

October 27, 1993

OPINION NO. 93-025

Frances S. Buchholzer, Director
Ohio Department of Natural Resources
Fountain Square
Columbus, Ohio 43224

Dear Director Buchholzer:

You have requested an opinion concerning the authority of the Department of Natural Resources with respect to Lake Erie. Your specific questions are as follows:

1. Whether the Ohio Supreme Court in *State ex rel. Squire v. Cleveland*, 150 Ohio St. 303 (1948) held that the natural shoreline of Lake Erie, from the east bank of the Cuyahoga River to East 70th Street in Cleveland, is the shoreline as it existed in 1914.
2. Whether the Ohio Supreme Court in *Sloan v. Biemiller*, 34 Ohio St. 492 (1878) held that the littoral property¹ owner owns to the ordinary low water mark in Lake Erie.
3. Whether the littoral property owner has superior title to the "lands beneath navigable water" vested in the state of Ohio by the United States pursuant to 43 U.S.C. §1311.

The Determination of the Exact Location of the Natural Shoreline of Lake Erie Is a Question of Fact

The question before the court in *State ex rel. Squire v. Cleveland*, 150 Ohio St. 303, 82 N.E.2d 709 (1948) was the determination of the rights of the state, the City of Cleveland, and private land owners with respect to certain land created by artificial fill to the north of the natural shoreline of Lake Erie. The court determined that, "[t]he littoral owners of the upland have no title beyond the natural shore line; they have only the right of access and wharfing out to navigable waters." 150 Ohio St. at 337, 82 N.E.2d at 725. In its decision, the court referred to the natural shoreline as the "1914 shore line." *State ex rel. Squire v. Cleveland*, 150 Ohio St. at 317, 82 N.E.2d at 717. After 1914,

¹ "Littoral land" is "[l]and bordering ocean, sea, or lake." *Black's Law Dictionary* 934 (6th ed. 1990).

littoral owners began filling in the shallow waters to create land north of the natural shoreline. This process permanently fixed the "natural shoreline" along the filled land. The question of exactly where the natural shoreline lay, however, was not at issue in *Squire*. See *State ex rel. Squire v. Cleveland*, 32 Ohio Op. 111, 136 (C.P. Cuyahoga County 1945) (the trial court in this case referred to "the natural shoreline which *by agreement* is the line indicated on Plaintiff's Exhibit A, _City, 1914_" (emphasis added)). Therefore, in *State ex rel. Squire v. Cleveland*, the court did not hold, as a matter of law, that the natural shoreline of Lake Erie, from the east bank of the Cuyahoga River to East 70th Street in Cleveland, is the shoreline as it existed in 1914.

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

Your second question asks whether the case of *Sloan v. Biemiller*, 34 Ohio St. 492 (1878), held that a littoral property owner owns to the ordinary low water mark in Lake Erie. The question at issue in that case was "whether the right of fishing in the lake and bay is limited to the plaintiff as the proprietor of the shores," 34 Ohio St. at 513, not the extent of a littoral property owner's title in the shores of Lake Erie. In its analysis of the law regarding Lake Erie, however, the court discussed the English common law, which had historically been the basis for decisions concerning the rights of littoral and riparian² property owners, and noted that it is sometimes inapplicable to the large fresh water lakes of the United States. In support of this point, the court cited the case of *The Canal Commissioners v. The People*, 5 Wend. 423, 447 (N.Y. 1830) in which it was stated that

our *large fresh water lakes, or inland seas*...are wholly unprovided for by the law of England.

As to these there is neither flow of the tide, or thread of the stream, and our own local law appears to have assigned the shores down to the ordinary low water mark to the riparian owners, and the beds of the lakes with the islands therein to the public. (Emphasis in original.)

This case was cited as an example of how the English common law was not always applicable to the Great Lakes, not as authority for the proposition that a littoral owner on Lake Erie holds title to the ordinary low water mark. In fact, the *Sloan v. Biemiller* court cited an Illinois case, *Seaman v. Smith*, 24 Ill. 521 (1860), which determined that the "usual high water mark," defined as "that line where the water usually stands when unaffected by any disturbing cause," *id.* at 524, was the boundary for littoral property on Lake Michigan. Therefore, *Sloan v. Biemiller* did not hold that a littoral property owner on Lake Erie holds title to the low water mark.³

² "Riparian" means "[b]elonging to or relating to the bank of a river or stream." *Black's Law Dictionary* at 1327.

³ Historically, the terms "high water mark" and "low water mark" apply to tidal waters, that is, waters that alternately rise and fall, each twenty-four hours, as a result of the attraction of the sun and moon. See generally *East Bay Sporting Club v. Miller*, 118 Ohio St. 360, 369, 161 N.E. 12, 15 (1928). The "[h]igh water mark" is "[t]he line on the shore to which high tide rises under normal weather conditions." *Black's Law Dictionary* at 728. The "[l]ow-water mark" is "[t]hat line on the shore of the sea which marks the edge of the waters at the lowest point of the ordinary ebb tide. The _low-water

A Littoral Owner Along Lake Erie Holds Title to the Extent of the Natural Shoreline

In your request letter, you expressed a need to know whether Ohio case law has established that a littoral property owner along Lake Erie owns to the ordinary low water mark. It appears that no Ohio case has addressed this issue directly, but it can be inferred from a review of relevant case law and the provisions of R.C. 1506.10 that a littoral owner along Lake Erie holds title to the extent of the natural shoreline.

A littoral owner's property, by definition, borders an ocean, sea, or lake. *Black's Law Dictionary* 934 (6th ed. 1990). Because a body of water such as an ocean, sea, or lake is not a stationary object, a deed that identifies an ocean, sea, or lake as a boundary of a parcel of real property leaves room for question as to the exact limits of the property. For example, in *Lembeck v. Nye*, 47 Ohio St. 336, 24 N.E. 686 (1890), the court was faced with determining the limits of a conveyance where the deed made a non-navigable lake a boundary of the property. The court considered the various possibilities for the limits of the conveyance, including the low water mark, the water's edge, or the center of the water. 47 Ohio St. at 349, 24 N.E. at 689. It was concluded that, to best effect the presumed intention of the parties, a sound public policy, and "the analogies of the rules in force...respecting boundaries upon running streams," *id.*, a deed calling for a non-navigable lake as a boundary conveys property to the center of the lake. The court distinguished, however, deeds calling for the "margin" of a lake as a boundary.

mark, of a river is the point to which the water recedes at its lowest stage." *Black's Law Dictionary* at 1593.

The question of whether a littoral owner's title extends to the low water mark was addressed at English common law. "In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage." *Shively v. Bowlby*, 152 U.S. 1, 13 (1893). The court in *Shively* stated further that, "[t]he common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several Colonies and States, or by the Constitution and laws of the United States." 152 U.S. at 14.

Ohio courts have accepted and applied the common law doctrines of the rights of riparian and littoral owners in many cases. See, e.g., *State ex rel. Duffy v. Lakefront East Fifty-Fifth St. Corp.*, 137 Ohio St. 8, 27 N.E.2d 485 (1940) (applying the common law doctrine of accretion); *Thomas v. Sanders*, 65 Ohio App. 2d 5, 413 N.E.2d 1224 (Erie County 1979) (applying the common law doctrine of state control over submerged lands for the beneficial ownership of the public). However, as evident in *Sloan v. Biemiller*, 34 Ohio St. 492 (1878), Ohio courts have also recognized that the application of the English common law is not always appropriate.

It has been repeatedly determined by the courts of this state that they will adopt the principles of the common law as the rules of decision so far only as those principles are adapted to our circumstances, state of society, and form of government.

State v. Cleveland & Pittsburgh Railroad Co., 94 Ohio St. 61, 70, 113 N.E. 677, 679 (1916).

"Margin of the lake" is a term of unequivocal import, meaning the line where the earth and water meet around the lake; by the use of these words the parties have declared their intention to make, not the middle, but another part of the lake – the edge of the water - the boundary line.

47 Ohio St. at 351, 24 N.E. at 689 and 690. The decision in *Lembeck*, however, was limited to non-navigable lakes and is therefore not applicable to littoral property along Lake Erie.⁴

In *State ex rel. Squire v. Cleveland*, 150 Ohio St. at 337, 82 N.E.2d at 725, the court held that the littoral owners along Lake Erie "have no title beyond the natural shoreline." Although the exact limits of a parcel of property depend upon the language of the deed conveying that property, see generally *Lembeck v. Nye*, the littoral owners along Lake Erie cannot hold title *beyond* the natural shoreline. The *Squire* court based its holding in that regard on G.C. 3699-a, which provided in relevant part as follows:

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.

See 1917 Ohio Laws 587 (Am. H.B. 255, approved March 30, 1917). The provisions of former G.C. 3699-a now appear at R.C. 1506.10⁵ in substantially similar form. R.C. 1506.10 reads, in pertinent

⁴ "Navigable waters" are "[t]hose waters which afford a channel for useful commerce." *Black's Law Dictionary* at 1028; but see *Coleman v. Schaeffer*, 163 Ohio St. 202, 126 N.E.2d 444 (1955) ("navigability" may be determined from a consideration of factors other than use of the waters for commerce, including the availability of the water for boating or sailing for pleasure or recreation and its accessibility by public termini).

⁵ G.C. 3699-a was reenacted as R.C. 123.03 in 1953 Ohio Laws, Part I, 95 (eff. Oct. 1, 1953), and subsequently recodified as R.C. 1506.10 in 1987-1988 Ohio Laws, Part I, 135 (Am. Sub. S.B. 70, eff. March 15, 1989).

part, as follows:

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 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 shoreline of those 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.

Pursuant to R.C. 1506.10, the state has asserted its ownership of the water of Lake Erie and the soil *beneath* the water. R.C. 1506.10 does not assert a claim by the state for ownership of the shore above the natural shoreline. *Compare* R.C. 1506.01(A) (defining "coastal area," for purposes of a coastal management program, to include "the waters of Lake Erie, the islands in the lake, and the lands under and adjacent to the lake, including transitional areas, wetlands, and beaches").

The "shoreline" is "[t]he line marking the edge of a body of water." *The American Heritage Dictionary* 1133 (2d college ed. 1985). Naturally, the shoreline of a body of water is in a constant state of change. Accordingly, it is impossible to fix a permanent property line for a littoral owner whose property is bounded by the natural shoreline, except where the natural shoreline has been permanently altered by artificial means. For example, in *State ex rel. Squire v. Cleveland* the natural shoreline was altered by the filling in of shallow waters by littoral owners. The fill created an artificial shoreline. The last "natural shoreline," therefore, was the shoreline as it existed prior to the filling in of the shallow waters, and littoral owners of land along the filled area and their grantees held title only to the natural shoreline as fixed prior to the time the shallow waters had been filled. *See State ex rel. Squire v. Cleveland*, 150 Ohio St. at 337, 82 N.E.2d at 725; *see also Thomas v. Sanders*, 65 Ohio App. 2d 5, 413 N.E.2d 1224 (Erie County 1979); R.C. 1506.10 ("[a]ny 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 shoreline* of those waters, not expressly authorized by the general assembly, acting within its powers, or pursuant to R.C. 1506.11 of the Revised Code, shall not be considered as having prejudiced the rights of the public in such

domain").⁶

A littoral owner along Lake Erie cannot extend his ownership by artificially filling in shallow lake waters. Any such artificial fill occupies lands owned by the State of Ohio.⁷

The Littoral Owner Is the Beneficiary of A Grant Pursuant to 43 U.S.C.S. §1311 of Land Above The Natural Shoreline of Lake Erie

Finally, you have asked whether a littoral owner of property along Lake Erie has superior title to the "lands beneath navigable water" vested in the State of Ohio by the United States pursuant to 43 U.S.C. §1311. In this statute, the United States relinquished any claims of the United States within the boundaries of the respective states as follows:

[T]itle 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...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 hereby, 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.S. §1311(a) (1980). "Lands beneath navigable waters" include, for nontidal waters, lands "up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction," 43 U.S.C.S. §1301(a)(1) (1980), and "all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters," 43 U.S.C.S. §1301(a)(3) (1980).

By enacting 43 U.S.C.S. §1311, the United States relinquished any title or ownership of the

⁶ Although a littoral owner has no title beyond the natural shoreline, the owner has the right of access and wharfing out to navigable waters. *State ex rel. Squire v. Cleveland*, 150 Ohio St. 303, 337, 82 N.E.2d 709, 725 (1948). "Wharfing out" is described as "[a] right to the exclusive use of submerged lands as by the affixing thereto or the establishment thereon of a permanent structure to some point within the navigable body of water, deep and wide enough to dock ocean-going vessels, and it presupposes exclusive use and to that extent may interfere with fishing or navigation." *Black's Law Dictionary* at 1595. R.C. 1506.10, which implicitly recognizes the right to wharf out, states that wharves or piers placed by littoral owners beyond the natural shoreline of Lake Erie that are not expressly authorized by the General Assembly or by R.C. 1506.11 "shall not be considered as having prejudiced the rights of the public in such domain." *See also* 1973 Op. Att'y Gen. No. 73-033 (discussing statutory limitations on the right to wharf out contained in former R.C. 123.031 (now R.C. 1506.11)); 1929 Op. Att'y Gen. No. 445, Vol. I, p. 659.

⁷ The ownership of the artificial fill itself is not addressed in this opinion.

lands beneath navigable waters which it held and vested such title and ownership in the 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. The phrase "under the law of the respective states in which the land is located" means "that state law determines the proper beneficiary of the grant of land under [43 U.S.C.S. §1311]." *California ex rel. State Lands Comm. v. United States*, 457 U.S. 273, 288 (1982).

Pursuant to Ohio law, the state holds title to land under the water of Lake Erie within the boundaries of the state and to all land beyond the natural shoreline that was previously covered by the waters of Lake Erie and is now covered by artificial fill. R.C. 1506.10; *State ex rel. Squire v. Cleveland*. Accordingly, the state is the beneficiary of the grant pursuant to 43 U.S.C.S. §1311 of "lands beneath navigable waters," 43 U.S.C.S. §1301(a)(1) (1980), that lie beneath the water of Lake Erie and "all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters," 43 U.S.C.S. §1301(a)(3) (1980). 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.

Conclusion

It is, therefore, my opinion, and you are hereby advised, that:

1. The determination of the natural shoreline of Lake Erie is a question of fact.
2. A littoral owner along Lake Erie has no title beyond the natural shoreline.
3. A littoral owner along Lake Erie is the beneficiary of a grant pursuant to 43 U.S.C.S. §1311 (1980) of land above the natural shoreline of Lake Erie.

Respectfully,

LEE FISHER
Attorney General

October 27, 1993

Frances S. Buchholzer, Director
Ohio Department of Natural Resources
Fountain Square
Columbus, Ohio 43224

SYLLABUS:

93-025

1. The determination of the natural shoreline of Lake Erie is a question of fact.
2. A littoral owner along Lake Erie has no title beyond the natural shoreline.
3. A littoral owner along Lake Erie is the beneficiary of a grant pursuant to 43 U.S.C.S. §1311 (1980) of land above the natural shoreline of Lake Erie.