lake Erie belongs to the littoral owner. Therefore, the littoral owner is the beneficiary of the grant pursuant to 43 U.S.C.S. § 1311 (1980) of land above the natural shoreline up to the ordinary high water mark.” *Id.* at \*5. Thus, the SLA is yet further evidence that Ohio, like other states, has the authority to set the boundary of the “territory” below the ordinary high water mark.

The appeals court correctly found that, under both Ohio’s common law and statutes, the public trust boundary along Lake Erie extends no further landward than the water’s edge when undisturbed.

**C. Littoral Property Owners Have All Rights Traditionally Exercised by Owners of Private Property With Regard to Lands Landward of the Natural Shoreline of Lake Erie.**

The appeals court did not err in rejecting the Intervening Appellants’ argument that littoral property owners have no right to exclude others from their property lying between OHWM and the natural shoreline. (*See* Appx. 27; Int. App. Br. at 23-28.)

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<sup>35</sup> *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[.]”

Intervening Appellants criticize the appeals court's reliance upon *Sloan*, but that criticism is based upon Intervening Appellants' failure to read, or their decision to ignore, the facts of the case. The Ohio Supreme Court rejected the claim that the public has the right to walk on the lands below the ordinary high water mark when it held in *Sloan* that there are no public rights to the shore. *See Sloan*, 34 Ohio St. at 516-17. The Court 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.* Though acknowledging the public right of fishery, and thus rejecting private restrictions in that deed against the right to fish in the water, the Court 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. *Sloan*, 34 Ohio St. at 516-17 (emphasis added). The Court even noted that Biemiller had trespassed against *Sloan* 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 Intervening Appellants to suggest otherwise, in the face of this direct precedent, is inappropriate and no basis for reversing the appeals court. *Sloan* 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 Intervening Appellants' claim.

Nor does *Sloan* stand alone on this point. As discussed above, the Court in *Bodi* affirmed an injunction in favor of the Winous Point Shooting Club and against trespassers on the shores and marshes owned by the club in the westerly end of Sandusky Bay. *Bodi*, 10 Ohio Cir. Dec. at 550-51 (containing mandate from Supreme Court dated Oct. 5, 1897). That 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. *See also Lessee of Blanchard v. Porter* (1841), 11 Ohio 138, syll. (land on Ohio River between low and high water mark is not common to public).

Other lower court cases are to the same effect. *See Miller v. Foos* (Erie App. Oct. 10, 1980), Case No. E-80-29, 1980 WL 351552, at \*3; *State v. Cleveland-Pittsburgh Ry. Co.* (Cuyahoga App. 1914), 21 Ohio C.A. 1 (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.* (Cuyahoga Common Pleas 1909), 19 Ohio Dec. 372, 376, 8 Ohio N.P. (n.s.) 457 (noting no public access at properties abutting Lake Erie). *See also Mass. v. New York*, 271 U.S. at 93 (“there are no public rights in the shores of non-tidal waters.”)<sup>36</sup> On the opposite shore of Lake Erie in Canada, there also is no public right to walk the beach above the water’s edge. *Purdum v. Robinson* (S.C.C. 1899), 30 S.C.R. 64, 1899 CarswellOnt 28.

Intervening Appellants’ confusion of private property rights with littoral rights (Int. App. Br. at 26) is easily addressed. Littoral rights are exercised beyond the border of a littoral

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<sup>36</sup> Intervening Appellants’ reliance upon *Glass v. Goeckel* (2005), 473 Mich. 667, is unfounded given that it makes no attempt to state Ohio law. Instead, Intervening Appellants describe it as stating Michigan law, with a mix of Roman and English law, and reflects the “evolution” of the public trust doctrine in America. (Int. App. Br. at p. 27). Class Plaintiffs strongly suggest that Ohio law should not liberally “evolve” so as to deprive them of their private property rights. Such an evolution, or more properly a revolution, would raise serious concerns that private property is being judicially taken as discussed by Justice Scalia in *Stop the Beach Renourishment*, 560 U.S. at \_\_\_, 130 S.Ct. at 2601-02. “If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.” *Id.* at \_\_\_, 130 S.Ct. at 2602 (emphasis in original).

property owner's property and relate, as does the public trust, to the waters themselves. No mention has ever been made in Ohio law of a littoral right to exclude others from the shore because littoral rights are exercised in the waters and on subaqueous lands, not on the shore. As Intervening Appellants note, these rights cannot be exercised in a manner that interferes with the public rights of navigation and fishery, which obviously means little on the privately-owned dry shore. R.C. § 1506.10.

Intervening Appellants point out that the public rights were expanded some 150 years after Ohio's founding to include "recreation," which is somewhat true. *See Coleman v. Schaeffer* (1955), 163 Ohio St. 202, syll. ¶ 1 (public right to "boating or sailing for pleasure and recreation as well as for pecuniary profit"). No such right, of course, was thought of or considered when Ohio's common law was developed in the 1800s. As discussed above, and as stated in G.C. 3699-a, the public trust as originally contemplated and adopted benefitted society by allowing free movement of goods across navigable waters to market and free access to fisheries in Lake Erie. There was no need to balance "public trust" rights in the shore against private property rights of ownership of the shore because the former did not exist and the latter were absolute. However, with the expansion of the public trust to include recreational boating, parties such as Intervening Appellants have come to court seeking a liberal expansion of the boundaries of the public trust so that they may recreate on the shore. Presumably they intend to do so sans boat, although Class Plaintiffs are unaware of any Ohio court decision that recreational boating, with or without a boat, is permitted on the beaches adjoining the waters of Lake Erie. It is said that this Court need not define the limits of that recreation, as Intervening Appellants and others are more than happy to continually press for a more and more expansive meaning in the future. This

Court must understand that one person's recreation is another person's nuisance, particularly when that nuisance is occurring in what is a littoral property owner's back yard or living room.

Amici Sommer *et al.* make clear that access to the shore is not intended for purposes of navigation, water commerce, fishery or recreational boating. Instead, they claim rights wholly unrelated to the water that could be applied against any private property: the right to walk, right to look for birds, right to hunt for fossils or study plants, right to remove trash and debris. They are free to exercise these rights, if they can be called rights, on the fifty-three miles of shoreline owned by the State, as well as on privately-owned lands with the permission of the owners. They also can walk in the waters of Lake Erie lakeward of the natural shoreline. (Appx. 27, ¶ 89.) As with any private property, they simply may not trespass on private property landward of the natural shoreline. This Court's role is not to legislate these "rights" into existence for Amici.

*Sloan*, other Ohio decisions, and the language of the Fleming Act preclude the State from establishing any vested right of the public in the shore. Thus, the appeals court did not err in rejecting Intervening Appellants' argument to the contrary.

### **Proposition of Law No. 2.**

**The natural shoreline typically moves as the waters of Lake Erie rise and fall, except in two situations where the water's edge and shoreline will diverge. First, 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. Second, when a littoral owner has placed or caused to be placed more than a negligible amount of artificial fill lakeward of the natural shoreline of Lake Erie and onto the submerged lands thereof, those submerged lands remain part of the public trust territory between the natural shoreline and the international boundary line with Canada and the natural shoreline remains fixed at its last location prior to the placement of the artificial fill.**

ODNR and the State both attempt to invent an error in the appeals court's opinion by arguing that the court below "suggested" or "implied" or secretly "intended" to hold that a littoral owner can move the natural shoreline lakeward by placing fill into the waters of Lake

Erie in front of the littoral owner's property. (ODNR Br. at 8-11; State Br. at 42-45.) The clause highlighted by ODNR and the State as creating clear error simply states that the shoreline typically separates wet from dry, with "natural or filled lands privately held by littoral owners" found on the dry side. (See Appx. 36, ¶ 127.) ODNR misconstrues this statement as suggesting that "artificially filling in submerged lands removes the lands from the public trust territory." (ODNR Br. at 11.) The State similarly charges that the appeal court held that landowners "may claim exclusive title over areas of the Lake that have been artificially filled in." (State Br. at 42.) To jump to these conclusions, both must ignore that the court of appeals limited the phrase "natural or filled lands" with the qualifier "privately held by littoral owners." Because Ohio law is clear that filled lands can be privately owned, the court of appeals did not err.

Indeed, both ODNR and the State agree that filled lands may be privately owned by recognizing the law applicable to avulsion. (ODNR Br. at 9 n. 1; State Br. at 44.) All parties agree that a littoral property owner maintains ownership of lands lost by avulsion – a sudden and perceptible loss of land by the action of water – because an avulsive event does not move the natural shoreline. See *United States v. 461.42 Acres of Land in Lucas County, Ohio* (N. D. Ohio 1963), 222 F. Supp. 55, 56-58 (holding in a "takings" case against the federal government that a private owner, not the state, held title to land under water at the time of dispute because the private land was lost from avulsion caused by a severe storm in 1929); see also *Baumhart v. McClure* (Erie App. 1926), 21 Ohio App. 491, 493-94; Class Supp. 22. Avulsion is so substantial along Lake Erie that it is responsible for greater than eighty percent of the total shore recession experiences. (Class Supp. 22.) Land lost through avulsion can be filled out to where the natural shoreline existed prior to the avulsive event and thereby reclaimed by the littoral owner. See *461.42 Acres of Land in Lucas County*, 222 F. Supp. at 58; *Hogg v. Beerman*, 41

Ohio St. at 98. When a property owner uses fill to reclaim land lost to avulsion, even though the fill is placed in the waters of Lake Erie, that fill (and the land beneath the fill) is privately held and remains so for many years. *See 461.42 Acres of Land in Lucas County*, 222 F. Supp. at 55, 58 (210 acres submerged for 34 years remain privately owned). As stated by the court of appeals, the natural shoreline then separates the waters of Lake Erie from “those natural or filled in lands privately held by littoral owners.”

The important distinction here is that a property owner reclaiming land lost to avulsion is placing artificial fill on its own land while covered by the waters of Lake Erie. The owner is not placing artificial fill onto the submerged lands of Lake Erie held in trust for the public. When an avulsive event occurs, the lake’s waters may move landward but the natural shoreline, and thus the boundary of submerged lands, does not. *See 461.42 Acres of Land in Lucas County*, 222 F. Supp. at 58; *Baumhart*, 21 Ohio App. at 494 (“if it disappeared suddenly, as a result of storms, and became for that reason submerged land, the defendant’s title would still remain”). In such a case the littoral owner may place artificial fill into the waters of Lake Erie and onto its own land to elevate its land above those waters. This fill is not placed onto public trust lands, and both the fill and the land beneath it is privately owned.

In contrast, when a littoral owner places more than a negligible amount of fill into the waters of Lake Erie and onto the public trust lands of Lake Erie, the fill does not alter the status of the submerged lands as public trust lands. *State ex rel. Squire v. City of Cleveland* (1948), 150 Ohio St. 303, 313, 317 (describing last natural shoreline fixed in 1914 by placing fill into shallow, nonnavigable waters to wharf out to navigable waters). The “natural shoreline” is then fixed at its last natural location prior to the placement of artificial fill, and, as stated in R.C. § 1506.11(A), the “territory” includes not only the waters of Lake Erie and the lands presently

underlying those waters but also the “lands formerly underlying the waters of Lake Erie and now artificially filled, between the natural shoreline and the international boundary line with Canada.” The filled-in, submerged lands in this example are public trust lands, so these are not the “filled in lands privately held by littoral owners” referenced by the court of appeals.<sup>37</sup>

The court of appeals’ decision also properly accounts for artificial fill placed on the shore of Lake Erie. Although ODNR cites on multiple occasions to *State ex rel. Duffy v. Lakefront East Fifty-Fifth Street Corp.* (1940), 137 Ohio St. 8, ODNR fails to recognize that the natural shoreline in that case also separated the public trust territory from natural *and filled* lands privately held by the Lakefront East Fifty-Fifth Street Corporation. In *Duffy*, the Court rejected the state’s claim on land measuring 1,000 feet from north to south and 700 feet from east to west that had formed by accretion between the shorelines of 1898 and 1938 (the shoreline moved to the north as the accreted beach grew). *Id.* at 11-13. The Court found that, once a beach accreted to the littoral owner’s property, it lawfully could place tons of fill on top of that beach, with a negligible amount in the water, to ensure that it remained part of the upland. *Id.* at 12. Thus, in *Duffy*, the shoreline separated the waters and submerged lands of Lake Erie from the several tons of filled lands privately held by the Lakefront East Fifty-Fifth Street Corporation.

ODNR’s claim that the court of appeals expanded *Sloan* to equate artificial fill with a “disturbing cause” can easily be disposed of as untrue. Nowhere in the court of appeals’ opinion does the court associate artificial fill with a disturbing cause. The word “fill” only appears once in the court’s opinion – in paragraph 127. As ODNR correctly observes, a “disturbing cause” is a storm or other natural cause that affects the usual water’s edge. (ODNR Br. at 13.) The Class

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<sup>37</sup> The fill itself, if placed by the littoral owner, remains the property of the littoral owner. See R.C. § 1506.11(E).

Plaintiffs agree with ODNR that there is nothing in *Sloan* upon which to premise the conclusion that artificial fill is a disturbing cause. *Id.* Thus, one is left to speculate why ODNR itself leapt to that conclusion.

### **Proposition of Law No. 3**

**When the General Assembly has expressly authorized a state agency to enforce a State interest and that state agency elects not to appeal from a trial court decision, the Attorney General lacks independent authority to pursue such an appeal on behalf of the State.**

The Attorney General asserts that he had the authority to appeal below on behalf of the State even though ODNR elected not to do so. (State Br. 12-21.) He, along with amici, former Attorneys General of Ohio Montgomery, Petro, and Rogers, contend that the Appellate Court erred in finding that the Attorney General lacked authority to prosecute this matter on behalf of the State. The Court should affirm the Appellate Court's decision on his authority here, not because it would dispose of the appeal before the merits (which it would not for reasons described below), but because the Appellate Court's decision recognizes a specific delegation of authority and, more importantly, properly redresses the gamesmanship engaged in by ODNR and the Attorney General.

**A. No Matter Which Way the Court Rules on the Question of the Attorney General's Authority, the Question of the Most Landward Boundary Line of the State's Public Trust Remains in Front of the Court.**

On the one hand, if the Court finds, as Class Plaintiffs believe it should, that the Attorney General did lack authority to prosecute the appeal below, and the State was bound by ODNR's decision not to appeal, the question of the boundary still remains in front of the Court based on the appeals filed by Appellants NWF and OEC. NWF and OEC appealed the Trial Court's decision to the appellate court separately from the Attorney General. Those two appeals proceeded independently, as case numbers 2008-L-007 (NWF and OEC) and 2008-L-008

(Attorney General), were not consolidated and were separately briefed. The Appellate Court's Opinion was entered in both case numbers. NWF and OEC then separately appealed the Appellate Court's decision to this Court on the question of the boundary. Thus, NWF and OEC have appealed the question of the boundary from the trial court up to this Court independent of the Attorney General's authority or decisions.

On the other hand, if the Court finds that the Attorney General did have authority to prosecute the appeal below despite ODNR's decision not to appeal, the question of the boundary obviously remains in front of the Court. None of the parties have asked the Court to remand for further proceedings should it reverse on the issue of authority. In fact, the Attorney General himself argued against remand in this situation, stating that "any remand would merely waste time and harm the parties' and the public's interest." (AG's Supp. Juris. Br. at 19.) As the Attorney General explained, "the issues here are primarily, if not exclusively, legal ones" and "regardless of the outcome on remand, the weighty issues at stake here would likely still warrant this Court's review" and "a remand, therefore, would not add value." (*Id.* at 20.) Appellees agree with this reasoning.

The question of the boundary is properly in front of the Court now based on the appeal by NWF and OEC, and should remain in front of the Court to further judicial economy and the parties' requests.

**B. The Attorney General's General Authority to Prosecute Actions on Behalf of the State Must Yield to ODNR's Specific Authority in this Limited Instance.**

The Attorney General had no authority to appeal the decision of the trial court after ODNR, on behalf of the State of Ohio, consented to the decision of the trial court, abided by the decision of the trial court and never appealed or moved to stay the decision of the trial court. Those actions are binding on the State through ODNR, and preclude the Attorney General from

having authority to appeal, either here or below in the Eleventh District Court of Appeals. The Attorney General, recognizing that hurdle, attempts to focus the Court on concepts of standing and general authority, which merely creates confusion as to whether he, or ODNR, has ultimate authority here and works prejudice on private property owners.<sup>38</sup> The Court should reject the Attorney General's arguments and affirm that ODNR is the real party in interest with standing and authority over all matters regarding the State's public trust rights in Lake Erie.

As OLG explained in detail previously during jurisdictional briefing, and as the Attorney General himself previously agreed, ODNR is the entity authorized on behalf of the State of Ohio to dispute the most landward location of the public trust boundary on Lake Erie. The General Assembly has designated ODNR "as the state agency *in all matters* pertaining to the care, protection, and *enforcement* of the *state's rights* designated in this section." R.C. § 1506.10 (emphasis added).<sup>39</sup> If a person is violating or failing to comply with any provision of R.C.

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<sup>38</sup> In his Supplemental Jurisdictional Memorandum, the Attorney General suggested that depriving him of this authority would also be tantamount to granting the Governor an unlimited veto over legislation. (AG's Supp. Memo., p. 17.) If this appeal had involved a challenge to the authority of the General Assembly to pass, or the constitutionality of, the statute at issue, then his argument might make some sense. This appeal, however, is limited to the question of interpreting the statute at issue as a matter of law, something in which this Court, not the Attorney General, has the ultimate say.

<sup>39</sup> The General Assembly has never delegated the ultimate authority over the State's public trust rights in Lake Erie to the Attorney General. It first delegated that authority in 1917 to municipalities. See Fleming Act, G.C. § 3699-5 (granting municipalities the authority to control and manage the public trust in Lake Erie). In 1940, the Ohio Department of Public Works was informed by the Attorney General that it had "not yet been granted by the legislature any power to maintain an action" with regard to the public trust. See Op. Att'y Gen. No. 1940-2503. In 1945, the General Assembly amended the Fleming Act to specifically note that "the department of Public Works of Ohio . . . is hereby designated as the state agency in all matters pertaining to the care, protection and enforcement of the state's rights" in Lake Erie. See G.C. § 3699-a. In 1948, in apparent recognition of the delegation by the General Assembly, the Attorney General participated in the Ohio Supreme Court as an amicus only in a dispute over the State's public trust rights in lake Erie. *State ex rel. Squire v. City of Cleveland* (1948), 150 Ohio St. 303, 345.

Chapter 1506, the Attorney General's enforcement thereof is contingent upon ODNR's written request. R.C. § 1506.09.

In the trial court, the Attorney General supported the General Assembly's authority to provide for the protection of the State's public trust rights. (*See, e.g.*, AG's Opp'n to OLG's SJ Motion at 7.) He has also similarly supported the propriety of the General Assembly's delegation of enforcement authority to ODNR. (*See, e.g.*, ODNR's SJ Motion at 30, filed by the Attorney General as counsel to ODNR.) The Attorney General even repeatedly disclaimed any authority superior to ODNR. (*See, e.g.*, AG's Opp'n to OLG's SJ Motion at 26 and 31, noting, respectively, that he "obviously would have no authority" to challenge ODNR's decision-making and that public reliance on opinions by his office regarding the boundary of the public trust would "unconstitutionally preempt[] the Legislature's exclusive authority to make law".) ODNR thus was the real party in interest with standing and authority, as delegated by the General Assembly, to prosecute this action on behalf of the State of Ohio.

ODNR exercised that authority for the State by consenting to the trial court's judgment and waiving the State's right to appeal. ODNR decided in the middle of briefing on summary judgment "that it would no longer participate in the ongoing boundary dispute" (State Br. at 7) and "indicated to the [trial] court that it *welcomed* the court's resolution of the issues before it" (ODNR Br. at 2 (emphasis added)). ODNR did not reserve any right to appeal the judgment of the Trial Court, did not file a notice of appeal and never moved to stay the judgment.

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Since then, the General Assembly has shifted responsibility from the Department of Public Works to the Department of Administrative Services (R.C. § 123.03 (effective 1973)) and then to ODNR (R.C. § 1506.10 (effective 1989)) where it sits today.

Such action amounts to a waiver of the right to appeal. See *Conover v. Milford* (June 29, 1983), Clermont App. No. CA-1190, 1983 WL 4405, \*3 (“the appellant cannot complain of an action made by the trial court that is in accord with appellant’s own suggestion or consent”); *In re Annexation of the Territory of Riveredge Township to the City of Fairview Park* (Cuyahoga App. 1988), 46 Ohio App. 3d 29, 31; *Bromley v. Hinton and Keith Development* (Summit App.), 2002-Ohio-1249, 2002 WL 432059. It also precludes “aggrieved party” status. See *Denovchek v. Board of Trumbull County Comm’rs* (1988), 36 Ohio St. 3d 14, 17 (cited in State’s Brief at 15 and noting that an “aggrieved party” must be prejudiced by the judgment); see also *Williams v. McFarland Properties, LLC* (Butler App.), 177 Ohio App. 3d 490, 498, 2008-Ohio-3594, ¶ 29, (“to have standing . . . , the person must be able to show he has a present interest in the subject matter of the litigation and that he has been prejudiced by the judgment of the lower court”).

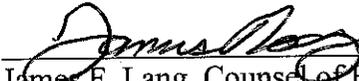
Attorney General Dann might have disagreed with ODNR’s decision to not appeal the decision of the trial court, but that disagreement does not justify what followed. The convenient bifurcation of authority between ODNR and the Attorney General has prejudiced Class Plaintiffs in the name of political expediency, as it allowed Governor Strickland and ODNR to support Class Plaintiffs while effectively preventing them from obtaining a final judgment against the “State” in the trial court. This unnecessary bifurcation creates confusion, as it suggests that the State has two competing decision-makers regarding the care, protection and enforcement of the State’s rights in Lake Erie. This confusion may lead to further prejudice against private property owners in that, for the past three years, ODNR has allowed them to maintain ownership over their deeded property down to the water’s edge, ownership which the Attorney General insists is in violation of the State’s public trust rights. The State cannot continue to take two conflicting positions here, but must instead speak with one voice, through ODNR.

The Court should recognize the General Assembly's valid delegation of power, find that ODNR possesses the ultimate authority with regard to the State's public trust rights in Lake Erie, including the authority to direct litigation on the State's behalf on such matters, and affirm the ruling that the Attorney General lacked authority to appeal the judgment of the trial court on behalf of the State.

#### **IV. CONCLUSION**

For the foregoing reasons, the Class Plaintiffs respectfully ask that the Court affirm the Eleventh District Court of Appeals' Opinion in all respects.

Respectfully submitted,

  
\_\_\_\_\_  
James F. Lang, Counsel of Record

*Attorney for Class Plaintiffs-Appellees*

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing **Class Plaintiffs-Appellees' Merit Brief** has been sent by regular U.S. Mail upon the following persons this 20th day of September, 2010:

Benjamin C. Mizer, Solicitor General  
Stephen P. Carney, Deputy Solicitor  
Cynthia K. Frazzini, Assistant Attorney General  
John P. Bartley, Assistant Attorney General  
30 East Broad Street, 17th Floor  
Columbus, Ohio 43215

Peter A. Precario  
326 South High Street  
Annex, Suite 100  
Columbus, Ohio 43215

Will Reisinger  
Trent A. Dougherty  
1207 Grandview Avenue, Suite 201  
Columbus, Ohio 43206

Neil S. Kagan  
National Wildlife Federation  
Great Lakes Natural Resource Center  
213 West Liberty Street, Suite 200  
Ann Arbor, Michigan 48104

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

Kathleen M. Trafford  
Porter Wright Morris & Arthur LLP  
41 S. High St.  
Columbus, Ohio 43215

L. Scot Duncan  
1530 Willow Drive  
Sandusky, Ohio 44870

*James F. Lang / N.T.A. (0080713)*  
One of the Attorneys for Class Plaintiffs-Appellees

**APPENDIX**

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1917

[Amended House Bill No. 255.]

AN ACT

Declaring the rights of the state in the waters of Lake Erie, and the soil under such waters and granting power to municipal corporations to use, lease and control the territory within their corporate limits, and amending and supplementing sections 3693-1 of the General Code.

It is enacted by the General Assembly of the State of Ohio:

Declaration of state's rights to soil under Lake Erie and soil thereunder.

Section 1. It is hereby declared that the waters of Lake Erie within the boundaries of the state together with the soil beneath and their contents do now and have always since the organization of the state of Ohio, belonged to the state of Ohio as proprietor in trust for the people of the state of Ohio, subject to the powers of the United States government the public rights of navigation and fishery and further subject only to the right of littoral owners while said waters remain in their natural state to make reasonable use of the waters in front of or flowing past their lands and the rights and liabilities of littoral owners while said waters remain in their natural state of accretion, erosion and avulsion. Any artificial encroachments by public or private littoral owners, whether in the form of wharves, piers, fills or otherwise beyond the natural shore line of said waters not expressly authorized by the general assembly, acting within its powers, shall not be considered as having prejudiced the rights of the public in such domain. Nothing herein contained shall be held to limit the right of the state to control, improve or place aids to navigation in the other navigable waters of the state or the territory formerly covered thereby.

Section 2. That section 3693-1 of the General Code be amended and supplemented by the enactment of supplemental sections to be known as sections 3699-2, 3699-3, 3699-4, 3699-5, 3699-6, 3699-7, 3699-8 and 3699-9 of the General Code, to read as follows:

Municipalities authorized to subscribe to control waters and soil of Lake Erie, within corporate limits, to extend the same out from natural shore.

Section 3699-1. All municipal corporations within the corporate limits of which there is or may hereafter be included part of the shore of the waters of Lake Erie shall have the power, in aid of navigation and water commerce, to construct, maintain, use and operate, piers, docks, wharves, to construct, maintain, use and operate, piers, docks, wharves and connecting ways, places, tracks and other water terminal improvements with buildings and appurtenances necessary or incidental to such use, on any land belonging to the corporation held under title permitting such use and also over and on any submerged or artificially filled land or lands made by accretion resulting from artificial encroachments made by the state of Ohio, within the territory covered or formerly covered by the waters of Lake Erie in front of littoral land within the limits of said corporation whether said littoral land is privately owned or

Sec. 3693-1.

Sec. 3699-1.

commissioners and county sheriff in order to facilitate the transaction of public county business, they shall adopt a resolution to that effect, and shall file an application in the court of common pleas, setting forth the necessity for such purchase, together with a statement of the kind and number of vehicles required and the estimated cost of each such vehicle. Ten days notice of the time of hearing such application shall be published in a newspaper of general circulation in the county. If upon such hearing of said application the court shall find that it is necessary and expedient to purchase one or more of such vehicles, it shall so order, and shall fix the number and kind of such vehicles, and the amount to be expended for each.

Section 2. When purchased, such vehicles shall be for the use of the county commissioners and county sheriff, such use to be subject to regulation of the county commissioners, and such vehicles shall be used by each of such officials in lieu of hiring vehicles in the number otherwise provided by law, unless the county vehicles are not available for such use, when vehicles are so purchased by the county commissioners, they may purchase such supplies as may be necessary. Any vehicles heretofore acquired and now owned by the county shall be used as herein provided. All such automobiles or other vehicles shall be plainly and conspicuously lettered as the property of the county. No official or employee shall use or permit the use of any such automobiles or other vehicles or any supplies therefor, except in the transaction of public business of such county.

Section 3. Any county official or employee thereof who uses or permits the use of any such automobile or other vehicle for any purpose other than public business shall be guilty of a misdemeanor, and be fined not less than twenty-five dollars nor more than one hundred dollars for each offense.

Speaker of the House of Representatives. EARL D. BLOOM, President of the Senate.

JAMES M. COX, Governor.

Passed March 21, 1917. Approved March 30, 1917.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 2nd day of April A. D. 1917. 147G.

Sec. 12386-1. Penalty for use of other than public life business.

The method of numbering on the margin hereof are designed by law. McORMACK, Attorney General.

Sec. 3699-4. Before a municipal corporation makes a lease for a term of three years or more of any territory mentioned in section 3699-1, title to which is in the state of Ohio, said municipal corporation shall, by resolution of its council, cause public notice to be given in the same manner that the ordinances of said council are published, that on a day named in said notice bids will be received by the clerk of the council for the leasing of the premises to be described in said notice. Said notice shall specify whether any rental shall be required or name a fixed rental to all bidders or may leave the amount of rental a matter of competition between bidders and shall require all bidders to specify the use they propose to make of the premises described in the notice. Said bids shall be opened only at a regular session of said council and a lease shall be given to the bidder whose offer, in the discretion of the council, is the best considering the amount of rental offered, if made competitive, as well as whose use of the premises under the lease will best advance the water concerns of the port.

Sec. 3699-5. The control of any municipal corporation may, when not otherwise prescribed by the charter law of the corporation, provide by ordinance for the manner and by what executive officials the ordinances and laws governing the administration of the territory described in section 3699-1 shall be administered and for the management of said territory and improvements placed thereon.

Sec. 3699-6. All rentals or charges made or collected by a municipal corporation for the use of any part of the territory described in section 3699-1, title to which is in the state of Ohio, or for improvements thereon, shall be used only to maintain, improve or add to improvements in aid of navigation and water commerce.

Sec. 3699-7. Nothing contained in section 3699-1 to section 3699-6, all inclusive, shall be held to have a retroactive effect to validate or add to the effect of any previous act of a municipal corporation concerning such or like territory or public rights, nor shall the provisions of said sections have any effect, except as expressly provided in this act, to give any littoral or riparian owner any rights in any territory covered or formerly covered by the waters of Lake Erie or the other navigable waters of the state.

Sec. 3699-8. All rights, title and interest of the state of Ohio in and to all submerged and filled lands in the harbor of the city of Cleveland, described in section 3, section 4, section 5, section 7 and section 9 in an ordinance of the city of Cleveland, designated Ordinance No. 37904-A, passed September 15th, 1915, which authorized the mayor of the city of Cleveland to enter into a contract with certain railroad companies for the purpose of securing a union passenger station for the city of Cleveland, together with all other submerged and filled lands within a tract which is bounded westerly by the east bank of Cuyahoga river as it now runs and the east government pier, northerly by the government harbor line as it is now or may hereafter be established, and

Control and management of territory.

Application of section.

Law shall have no retroactive effect.

All state rights in certain submerged lands, acquired from the act.

not. Any such municipal corporation shall also have power and authority to by ordinance subject to superior federal legislation, establish harbor lines and other regulations for said territory and to prohibit the plying, maintaining or causing or permitting to be placed thereon any unwharfed encroachments on said territory. The territory to which the powers hereby granted shall apply shall be limited to that within the existing or future corporate limits of the corporation and extending into Lake Erie to the distance of two miles from the natural shore line; and for all purposes of government and exercise of said powers the corporate limits of any such corporation shall be held to extend out in, over and under said water and land made or that may be made within said territory. These provisions, however, shall not have the effect of limiting the now existing boundaries of any municipal corporation and in case where two municipal corporations have upland territory fronting on said waters and there should be a conflict on account of the curve of the shore line or otherwise as to said two mile boundary the boundaries of each corporation shall be a line midway between the shore line of each and not exceeding two miles from the shore line of either. Provided, however, that all powers hereby granted shall be exercised subject to the powers of navigation and fishery in any such territory and rights of navigation and fishery in any such territory and all mineral rights or other natural resources existing in the soil or waters in said territory, whether now covered by water or not, are reserved to the state of Ohio and its citizens.

Powers, duties and limitations.

Sec. 3699-2. Limitations of territory of municipalities and front lands reserved by private owner.

Sec. 3699-3. Execution of leases; procedure.

Sec. 3699-2. When any part of the territory mentioned in Sec. 3699-1, title to which is in the state of Ohio, is in front of privately owned upland and has been filled in or improved by said private upland owner or his predecessor in title to said upland, then a municipal corporation shall not have the power to take possession of or lease such part of the public domain so filled or improved, without the consent of said upland owner, until said municipal corporation has complied with the laws governing the appropriation of private property for municipal purposes, except that in any such proceeding to appropriate there shall be no compensation allowed to the upland owner for the site of such fill or improvements.

Sec. 3699-3. Any lease by a municipal corporation, made under the provision of section 3699-1, for a term of three years or more, shall be made by the passage of an ordinance describing the premises leased and locating by metes and bounds the then existing natural shore line or the last natural shore line, if artificially changed, and fixing the terms and conditions of the lease, and the acceptance thereof in writing by the lessee. But the same shall have no validity unless a true copy of such ordinance and said acceptance certified as correct by the clerk of the council of said municipality is recorded in the office of the recorder of the county where the premises are located.



1955

Filed in the office of the Secretary of State at Columbus, Ohio on the first day of July, A. D. 1955.

TED W. BROWN,  
Secretary of State.

File No. 181

(Amended Substitute Senate Bill No. 187)

AN ACT

To enact section 133.031 and to amend sections 123.03, 721.04, 721.05, and 721.11, and to repeal sections 721.06 and 721.07 of the Revised Code, for the purpose of encouraging and providing for the private development of waterfront lands and the development, utilization, and conservation of said territory for the uses to which it may be adapted, and to protect the rights of the state and to delegate certain powers to municipal corporations, port authorities, counties and the director of public works.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 123.03, 721.04, 721.05, and 721.11 be amended and section 123.031 of the Revised Code be enacted to read as follows:

State's rights to waters of Lake Erie.

Sec. 123.03. It is hereby declared that the waters of Lake Erie consist of the territory within the boundaries of the state, extending from the southerly shores of Lake Erie to the international boundary line between the United States and Canada, together with the soil beneath and their contents, do now and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state, for the public uses to which it may be adapted, subject to the powers of the United States government, and further subject to the power of water commerce and fishery, and further subject to make reasonable use of the waters in front of or flowing past their lands. Any artificial encroachments by public or private littoral owners, which interfere with the free flow of commerce in navigable channels, whether in the form of wharves, piers, fills, or otherwise, beyond the natural shore line of said waters, not expressly authorized by the general assembly, acting within its powers, or pursuant to section 123.031 of the Revised Code, shall not be considered as having prejudiced the rights of the public in such domain. This section does not limit the right of the state to control, improve, or place aids to navigation in the other navigable waters of the state or the territory formerly covered thereby.

The department of public works is hereby designated as the state

Revised Statutes of Ohio (1887)

To enact section 307.73 of the Revised Code relative to granting of permission by the board of county commissioners to re-survey of private enterprises to construct water and sewer lines.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That section 307.73 of the Revised Code be enacted to read as follows:

Private construction of water and sewer lines.

Sec. 307.73. The board of county commissioners for any unincorporated portion of the county, upon application by any individual, organization, or agency of private enterprise, may grant permission to such individual, organization, or agency to construct water or sewer lines, or both, under the supervision of the board.

The board shall collect and return to such individual, organization, or agency a prorated share of the cost of such improvement in any instance in which such improvement is tapped into by a nonparticipant in the original cost. The prorated share shall be based on the front footage of improvement to the nonparticipant and shall not be in excess of the amount chargeable to such nonparticipant if such nonparticipant had participated in the aforesaid improvements.

No subsequent assignee or grantee of such individual, organization, or agency shall be considered a nonparticipant in the original cost. The county commissioners may make such rules and regulations as may be necessary to administer this section.

ROGER CLOUD,  
Speaker of the House of Representatives.

JOHN W. BROWN,  
President of the Senate.

Passed June 20, 1955.

Approved July 1, 1955.

FRANK J. JAUSCHE,  
Governor.

The sectional number herein is in conformity with the Revised Code.  
OHIO LEGISLATIVE SERVICE COMMISSION  
JOHN A. SKIRROW, Director

shall be entitled to be heard, to be represented by counsel, and to have process to compel the attendance of witnesses. The findings and order of the director of public works shall be in writing. All costs of the hearings, including publication costs, shall be paid by the applicant.

In the event the director of public works finds that a lease may properly be entered into with the applicant he shall recommend to the governor the terms and conditions of such lease, and shall determine the consideration to be paid by the applicant, which consideration shall include the value of the upland owner's littoral rights and improvements made or paid for by the upland owner or his predecessors in title. Such lease may be for such periods of time, whether limited or perpetual, as the director of public works shall recommend. The rentals received under the terms of such a lease shall be paid into the city, county, or port authority making the finding herein provided for.

If the governor concurs in the findings of the director of public works, and approves the terms and conditions of said lease agreement, he shall issue a certificate to that effect and deliver the same to the auditor of state for the drafting of the lease agreement. All leases made hereunder shall be executed in the manner provided by section 5301.13 of the Revised Code and shall contain, in addition to the provisions required herein, a reservation to the state of all mineral rights as required by section 155.01 of the Revised Code, except that the removal of such minerals shall be conducted in such manner as not to damage any improvements placed by the littoral owner or lessee on such leased lands. No lease of the lands herein defined shall express or imply any control of fisheries or aquatic wildlife now vested in the division of wildlife of the department of natural resources.

(D) Upland owners who have, prior to the effective date of section 123.031 of the Revised Code, created, developed or maintained structures, facilities, buildings or improvements or made use of waters in the part of the territory in front of such uplands shall be granted a lease by the state, acting through the governor, as set forth in this section, upon the presentation of a certification by the chief executive of a municipality, resolution of the board of county commissioners, or by a resolution of the board of directors of the port authority establishing that such structures, facilities, buildings, improvements or uses do not constitute an unlawful encroachment on navigation and water commerce. Such lease, upon its issuance, shall specifically enumerate the structure facilities, buildings, improvements, or uses so included.

(E) Upland owners having secured a lease pursuant to section 123.031 of the Revised Code shall be entitled to just compensation for the taking, whether for navigation, water commerce, or otherwise, by any governmental authority having the power of eminent domain, of structures, facilities, buildings, improvements, or uses, erected or placed upon the territory, pursuant to the provisions of such lease or the littoral rights of such upland owner, and such leasehold and the littoral rights of the upland owner, pursuant to the procedure provided in sections 719.01 to 719.21, inclusive, of the Revised Code. Such compensation shall not include any compensation for the site in the territory except to the extent of any interest in the site theretofore acquired by the upland owner under this sec-

agency in all matters pertaining to the care, protection, and enforcement of the state's rights designated in this section.

Any order of the director of public works in any water pertaining to the care, protection and enforcement of the state's rights in said territory shall be deemed a rule or regulation within the meaning of sections 119.01 to 119.13, inclusive, of the Revised Code.

Leasing of lakefront land for private improvement.

Sec. 123.031. (A) "Territory", as used in this section, means the waters and the lands presently underlying the waters of Lake Erie and lands formerly underlying the waters of Lake Erie and now artificially filled, between the natural shore line and the harbor line or the line of commercial navigation where no harbor line has been established.

(B) Whenever the state, acting through the governor upon the recommendation of the director of public works, shall, upon application of any owner of uplands fronting on Lake Erie, and after notice as hereinafter provided, determine that any part of the territory as defined in section 123.031 of the Revised Code, in front of said uplands can be developed and improved at the waters thereof used as specified in said application without impairment of the public right of navigation, water commerce, and fishery, a lease of all or any part of the state's interest therein may be entered into with said owner, subject to the powers of the United States government, and without prejudice to the littoral rights of said upland owner, provided the legislative authority of the municipal corporation within which any such part of the territory is located if such municipal corporation is not within the jurisdiction of a port authority, or the county commissioners of the county within which such part of the territory is located, excluding any territory within a municipal corporation or under the jurisdiction of a port authority, or the board of directors of a port authority with respect to such part of the territory included in the jurisdiction of the port authority, shall have enacted an ordinance or resolution finding and determining that such part of the territory, described by metes and bounds, is not necessary or required for the construction, maintenance, or operation by the municipal corporation, county, or port authority of breakwaters, piers, docks, wharves, bulwarks, connecting ways, water terminal facilities and improvements and marginal highways, in aid of navigation and water commerce, and that the land uses specified in said application comply with regulation of permissible land use under a waterfront plan of the local authority.

(C) Upon the filing of the application of such upland owner in the office of the director of public works in Columbus, Ohio, such director shall hold a public hearing thereon and cause written notice of such filing to be given any municipal corporation, county, or port authority, as the case may be, in which such part of the territory is located and also public notice of such filing by advertisement in a newspaper of general circulation within the locality where such part of the territory is located, once a week for four consecutive weeks prior to the date of the initial hearing. All hearings shall be before the director of public works and shall be open to the public and a record shall be made of the proceedings. Parties thereto

tion or by prior acts of the general assembly or grants from the United States. The failure of any owner of uplands to apply for or obtain a lease under this section shall not prejudice any right said upland owner may have to compensation for a taking of littoral rights and improvements made in the exercise thereof.

(F) In the event any taxes or assessments are levied or assessed upon the property which is the subject of a lease pursuant to section 721.031 of the Revised Code, such taxes or assessments shall be and become the obligation of the lessee having secured a lease pursuant to this section.

#### Use and control of waters and soil of Lake Erie.

Sec. 721.04. Any municipal corporations within the limits of which there is included a part of the shore of the waters of Lake Erie may, in aid of navigation and water commerce, construct, maintain, use, and operate \*\* piers, docks, wharves, and connecting ways, places, tracks, and other water terminal improvements with buildings and appurtenances necessary or incidental to such use, on any land belonging to the municipal corporation held under title permitting such use, and also over and on any submerged or artificially filled land made by accretion resulting from artificial encroachments, title to which is in the state, within the territory covered or formerly covered by the waters of Lake Erie in front of littoral land within the limits of such municipal corporation, whether such littoral land is privately owned or not.

Any such municipal corporation may, by ordinance, subject to federal legislation, establish harbor lines and other regulations for such territory and prohibit the placing, maintaining, or causing or permitting to be placed therein any unlawful encroachments on such territory.

The territory to which this section applies is limited to that within the limits of the municipal corporation and extending into Lake Erie to the distance of two miles from the natural shore line. For all purposes of government and exercise of such powers the limits of any such municipal corporation shall be held to extend out, in, over, and under such water and land made or that may be made within such territory. This section does not limit the now existing boundaries of any municipal corporation. Where two municipal corporations have upland territory fronting on such waters, and there is a conflict because of the curve of the shore line or otherwise as to such two mile boundary, the boundaries of each such municipal corporation *may be determined by agreement between the municipal corporations concerned.*

All powers granted by this section shall be exercised subject to the powers of the United States government and the public rights of navigation and fishery in any such territory. All mineral rights or other natural resources existing in the soil or waters in such territory, whether now covered by water or not, are reserved to the state.

#### Acquisition of privately improved lakefront area.

Sec. 721.05. When any part of the territory mentioned in section 721.04 of the Revised Code is in front of privately owned upland and has

been filled in or improved by the owner or his predecessor in title to such upland, a municipal corporation shall not take possession \*\*\* such part of the public domain so filled or improved, without the consent of such upland owner, until the municipal corporation has complied with sections 719.01 to 719.21, inclusive, of the Revised Code. In any such proceeding to appropriate there shall be no compensation allowed to the upland owner for the site of such fill or improvements.

#### Waterfront development; assessments on improvements.

Sec. 721.11. Any municipal corporation having jurisdiction over any part of the territory mentioned in section 721.04 of the Revised Code, whether in front of privately owned upland or otherwise, as provided in such section, may, in aid of navigation and water commerce, adopt plans for the development of such water front, construct bulkheads at such locations as it approves between the shore line and the harbor line as fixed by the United States government, make fills with earth or other suitable materials out to such bulkheads, and construct public highways on the filled portions \*\*\*.

*Leases made pursuant to section 123.011 of the Revised Code shall be subject to the right of the municipal corporation to maintain a highway, a marginal railroad, and other agreed reasonable means of access to the waters of Lake Erie in conformity with the water front plan of such municipality in aid of navigation and water commerce, provided that an adequate means of access to said waters must be provided to the lessees.*

\*\*\*

Such municipal corporations may assess, in any one of the three methods authorized by section 727.01 of the Revised Code, against the littoral land and other specially benefited property, such part or all of the cost of constructing such bulkheads, filling, highway, and other improvements, in aid of navigation and water commerce, as are agreed upon by the owners of such littoral lands and the legislative authority of such municipal corporation. Such municipal corporation may issue bonds in anticipation of the collection of such assessments and use the proceeds thereof in paying the cost of constructing such improvements of the water front.

\*\*\*

#### Repeal.

SECTION 2. That existing sections 123.03, 721.04, 721.05, 721.06, 721.07 and 721.11 of the Revised Code are hereby repealed.

ROGER CLOUD

Speaker of the House of Representatives.

JOHN W. BROWN,

President of the Senate.

Passed June 23, 1955.

I return to you herewith Amended Substitute Senate Bill No. 187 without my signature and with my veto, July 11, 1955.

FRANK J. LAUSCHE  
Governor.

IN THE SENATE

Passed notwithstanding the objections of the Governor, July 13, 1955.  
Yeas—27; Nays—4.

JOHN W. BROWN,  
President of the Senate.

IN THE HOUSE OF REPRESENTATIVES:

Passed notwithstanding the objections of the Governor, July 13, 1955.  
Yeas—95; Nays—21.

KLINE L. ROBERTS,  
Speaker Pro Tem of the House of Representatives.

The sectional numbers herein are in conformity with the Revised Code  
OHIO LEGISLATIVE SERVICE COMMISSION  
JOHN A. SHANNON, Director

Filed in the office of the Secretary of State at Columbus, Ohio on the 14th day of July, A. D. 1955.

TED W. BROWN,  
Secretary of State.

File No. 319. Effective October 13, 1955.

(Amended Substitute Senate Bill No. 183)

AN ACT

To amend sections 4582.01, 4582.02, 4582.03, 4582.04, 4582.05, 4582.06, 4582.07, 4582.08, 4582.09, 4582.10, 4582.11, 4582.12, 4582.13, 4582.14, 4582.15, and 4582.16 of the Revised Code providing statutory authority for the creation of port authorities by political subdivisions, and to declare an emergency.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 4582.01, 4582.02, 4582.03, 4582.04, 4582.05, 4582.06, 4582.07, 4582.08, 4582.09, 4582.10, 4582.11, 4582.12, 4582.13, 4582.14, 4582.15, and 4582.16 of the Revised Code be enacted to read as follows:

Definitions.

Sec. 4582.01. As used in sections 4582.02 to 4582.16 of the Revised Code:

(A) "Port authority" means a port authority created pursuant to authority of section 4582.02 of the Revised Code.

(B) "Submerged lands" means the lands presently underlying the waters of Lake Erie or formerly underlying the waters of Lake Erie and now artificially filled between the natural shoreline and the harbor line or the line of commercial navigation where no harbor line has been established.

(C) "Uplands" means lands contiguous to or fronting upon any submerged lands in this state.

(D) "Publication" means publication once a week on the same day of the week for three consecutive weeks in a newspaper of general circulation in the county or counties wherein such publication is required to be made. Publication shall be complete on the date of the last publication.

Creation by municipal corporation or county.

Sec. 4582.02. Any municipal corporation, county, or any combination of a municipal corporation, municipal corporations, county, or counties may create a port authority. A municipal corporation shall act by ordinance, and a county shall act by resolution of the county commissioners, in authorizing the creation of a port authority. A port authority created hereunder shall be a body corporate and politic which may sue and be sued, plead and be impleaded, and shall have the powers and jurisdiction enumerated in sections 4582.01 to 4582.16, inclusive, of the Revised Code. The exercise by such port authority of the powers conferred upon it shall be deemed to be essential governmental functions of the state of Ohio, but no port authority shall be immune from liability by reason thereof.

Compensation to municipal corporation by county.

Sec. 4582.021. Any county, which seeks to create a port authority shall, prior to such creation of a port authority, and prior to the exercising of the hereinafter described rights, compensate in full the municipal corporations included in the territory of such county, in an amount of money equal to the waterfront investment of such municipal corporations in the territory or adjoining lands, including but not limited to appropriations, expenditures, charges for materials used or labor performed by public officials or employees of said municipal corporation in the placing, construction, development, or improvement of land fills; waterfront shoreways or highways; bulkheads; connecting ways; tracks; breakwaters; soil erosion projects; harbor improvements; public beaches; boat harbor facilities; drainage systems; docks; wharves; piers; piers; places; ways; buildings and apparatuses; sewers; public utility facilities for power, light, heat or water; dredging or channel improvement projects; communications systems; and lakelift improvements. Such municipal corporations may decline to demand compensation for any of the foregoing components of its waterfront investment and thereby retain its possession, custody, control, and property interest in the component for which no compensation is demanded.

Such compensation paid to the municipal corporation may not be derived or take origin directly or indirectly from levies, taxes, assessments, fees, or charges of any kind or nature which were imposed or will be imposed upon the citizens, electors or taxpayers of the municipal corporation which receives such compensation.

(Amended Substitute Senate Bill Number 70)

# AN ACT

To amend sections 123.03, 123.031, 307.37, 721.10, 721.11, 1505.07, 1507.03 to 1507.05, 1507.11, 1507.12, and 1547.77; to amend, for the purpose of adopting new section numbers as indicated in parentheses, sections 123.03 (1506.10) and 123.031 (1506.11); and to enact sections 1506.01 to 1506.09, 1506.12, and 1506.99 of the Revised Code to provide for a comprehensive coastal management program along Lake Erie.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 123.03, 123.031, 307.37, 721.10, 721.11, 1505.07, 1507.03, 1507.04, 1507.05, 1507.11, 1507.12, and 1547.77 be amended; sections 123.03 (1506.10) and 123.031 (1506.11) be amended for the purpose of adopting new section numbers as indicated in parentheses; and sections 1506.01, 1506.02, 1506.03, 1506.04, 1506.05, 1506.06, 1506.07, 1506.08, 1506.09, 1506.12, and 1506.99 of the Revised Code be enacted to read as follows:

Sec. 307.37. (AM1) The board of county commissioners, in addition to its other powers, may adopt, AMEND, REScind, administer, and enforce regulations pertaining to the erection, construction, repair, alteration, REDEVELOPMENT, and maintenance of single-family, two-family, and three-family dwellings within the unincorporated territory of the county, or the board may establish districts in any part of the unincorporated territory and may adopt, AMEND, REScind, administer, and enforce such regulations in the districts. When adopted, all such regulations, including service charges, shall be uniform within all districts in which building codes are established; however, more stringent regulations may be imposed in flood hazard areas AND IN THE LAKE ERIE EROSION HAZARD AREA IDENTIFIED UNDER SECTION 1506.06 OF THE REVISED CODE in order to prevent or reduce the hazard resulting from flooding AND FROM EROSION ALONG LAKE ERIE. In no case shall such regulations go beyond the scope of regulating the safety, health, and sanitary conditions of such buildings. Any person adversely affected by an order of the board adopting, amending, or rescinding such a reg-

ulation may appeal to the court of common pleas of the county on the ground that the board failed to comply with the law in adopting, amending, rescinding, publishing, or distributing such regulations, or that the regulation, as adopted or amended by the board, is unreasonable or unlawful, or that the revision of the regulation was unreasonable or unlawful.

(2) A county building code may include regulations that are necessary for participation in the national flood insurance program and are not in conflict with the Ohio building code, ESTABLISHED IN THE "FLOOD DISASTER PROTECTION ACT OF 1973," 37 STAT. 975, 42 U.S.C.A. 4002, AS AMENDED, AND REGULATIONS ADOPTED FOR THE PURPOSES OF SECTION 1506.04 OR 1506.07 OF THE REVISED CODE governing the prohibition, location, erection, construction, REDEVELOPMENT, or floodproofing of new buildings or structures, or substantial improvements to existing buildings or structures, OR OTHER DEVELOPMENT in unincorporated territory within flood hazard areas identified under the "Flood Disaster Protection Act of 1973," 37 STAT. 975, 42 U.S.C.A. 4002, AS AMENDED, OR WITHIN THE LAKE ERIE EROSION HAZARD AREA IDENTIFIED UNDER SECTION 1506.06 OF THE REVISED CODE, including, but not limited to, residential, commercial INSTITUTIONAL, or industrial buildings or structures OR OTHER PERMANENT STRUCTURES, AS THAT TERM IS DEFINED UNDER DIVISION (A)(2) OF THIS SECTION CODE, RULES ADOPTED UNDER DIVISION (A)(2) OF THIS SECTION SHALL NOT CONFLICT WITH THE OHIO BUILDING CODE.

(3) Regulations or amendments may be adopted under this section only after public hearing at not fewer than two regular sessions of the board. The board shall cause to be published in a newspaper of general circulation in the county notice of the public hearings, including time, date, and place, once a week for two weeks immediately preceding the hearings. The proposed regulations or amendments shall be made available by the board to the public at the board office. The regulations or amendments shall take effect on the thirty-first day following the date of their adoption.

(C) No person shall violate any such regulation of the board under sections 307.37 to 307.40 of the Revised Code.

Each day during which such illegal location, erection, construction, floodproofing, repair, alteration, DEVELOPMENT, REDEVELOPMENT, or maintenance continues may be considered a separate offense.

(D) Regulations adopted by resolution of the board do not affect buildings or structures that exist or on which construction has begun on or before the date the regulation or amendment is adopted by the board.

(E) The board of county commissioners may provide for a building regulation department and may employ such personnel as it determines to be necessary for the purpose of enforcing such regulations. Upon re-creation of the building department under section 3781.19 of the Revised Code, the board of assessors may direct the county building department to exercise enforcement authority and to accept and approve plans pursuant to sections 3781.03 and 3791.04 of the Revised Code for any other kind or class of building in the unincorporated territory of the county.

ERNED BY THE RULES OF CIVIL PROCEDURE AND OTHER RULES OF PRACTICE AND PROCEDURE APPLICABLE TO CIVIL ACTIONS.

Sec. 1506.10. It is hereby declared that the waters of Lake Erie consisting of the territory within the boundaries of the state, extending from the southerly shore of Lake Erie to the international boundary line between the United States and Canada, together with the soil beneath and their contents, do now BELONG and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state, for the public uses to which they may be adapted, subject to the powers of the United States government, to the public rights of navigation, water commerce, and fishery, and subject to the property rights of littoral owners, including the right to make reasonable use of the waters in front of or flowing past their lands. Any artificial encroachments by public or private littoral owners, which interfere with the free flow of commerce in navigable channels, whether in the form of wharves, piers, fills, or otherwise, beyond the natural shore SHORELINE of said waters, not expressly authorized by the general assembly, acting within its powers, or pursuant to section 1506.11 of the Revised Code, shall not be considered as having prejudiced the rights of the public in such domain. This section does not limit the right of the state to control, improve, or place aids to navigation in the other navigable waters of the state or the territory formerly covered thereby.

The department of administrative services NATURAL RESOURCES is hereby designated as the state agency in all matters pertaining to the care, protection, and enforcement of the state's rights in said territory and shall be deemed to be the rule or adjudication within the meaning of sections 119.01 to 119.13 of the Revised Code.

Any order of the director of administrative services NATURAL RESOURCES in any matter pertaining to the care, protection, and enforcement of the state's rights in said territory shall be deemed to be the rule or adjudication within the meaning of sections 119.01 to 119.13 of the Revised Code.

Sec. 1506.11. (A) "Territory" as used in this section, means the waters and the lands presently underlying the waters of Lake Erie and the lands formerly underlying the waters of Lake Erie and now artificially filled, between the natural shoreline and the harbor INTERNATIONAL BOUNDARY line or the line of commercial navigation where no harbor line has been established WITH CANADA.

(B) Whenever the state, acting through the governor upon the recommendation of the director of administrative services NATURAL RESOURCES, upon application of any owner of uplands fronting on Lake Erie PERSON WHO WANTS TO DEVELOP OR IMPROVE PART OF THE TERRITORY, and after notice as provided in this section, determines that any part of the territory as defined in division (A) of this section, in front of the uplands can be developed and improved or the waters thereof used as specified in the application without impairment of the public right of navigation, water commerce, and fishery, a lease of all or any part of the state's interest therein may be entered into with the owner

SECTION 1506.07 OF THE REVISED CODE MAY, WITHIN THIRTY DAYS AFTER THE IDENTIFICATION, ACT, OR DENIAL, APPEAL IT IN ACCORDANCE WITH CHAPTER 119. OF THE REVISED CODE.

Sec. 1506.08. (A) NO PERSON SHALL VIOLATE OR FAIL TO COMPLY WITH ANY PROVISION OF THIS CHAPTER, ANY RULE OR ORDER ADOPTED OR ISSUED UNDER IT, OR ANY CONDITION OF A PERMIT ISSUED IN ACCORDANCE WITH RULES, RESOLUTIONS, OR ORDINANCES ADOPTED UNDER IT.

(2) THE ATTORNEY GENERAL, UPON WRITTEN REQUEST OF THE DIRECTOR OF NATURAL RESOURCES, SHALL BRING AN ACTION FOR AN INJUNCTION AGAINST ANY PERSON WHO HAS VIOLATED, IS VIOLATING, OR IS THREATENING TO VIOLATE DIVISION (A) OF THIS SECTION.

(3) ANY PERSON WHO VIOLATES ANY PROVISION OF THIS CHAPTER, ANY RULE OR ORDER ADOPTED OR ISSUED UNDER IT, OR ANY CONDITION OF A PERMIT ISSUED IN ACCORDANCE WITH RULES ADOPTED UNDER DIVISION (A) OF SECTION 1506.07 OF THE REVISED CODE SHALL, IN ADDITION TO ANY FINE THAT MAY BE ASSESSED UNDER SECTION 1506.99 OF THE REVISED CODE, BE ASSESSED A CIVIL PENALTY OF NOT MORE THAN FIVE THOUSAND DOLLARS FOR EACH OFFENSE TO BE PAID INTO THE STATE TREASURY TO THE CREDIT OF THE GENERAL REVENUE FUND. UPON WRITTEN REQUEST OF THE DIRECTOR, THE ATTORNEY GENERAL SHALL COMMENCE AN ACTION AGAINST ANY SUCH VIOLATOR. ANY ACTION UNDER THIS DIVISION IS A CIVIL ACTION, GOVERNED BY THE RULES OF CIVIL PROCEDURE AND OTHER RULES OF PRACTICE AND PROCEDURE APPLICABLE TO CIVIL ACTIONS.

(B) THE PROSECUTING ATTORNEY OF A COUNTY OR THE CITY DIRECTOR OF LAW OF A MUNICIPAL CORPORATION THAT HAS ADOPTED A RESOLUTION OR ORDINANCE IN ACCORDANCE WITH DIVISION (D) OF SECTION 1506.07 OF THE REVISED CODE MAY, ON BEHALF OF THAT COUNTY OR MUNICIPAL CORPORATION, RESPECTIVELY, BRING A CIVIL ACTION AGAINST ANY PERSON WHO VIOLATES THAT RESOLUTION OR ORDINANCE WITHIN THE TERRITORY OF THAT COUNTY OR MUNICIPAL CORPORATION IN THE COURT OF COMMON PLEAS IN THAT COUNTY IN WHICH THE VIOLATION OCCURRED. ANY SUCH VIOLATOR MAY, IN ADDITION TO ANY FINE THAT MAY BE ASSESSED UNDER SECTION 1506.99 OF THE REVISED CODE, BE ASSESSED A CIVIL PENALTY OF NOT MORE THAN FIVE THOUSAND DOLLARS FOR EACH OFFENSE TOGETHER WITH COURT COSTS. ANY MONIES RECOVERED UNDER THIS DIVISION SHALL BE PAID INTO THE TREASURY OF THE APPROPRIATE COUNTY OR MUNICIPAL CORPORATION. ANY ACTION UNDER THIS DIVISION SHALL BE GOVERNED BY THE RULES OF PRACTICE AND PROCEDURE APPLICABLE TO CIVIL ACTIONS.

periods of time, whether limited or perpetual, as the director recommends. The rentals received under the terms of such a lease OR PERMIT shall be paid into the STATE TREASURY TO THE CREDIT OF THE LAKE ERIE SUBMERGED LANDS FUND, WHICH IS HEREBY CREATED, AND SHALL BE DISTRIBUTED FROM THAT FUND AS FOLLOWS:

(1) FIFTY PER CENT OF EACH RENTAL SHALL BE PAID TO THE DEPARTMENT OF NATURAL RESOURCES FOR THE ADMINISTRATION OF THIS SECTION AND SECTION 1566.10 OF THE REVISED CODE AND FOR THE COASTAL MANAGEMENT ASSISTANCE GRANT PROGRAM REQUIRED TO BE ESTABLISHED UNDER DIVISION (C) OF SECTION 1566.02 OF THE REVISED CODE.

(2) FIFTY PER CENT OF EACH RENTAL SHALL BE PAID TO the municipal corporation, county, or port authority making the finding provided for in this section.

If the governor concurs in the findings of the director and approves the terms and conditions of the lease agreement OR PERMIT, he shall issue a certificate to that effect and deliver it to the director for the drafting of the lease agreement OR PERMIT. All such leases AND PERMITS shall be executed in the manner provided by section 5301.13 of the Revised Code and shall contain, in addition to the provisions required in this section, a reservation to the state of all mineral rights and a provision that the removal of any minerals shall be conducted in such manner as not to damage any improvements placed by the littoral owner as lessee, OR PERMIT HOLDER on such leased lands. No lease OR PERMIT of the lands defined in this section shall express or imply any control of fisheries or aquatic wildlife now vested in the division of wildlife of the department of natural resources.

(3) Upland owners who have, prior to October 13, 1965, erected, developed, or maintained structures, facilities, buildings, or improvements or made use of waters in the part of the territory in front of such THOSE uplands shall be granted a lease OR PERMIT by the state, acting through the governor, as set forth in this section, upon the presentation of a certification by the chief executive of a municipal corporation, resolution of the board of county commissioners, or resolution of the board of directors of the port authority establishing that such THE structures, facilities, buildings, improvements, or uses do not constitute an unlawful encroachment on navigation and water commerce. Such THE lease OR PERMIT shall specifically enumerate the structures, facilities, buildings, improvements, or uses so included.

(E) Upland owners PERSONS having secured a lease pursuant to OR PERMIT UNDER this section are entitled to just compensation for the taking, whether for navigation, water commerce, or otherwise, by any governmental authority having the power of eminent domain, of structures, facilities, buildings, improvements, or uses erected or placed upon the territory pursuant to the lease OR PERMIT or the littoral rights of such upland owners, THE PERSON and each FOR THE TAKING OF THE leasehold and the littoral rights of the upland owner.

APPLICANT, OR A PERMIT MAY BE ISSUED FOR THAT PURPOSE, subject to the powers of the United States government AND IN ACCORDANCE WITH RULES ADOPTED BY THE DIRECTOR IN ACCORDANCE WITH CHAPTER 113, OF THE REVISED CODE and without prejudice to the littoral rights of the leased ANY owner OF LAND FRONTING ON LAKE ERIE, provided THAT the legislative authority of the municipal corporation within which any such part of the territory is located, if such THE municipal corporation is not within the jurisdiction of a port authority, or the county commissioners of the county within which such part of the territory is located, excluding any territory within a municipal corporation or under the jurisdiction of a port authority, or the board of directors of a port authority with respect to such part of the territory included in the jurisdiction of the port authority has enacted an ordinance or resolution finding and determining that such part of the territory, described by metes and bounds, is not necessary or required for the construction, maintenance, or operation by the municipal corporation, county, or port authority of breakwaters, piers, docks, wharves, bulkheads, connecting ways, water terminal facilities, and improvements and that the marginal highways-in aid of navigation and water commerce-and that the land uses specified in the application comply with regulation of permissible land use under a waterfront plan of the local authority.

(C) Upon the filing of the application of each applicant-owners in the office of the director of administrative services NATURAL RESOURCES in Columbus, the director shall MAY hold a public hearing thereon and SHALL cause written notice of such THE filing to be given TO any municipal corporation, county, or port authority, as the case may be, in notice of such THE filing to be given by advertisement in a newspaper of general circulation within the locality where such part of the territory is located. IF A HEARING IS TO BE HELD, PUBLIC NOTICE OF THE FILING MAY BE COMBINED WITH PUBLIC NOTICE OF THE HEARING AND SHALL BE GIVEN once a week for four consecutive weeks prior to the date of the initial hearing. All hearings shall be before the director and shall be open to the public, and a record shall be made of the proceeding. Parties thereto are entitled to be heard, to be represented by counsel, and to have process to compel the attendance of witnesses. The findings and order of the director shall be in writing. All costs of the hearings, including publication costs, shall be paid by the applicant. THE DIRECTOR MAY ALSO HOLD PUBLIC MEETINGS ON THE FILING OF AN APPLICATION.

As the case if the director finds that a lease may properly be entered into with the applicant OR A PERMIT MAY PROPERLY BE ISSUED TO THE APPLICANT, he shall recommend to the governor the terms and conditions of such THE lease-OR PERMIT and shall determine the consideration to be paid by the applicant, which consideration shall include the value of the leased upland littoral rights OF THE OWNER OF LAND FRONTING ON LAKE ERIE and improvements made or paid for by the upland owner OF LAND FRONTING ON LAKE ERIE or his predecessors in title. Such THE lease OR PERMIT may be for such

AND DEVELOPMENT OF COASTAL AREA RESOURCES. THE DIRECTOR SHALL SOLICIT NAMES OF QUALIFIED PERSONS TO SERVE ON THE COUNCIL FROM THE LEGISLATIVE AUTHORITIES OF COUNTIES, TOWNSHIPS, MUNICIPAL CORPORATIONS, AND OTHER POLITICAL SUBDIVISIONS AND FROM INTEREST GROUPS LOCATED IN THE COASTAL AREA. THE DIRECTOR SHALL APPOINT TO THE COUNCIL AT LEAST ONE MEMBER FROM EACH SHORELINE COUNTY, WHICH MEMBERS SHALL BE SELECTED FROM THE NAMES SUBMITTED TO THE DIRECTOR AS DESCRIBED ABOVE AND AT LEAST ONE OF WHICH SHALL BE A PUBLIC OFFICIAL OF SUCH A COUNTY; AT LEAST ONE PUBLIC OFFICIAL OF A MUNICIPAL CORPORATION THAT IS LOCATED IN A SHORELINE COUNTY; AT LEAST ONE INDIVIDUAL WHO IS A MEMBER OF THE OHIO ASSOCIATION OF REALTORS AND WHOSE PLACE OF BUSINESS AS SPECIFIED IN SECTION 4785.16 OF THE REVISED CODE IS LOCATED IN THE SHORELINE AREA; AND AT LEAST ONE INDIVIDUAL WITH EXPERIENCE IN RESIDENTIAL AND COMMERCIAL LAND DEVELOPMENT IN THE SHORELINE AREA, NO MORE THAN SEVEN MEMBERS OF THE COUNCIL SHALL BE FROM THE SAME POLITICAL PARTY. THE DIRECTOR MAY PARTICIPATE IN THE DELIBERATIONS OF THE COUNCIL, BUT SHALL NOT VOTE.

THE MEMBERS OF THE COUNCIL FIRST APPOINTED BY THE DIRECTOR SHALL SERVE TERMS COMMENCING NO LATER THAN ONE HUNDRED EIGHTY DAYS AFTER THE EFFECTIVE DATE OF THIS SECTION AND EXPIRING ON FEBRUARY 1, 1990. ON FEBRUARY 2, 1990, THE DIRECTOR SHALL APPOINT SIX MEMBERS TO SERVE FOR A TERM OF ONE YEAR, AND SEVEN MEMBERS TO SERVE FOR A TERM OF TWO YEARS. THEREAFTER, TERMS OF OFFICE SHALL BE FOR TWO YEARS COMMENCING ON THE SECOND DAY OF FEBRUARY AND ENDING ON THE FIRST DAY OF FEBRUARY. THE DIRECTOR MAY REMOVE ANY MEMBER AT ANY TIME FOR INEFFICIENCY, NEGLIGENCE OF DUTY, OR MALFEASANCE IN OFFICE. IN THE EVENT OF THE DEATH, REMOVAL, RESIGNATION, OR INCAPACITY OF ANY MEMBER, THE DIRECTOR SHALL APPOINT A SUCCESSOR TO HOLD OFFICE FOR THE REMAINDER OF THE TERM FOR WHICH HIS PREDECESSOR WAS APPOINTED. ANY MEMBER SHALL CONTINUE IN OFFICE SUBSEQUENT TO THE EXPIRATION DATE OF HIS TERM UNTIL HIS SUCCESSOR TAKES OFFICE, OR UNTIL A PERIOD OF SIXTY DAYS HAS ELAPSED, WHICHEVER OCCURS FIRST.

MEMBERSHIP ON THE COUNCIL DOES NOT CONSTITUTE HOLDING A PUBLIC OFFICE OR POSITION OF EMPLOYMENT UNDER STATE LAW AND IS NOT GROUNDS FOR REMOVAL OF PUBLIC OFFICERS OR EMPLOYEES FROM THEIR OFFICES OR POSITIONS OF EMPLOYMENT.

PERSON pursuant to the procedure provided in sections 4719.01 to 4719.21 CHAPTER 163, of the Revised Code, such THE compensation shall not include any compensation for the site in the territory except to the extent of any interest in the site theretofore acquired by the lease owner PERSON under this section or by prior acts of the general assembly or grants from the United States GOVERNMENT. The failure of any owner of lands PERSON to apply for or obtain a lease OR PERMIT under this section does not prejudice any right the lease owner PERSON may have to compensation for a taking of littoral rights and OR OF improvements made in the exercise thereof ACCORDANCE WITH A LEASE, A PERMIT, OR LITTORAL RIGHTS.

(F) In the event IF any taxes or assessments are levied or assessed upon the property which THAT is the subject of a lease pursuant to OR PERMIT UNDER this section, such THE taxes or assessments are the obligation of the lessee having secured a lease pursuant to this section OR PERMIT HOLDER.

(G) If a lease OR PERMIT secured under this section requires the lessee OR PERMIT HOLDER to obtain the approval of the department of administrative services NATURAL RESOURCES or any of its divisions for any changes in structures, facilities, or buildings, FOR ANY improvements, or FOR ANY changes or expansion in uses, no lessee OR PERMIT HOLDER shall change any structures, facilities, or buildings, make any improvements, or expand or change any uses unless the director of natural resources first determines that the proposed changes in structures, facilities, or buildings improvements or changes or expansions in uses will not adversely affect any current or prospective exercise of the public right of recreation in the territory and in the state's reversionary interest in any territory leased OR PERMITTED under this section.

The director of administrative services shall submit to the director of natural resources for approval any relevant planer drawings, and supporting documentation of any proposed changes by a lessee in structures, facilities, or buildings improvements or changes or expansions in uses before the director of administrative services takes any final action upon the proposed changes or improvements. Proposed changes or improvements shall be deemed to "adversely affect" the public right of recreation if the changes or improvements cause or will cause any significant demonstrable negative impact upon any present or prospective recreational use of the territory by the public during the term of the lease OR PERMIT or any renewals and of any public recreational use of the leased OR PERMITTED premises in which the state has a reversionary interest.

Sec. 1566.12. THERE IS HEREBY CREATED THE COASTAL RESOURCES ADVISORY COUNCIL, WHICH SHALL CONSIST OF THIRTEEN MEMBERS, APPOINTED BY THE DIRECTOR OF NATURAL RESOURCES, WHO REPRESENT A BROAD RANGE OF INTERESTS, EXPERIENCE, AND KNOWLEDGE RELATING TO THE MANAGEMENT, USE, CONSERVATION, PROTECTION

If no application is filed with the Commissioner or if an application is filed and the Commissioner finds that the property is not entitled to tax exemption and to the abatement of delinquent taxes, penalties, and interest, the Commissioner shall, by journal entry, order the county auditor of the county in which property is located to forthwith collect all taxes, penalties, and interest thereon in accordance with law.

*Henry H. Coffey*  
Speaker of the House of Representatives.  
*Paul E. Johnson*  
President of the Senate.

Passed February 9 1988

Approved March 1988

*Richard J. Cleave*  
Governor.

(4) PUBLIC colleges and academies and all buildings connected therewith WITH THEM, and all lands connected with public institutions of learning, not used with a view to profit, shall be exempt from taxation.

(5) This section shall not extend to leasehold estates or real property held under the authority of a college or university of learning in this state; but tenements, or other estates or property, real or personal, the rents, issues, profits, and income of which is given to a municipal corporation, school district, or subdivision in this state exclusively for the use, enjoyment, or support of schools for the free education of youth without charge shall be exempt from taxation as long as such property, or the rents, issues, profits, or income thereof OF THE PROPERTY is used and exclusively applied for the support of free education by such municipal corporation, district, or subdivision.

(C) AS USED IN THIS SECTION, "CHURCH" MEANS A FELLOWSHIP OF BELIEVERS, CONGREGATION, SOCIETY, CORPORATION, CONVENTION, OR ASSOCIATION THAT IS FORMED PRIMARILY OR EXCLUSIVELY FOR RELIGIOUS PURPOSES AND THAT IS NOT FORMED FOR THE PRIVATE PROFIT OF ANY PERSON.

SECTION 2. That existing section 5709.07 of the Revised Code is hereby repealed.

SECTION 3. Notwithstanding Chapter 5713, of the Revised Code, when real and tangible personal property belonging to charitable institutions that is used exclusively for charitable purposes, has not received tax exemption as authorized by section 5709.12 of the Revised Code due to a failure to comply with Chapter 5713, of the Revised Code, the title holder of the property may, at any time prior to December 31, 1988, file with the Tax Commissioner an application requesting that the property be placed on the tax exempt list and that all delinquent taxes, penalties, and interest thereon shall be abated.

The application shall list the name of the political subdivision in which the property is located, the property's legal description, its taxable value, the amount in dollars of the delinquent taxes, the amount of penalties, the amount of interest, the date of acquisition of title to the property, the use of the property during any time that such delinquent taxes accrued, and such other information as may be required by the Commissioner. The information required shall be supplied by the county auditor upon request of the applicant.

Upon receipt of such application and after consideration thereof, the Commissioner, if he determines the applicant meets the qualifications set forth in this act, shall issue an order consenting to and directing that the property be placed on the tax exempt list of the county and order the abatement of all delinquent taxes, penalties, and interest for every year he finds the property met the qualifications for exemption described in section 5709.12 of the Revised Code. If he finds that the property is not now being so used or is being used for a purpose that would foreclose its right to tax exemption, he shall issue an order denying the application.

# AN ACT

To amend section 3319.321 and to enact sections 3319.471 and 3345.38 of the Revised Code to prohibit school districts and institutions of higher education from imposing any restriction on the presentation of career information to students and on the release of student directory information that is not uniformly imposed on representatives of the armed forces, business, industry, and charitable and educational institutions.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That section 3319.321 be amended and sections 3319.471 and 3345.38 of the Revised Code be enacted to read as follows: Sec. 3319.471. AS USED IN THIS SECTION, "ARMED FORCES" MEANS THE OHIO NATIONAL GUARD, THE OHIO NAVAL MILITIA, THE OHIO MILITARY RESERVE, AND THE ACTIVE AND RESERVE COMPONENTS OF THE UNITED STATES ARMY, NAVY, AIR FORCE, MARINE CORPS, AND COAST GUARD.

NO SCHOOL DISTRICT BOARD OF EDUCATION SHALL IMPOSE ANY RESTRICTION ON THE PRESENTATION OF CAREER INFORMATION TO STUDENTS THAT IS NOT UNIFORMLY IMPOSED ON REPRESENTATIVES OF THE ARMED FORCES, BUSINESS, INDUSTRY, CHARITABLE INSTITUTIONS, OTHER EMPLOYERS, AND INSTITUTIONS OF HIGHER EDUCATION.

Sec. 3319.321. (A) No person shall release, or permit access to, the names or other personally identifiable information concerning any pupils STUDENTS attending a public school, to any person or group for use in a profit-making plan or activity.

(B) No person shall release, or permit access to, personally identifiable information other than directory information concerning any pupil STUDENT attending a public school, for purposes other than those identified in division (C) or (E) of this section, without the written consent of the parent, guardian, or custodian of each such pupil STUDENT who is less than eighteen years of age, or without the written consent of each such pupil STUDENT who is eighteen years of age or older.

Am. S. B. No. 71

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The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

*Edward S. Hoover*  
 Director, Legislative Service Commission.

Filed in the office of the Secretary of State at Columbus, Ohio, on the

1st day of March 1988  
*Edward S. Hoover*  
 Secretary of State.

File No. 125

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