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Paradise Lost? A Call to Clarify the Public Purpose Requirement in Ohio's Public Trust Doctrine

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I. INTRODUCTION

The State of Ohio holds all land underlying the waters of Lake Erie and navigable rivers, as well as all artificially filled land, in trust for the benefit of the people of Ohio.[1] Traditionally, private use of trust resources was subject to the public rights of navigation, water commerce, and fishing.[2] This principle, known as the public trust doctrine, exists in every state but takes myriad forms and protects

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[1] OHIO REV. CODE ANN. § 1506.10 (West 2012).

[2] Lemley v. Stevenson, 661 N.E.2d 237, 245 (Ohio Ct. App. 1995).

widely varying uses and interests.[3] Many states have clarified their public trust doctrines through statutes or judicial review in order to meet the public's changing needs, but Ohio's public trust doctrine remains nebulous.[4] While Ohio's legislature and courts have reviewed the state's public trust doctrine in other ways, they have failed to clearly define how trust land can be used in harmony with the public's inalienable and expanding rights. An overbroad interpretation of Ohio's doctrine may lead to obliteration of the natural shoreline; a narrow interpretation may lead to ossification of the valuable resource. The question then becomes this: How can Ohio effectively protect the public's right to the state's water resources while promoting the highest and best use of the valuable shoreline? The needs are not mutually exclusive, but must be carefully balanced to avoid over- or under-utilization, to protect the environment, and to encourage a robust economy.

Nowhere in Ohio is the public trust doctrine's ambiguity more impactful than in Cleveland, the state's second most populous city[5] and only major metropolitan area located directly on Lake Erie. For decades, Cleveland's lakefront has been a central focus of planners, public officials, civic leaders and average citizens.[6] Inspired by other waterfront cities' development projects and their beneficial impact on the regional economies, Cleveland's Mayor Frank Jackson has asked private developers for proposals on how to transform some twenty-five acres north of First Energy Stadium, the Rock 'n Roll Hall of Fame, and Burke Lakefront Airport into places for the public to live, work, and enjoy.[7] A looming problem, however, may put an end to Cleveland's lofty ambitions as many developers and politicians fail to consider the public trust doctrine's effect on the very lands they seek to develop.

The City seeks to develop artificially filled land that falls within the public trust. Although the City of Cleveland received title to the land in 1914 and 1953 via quit claim deeds,[8] Ohio's public trust doctrine historically restricted such land use to only

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[3] *Compare* Greater Providence Chamber of Commerce v. State, 657 A.2d 1038 (R.I. 1995) (holding public trust does not apply to artificially filled land), *with* State *ex rel.* Squire v. City of Cleveland, 82 N.E.2d 709 (Ohio 1948) (finding the public trust does apply to artificially filled land).

[4] *See* Kenneth K. Kilbert, *The Public Trust Doctrine and the Great Lakes Shores*, 58 CLEV. ST. L. REV. 1, 2 (2010).

[5] *Population Estimates: Places in Ohio Listed Alphabetically*, US CENSUS BUREAU, http://www.census.gov/popest/data/cities/totals/2011/tables/SUB-EST2011-03-39.xls (last visited Nov. 23, 2012).

[6] See generally Dennis Keating et al., Cleveland's Lakefront: Its Development and Planning, 4 J. PLANNING HISTORY 129 (2005).

[7] *See generally Cleveland's Downtown Lakefront Plan*, THE CITY OF CLEVELAND PLANNING COMM'N (Apr. 2012), http://planning.city.cleveland.oh.us/lakefront/may2012/april2012CPCpresentation.pdf; *Seeking a Private Stake in Cleveland's Lakefront: Editorial*, CLEVELAND PLAIN DEALER (Sept. 27, 2012), http://www.cleveland.com/opinion/index.ssf/2012/09/seeking_a_private_stake_in_cle.html; *Cleveland Asks Prospective Lakefront Developers to Start Lining Up*, IDEASTREAM.COM (June 3, 2013), http://www.ideastream.org/news/feature/54072.

[8] Deed from The State of Ohio to The City of Cleveland (recorded July 17, 1914) (on file with author); Deed from The New York Central Railroad Company to The City of Cleveland (recorded on Oct. 21, 1953) (on file with author).

navigation, water commerce, and fishing. More recently, the legislature broadened the scope of permitted land use to "public uses" but failed to define the scope of this category. The following problem remains: if the City uses the land contrary to the public trust, the State of Ohio could attempt to void the land grant, preventing the City from pursuing development plans essential to the region's economic development. On the other hand, if the expanded public use requirement is interpreted too broadly, it could allow for unfettered development and the privatization of Lake Erie's shoreline.

While this Note specifically focuses on Cleveland and Lake Erie's shoreline, the public trust doctrine directly affects all Ohio waterfront communities. With many states expanding public trust use restrictions to non-navigable water and smaller tributaries, the doctrine may potentially affect every municipality containing a water resource.[9] Consequently, clarifying this doctrine becomes an essential state-wide issue. Though numerous legal scholars have discussed the public trust in relation to the nation's water resources, few have specifically addressed how the public trust governs the use of trust property that has been created by filling in submerged land.[10]

This Note will first provide a brief overview of the historical public trust doctrine as derived from Roman and English law and will outline the development of Ohio's public trust doctrine by focusing on how the doctrine governs filled land. Next, this Note will discuss different states' adaptations of the doctrine and will compare them to Ohio's public purpose requirement. Finally, this Note will propose a solution for clarifying Ohio's public trust doctrine that will enable land development while protecting the state's valuable waterfront for the benefit of the public.

II. BACKGROUND

A. Historical Overview of the Public Trust Doctrine

The public trust doctrine has ancient roots.[11] The doctrine originated in Roman legal concepts of common property.[12] It then evolved under English common law, where the sovereign held the navigable waterways and submerged lands "as trustee

[9] *See* Danielle Spiegel, *Can the Public Trust Doctrine Save Western Groundwater?*, 18 N.Y.U. ENVTL. L.J. 412, 413 (2010) (finding advocates for expansion of the public trust beyond navigable waters to groundwater); Janice Holmes, *Following the Crowd: The Supreme Court of South Dakota Expands the Scope of the Public Trust Doctrine to Non-Navigable, Non-Meandered Bodies of Water in* Parks v. Cooper, 38 CREIGHTON L. REV. 1317, 1318 (2005) (finding South Dakota has expanded the public trust doctrine to non-meandered, non-navigable lakes); Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) (expanding public trust doctrine to non-navigable wetlands lying several miles north of the Mississippi coast).

[10] See, e.g., Bertram C. Frey & Andrew Mutz, The Public Trust in Surface Waterways and Submerged Lands of the Great Lakes States, 40 U. MICH. J.L. REFORM 907, 954 (2007); Joseph Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 MICH. L. REV. 471, 471-566 (1970).

[11] Kilbert, *supra* note 4, at 3.

[12] J. INST. 2.1.1.

of a public trust for the benefit of the people" for uses such as navigation, water commerce and fishing.[13]

Roman and English law divided all property interests in land underlying navigable waterways into both private and public titles. These titles have been termed *jus privatum* and *jus publicum*, respectively.[14] Private title could be transferred to a private party; however, the government always retained the public title and continued to hold the land in trust for the people for navigation, commerce and fishing.[15] "[Land] ownership is often referred to in legal philosophy as a bundle of sticks or rights, and one or more of the sticks may be separated from the bundle and the bundle will still be considered ownership."[16] The private and public titles that apply to public trust land are like individual sticks and can be separated—the private title stick is held by the landowner while the public title stick remains held by the state in perpetuity. In this way, ownership is vested in the landowner while the state maintains its public rights.[17]

Public rights have historically burdened privately owned public trust property. Public rights in England, for example, attached to riverbanks and seashores, which were essential for use in fishing and navigation even if they were privately owned.[18] Consequently, the King could demolish or seize any structure which encroached or intruded upon the trust land and impeded the public's rights.[19] In this way, the private landowner's rights were subordinate to the public rights to use trust land because the government retained its trust obligation for the people.[20] But this trust was not absolute. The law recognized that public rights were not indestructible, often eliminating public rights by granting exclusive rights, or individual ownership, in

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[13] Shively v. Bowlby, 152 U.S. 1, 11 (1894) ("By the common law, both 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. Therefore the title, jus privatum, in such lands, as of waste and unoccupied lands, belongs to the king, as the sovereign; and the dominion thereof, jus publicum, is vested in him, as the representative of the nation and for the public benefit.").

[14] *Id.*

[15] *Id.*

[16] Air Flite & Serv-A-Plane v. Tittabawassee Twp., 350 N.W.2d 837, 839 (Mich. Ct. App. 1984).

[17] See *id.*

[18] Lynda L. Butler, The Commons Concept: An Historical Concept with Modern Relevance, 23 WM. & MARY L. REV. 835, 852 (1982).

[19] State v. Cleveland-Pittsburgh Ry., 25 Ohio C.D. 630, 637 (Ohio Ct. App. 1914).

[20] Glass v. Goeckel, 703 N.W.2d 58, 64 (Mich. 2005) ("Therefore the title, *jus privatum,* in such lands . . . belongs to the King as the sovereign; and the dominion thereof, *jus publicum,* is vested in him as the representative of the nation and for the public benefit." (quoting Shively v. Bowlby, 152 U.S. 1, 11 (1894))).

communal property or modifying the public rights for some "legitimate public purpose."[21]

The United States adopted the English doctrine, and each new state entering the Union received title to the lands underlying the navigable and tidal waters within its boundaries.[22] Since the early days of the Union, the United States recognized these land interests as the public trust doctrine.[23] Most notably, the United States Supreme Court addressed the doctrine in *Illinois Central Railroad Co. v. Illinois*, which has come to be known as "the lodestar in American public trust law."[24] The Court found that a state's title to tide and submerged lands differs from the title to other land.[25] As the Court explained, a public trust title "is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing," free from interference by the state or private parties.[26] The *Illinois* Court did not, however, hold that public rights could never be alienated from trust land under any circumstances. The Court explained that the legislature could expressly alienate property free of the public trust when the grant "promot[es] the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."[27]

In *Illinois*, the United States Supreme Court invalidated a grant from the Illinois legislature conveying approximately one thousand acres of submerged lands, encompassing virtually the entire commercial waterfront of Chicago, to the Illinois Central Railroad because the transfer violated the public trust doctrine.[28] Four years later, the legislature repealed the exclusive grant, and the state sought a judicial declaration confirming its title to the submerged bed of Lake Michigan and its exclusive right to develop Chicago harbor. Finding Chicago harbor to be immensely valuable to the citizens of Illinois, the Court determined that the legislature lacked the power to convey the submerged lands to private individuals and concluded that, as a result of the state's sovereign obligation, the legislative grant to Illinois Central was necessarily revocable.[29]

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[21] Sax, *supra* note 10; Butler, *supra* note 18.

[22] *Shively*, 152 U.S. at 26 (explaining that the United States acquired title and under the equal footing doctrine).

[23] Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892); *see also Shively*, 152 U.S. at 1, (recognizing the public trust doctrine); Pollard v. Hagan, 44 U.S. 212 (1845) (same); Martin v. Waddell's Lessee, 41 U.S. 367 (1842) (same).

[24] Sax, *supra* note 10, at 489; s*ee also Ill. Cent. R.R. Co.*, 146 U.S. at 452; Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from* Illinois Central Railroad, 33 ARIZ. ST. L.J. 849, 885 (2001).

[25] *Ill. Cent. R.R. Co.*, 146 U.S. at 452.

[26] *Id.*

[27] *Id.* at 453.

[28] The fee simple grant gave all rights, title, and interest in the submerged beds of Lake Michigan to the Illinois Central Railroad Company. *Id.*

[29] *Id.* The *Illinois Central* decision has also received much criticism. S*ee* Kilbert, *supra* note 4, at 7 ("[S]ome commentators have criticized the public trust doctrine [and the *Illinois Central* decision], claiming that it is an ill-defined excuse for judges to override the decisions of elected legislatures and to trample and take private property rights without due

Despite the *Illinois* decision, each state has interpreted and enforced the public trust doctrine independently and distinctly.[30] States' varying interpretations have led to the doctrine's current form: there is "no universal and uniform law upon the subject, but each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy."[31] Most significantly, states' doctrines vary widely in the breadth of protected public uses. Some states restrict public trust lands to a traditional triad of uses: navigation, water commerce, and fishing. For example, Ohio courts historically restricted the use of public trust land by interpreting the public trust doctrine to allow only the traditional triad of uses.[32] In contrast, other states have broadened their doctrines to include recreational uses such as swimming, bathing, and pleasure boating.[33] Still other states have generalized public rights as "other easements allowed by law"[34] and "other interests."[35] Some states have broadened their doctrines to allow land use for a public purpose and have applied varying tests to determine which types of land use fulfill this requirement, finding the following to be acceptable: production of oil,[36]

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compensation to the owners, either by restricting the owners' ability to use their property or by forcing them to allow the public to use their property."); Eric Pearson, Illinois Central *and the Public Trust Doctrine in State Law*, 15 VA. ENVTL. L.J. 713, 740 (1996) ("[S]tates should view *Illinois Central* as persuasive, rather than mandatory, authority. . . . [It] relies conceptually on a fundamental misreading of the scope of state power . . . [and] the decision is ill-reasoned, as demonstrated by the opinion's dependence on inapposite precedent. *Illinois Central* is flawed as well because it lacks a foundation in either the federal Constitution or in federal common law."). However, other courts have also found grants revocable. *See* Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1094 (Idaho 1983) ("[T]he continuing power of the state as administrator of the public trust . . . extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust.").

[30] Shively v. Bowlby, 152 U.S. 1, 26 (1894) ("The foregoing summary of the laws of the original States shows that there is no universal and uniform law upon the subject; but that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.").

[31] *See* Lake Front E. 55th St. Corp. v. City of Cleveland, 7 Ohio Supp. 17, ¶ 22 (Ohio Ct. Comm. Pleas 1939).

[32] *See, e.g.*, State v. Cleveland & P.R. Co., 113 N.E. 677, 682 (Ohio 1916) (holding that a property owner's right in public trust lands is one that can only be exercised in aid of navigation and commerce and for "no other purpose").

[33] Robin Kundis Craig, A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and States Summaries, 16 PENN ST. ENVTL. L. REV. 1, 18 (2007).

[34] Brannon v. Boldt, 958 So.2d 367, 372 (Fla. 2007).

[35] LA. REV. STAT. ANN. § 41:1701 (2007).

[36] *See* Boone v. Kingsbury, 273 P. 797, 815-16 (Cal. 1928).

construction of bridges,[37] a YMCA,[38] restaurants, bars, driving ranges and a shopping complex.[39] Such a broad range of uses leads to confusion among and within states on how public trust land can and should be used.

The public trust endows rights upon the public, but it also imposes certain responsibilities on the state. The state must protect the public's right to use those waters and underlying lands. In doing so, the public trust doctrine can be employed to invalidate or stop both governmental and private actions that violate the doctrine.[40] Several courts have found that the state can revoke private titles if land use is contrary to the public rights and specifically inconsistent with the traditional "triad" of uses.[41] For example, Massachusetts' Supreme Judicial Court transformed land owners' fee simple absolute titles in submerged public trust land into revocable defeasible fees.[42] The court found that, pursuant to the public trust, nineteenth century statutes authorizing fills in Boston Harbor for wharfing included an implied

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[37] *See* Colberg, Inc. v. State *ex rel.* Dep't of Public Works, 432 P.2d 3, 9 (Cal. 1967) (dictum).

[38] *See* People v. City of Long Beach, 338 P.2d 177, 179 (Cal. 1959) ("[O]ther than the goodwill that it may engender for itself, the sole benefit it will derive is the ability to promote a public trust purpose that happens also to be one of its own. Under these circumstances, the public benefit that will result from the Y.M.C.A.'s operation of the facility at its own expense is clearly sufficient consideration for the Y.M.C.A.'s use of the building and such incidental non-monetary benefits as it may receive.").

[39] *See* Martin v. Smith, 184 Cal. App. 2d 571, 578 (Cal. Ct. App. 1960); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 652-53 (1986).

[40] Kilbert, *supra* note 4, at 5.

[41] *See, e.g.*, Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 367 (Mass. 1979); State v. Cent. Vt. Ry., Inc., 571 A.2d 1128 (Vt. 1989); Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892); Conveying *Jus Privatum* Title to a Port Authority, Ohio Op. Atty. Gen. 2-284 (2000) ("Because the public's trust rights in the parcel have not been terminated, the General Assembly may enact legislation that repeals the conveyance to the port authority of the state's *jus privatum* title to the parcel.").

In *Illinois Central*, the United States Supreme Court invoked the public trust doctrine to invalidate a legislative grant of property underlying Lake Michigan. The Court found that transferring a vast swath of Lake Michigan beds to a private corporation would render virtually the entire Chicago Harbor useless for public navigation. In light of the public trust doctrine, the Court found the State of Illinois did not have the authority to alienate the lands in a manner that did not preserve the waters for the use of the public. Though the grant had transferred the *jus privatum* title to the railroad, the Court found the State retained the *jus publicum* title in the land, which allowed the Court to revoke the railroad's grant when its use of the land violated the public trust.

However, in *Boston Waterfront*, the Supreme Judicial Court struggled with determining an appropriate remedy in such a situation. Reclaiming land for violation of the public trust "would probably not be appropriate in many cases, particularly given the extensive reliance on the grant that is likely to have occurred, the considerable length of time that is likely to have passed since the grant, and the potential for characterization as an unconstitutional taking in some cases." Kristen Hoffman, *Waterfront Redevelopment as an Urban Revitalization Tool: Boston's Waterfront Redevelopment Plan*, 23 HARV. ENVTL. L. REV. 471, 545 (1999).

[42] *Bos. Waterfront Dev. Corp.*, 393 N.E.2d at 367 (Mass. 1979).

condition subsequent that required the lands to be used for the public purpose of maritime commerce. Thus, the lands were subject to forfeiture if converted to private condominiums.[43] Likewise, Ohio courts have found private titles burdened with public trust limitations, finding "[u]nless the fee be expressly authorized to be taken, the interest taken will be limited by the public necessity. . . . Where lands are acquired for a public use, an easement only is taken."[44] As a remedy to non-permitted use, "[t]he State of Ohio by appropriate action may restore to navigation any property that may have been developed for other uses."[45]

The uncertainty in Ohio's public trust doctrine is most appreciable in Cleveland, Ohio.[46] The State of Ohio granted the City of Cleveland title to large areas of artificially filled lands in Lake Erie.[47] The legislative grants do not expressly extinguish the public trust interest from the land; therefore, courts would likely find the state of Ohio only granted the City the private title, retaining the public title in trust for the people of Ohio. For that reason, title to the land is vested in the City so long as the land is utilized in a manner consistent with uses comporting with the public trust doctrine. Should the City use the land for any purpose that infringes on the public's rights or is contrary to the state's public trust doctrine, the state may assert its interest and void the City's title.[48]

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[43] *Id.*; s*ee also Cent. Vt. Ry., Inc.*, 571 A.2d at 1135 (holding that an attempted conveyance of over a mile of Lake Champlain waterfront for real estate development was a violation of the public trust doctrine and the state had the right to reclaim title to the lands if they were devoted to purposes inconsistent with the public trust doctrine).

[44] White v. City of Cleveland, 21 Ohio Dec. 311, 317 (Ohio Ct. Comm. Pleas 1911) (holding further, "[w]here lands are acquired for a public use, an easement only is taken therein, unless the taking of a greater estate, as a fee simple, is expressly authorized by law."). For an interesting discussion regarding the public trust as an easement, see Butler, *supra* note 18, at 843 ("Although many courts classify the right as an easement, the right technically is a profit à prendre. Unlike a common right, an easement merely creates a right to use another's land in a specified manner and does not confer any right to take the land's natural products. Also, whereas an easement creates an exclusive right of use, a common right, by definition, is shared by all commoners. A common right is not an estate held in common because the latter involves an interest in the land that is shared by more than one party and gives each equal possessory rights in the entire tract. Thus, regulation of land held in a concurrent estate would be impossible without the consent of all parties. Finally, unlike most other property interests, common rights exist regardless of the property owner's intent.").

[45] State *ex rel.* Squire v. City of Cleveland, 17 Ohio Supp. 137, 165 (Ohio Ct. Comm. Pleas 1945).

[46] Other lakefront cities in Ohio have also been impacted by Ohio's public trust. *See* Ohio Op. Att'y Gen. No. 2000-047 (2000) (discussing whether a grant to the Toledo Port Authority was revocable under Ohio's public trust doctrine).

[47] Deed from The State of Ohio to The City of Cleveland (recorded July 27, 1914) (copy on file with author); Deed from The New York Central Railroad Company to The City of Cleveland (recorded Oct. 21, 1953) (copy on file with author).

[48] In Thomas v. Sanders, 413 N.E.2d 1224, 1231 (Ohio Ct. App. 1979), the Ohio Appeals Court found that a change in land use could void title to the property. A railroad attempted to transfer artificially filled land lying within an area of the public trust to a private entity and thereby alienate the public of their rights to this property under the trust. The court found that so long as the property was used in aid of navigation to benefit the public trust the owner had a right to title, but changing the use of the property to permit a diversion of it to private uses

The City has announced plans to utilize this filled land as a mixed-use commercial development, consisting of an office campus, residential housing, hotel, parking, and public recreation facilities.[49] In response to the City's 2013 Request for Qualifications, at least five development teams submitted proposals for the site.[50] The teams proposed constructing film studios, schools, restaurants and hotels on the site. If the state of Ohio finds that these uses are inconsistent with the state's public trust doctrine, it could cause delays in development, cause years of litigation, and result in the state revoking the City's title. It is imperative, then, to analyze and define to what uses public trust land can be put when the public title remains in trust with the state of Ohio.

B. Overview of Ohio's Public Trust Doctrine

Each state interprets the public trust doctrine to fit its particular needs and circumstances.[51] Because much of Ohio's public trust jurisprudence is the result of litigation concerning land on Cleveland's waterfront, this Note considers Ohio's doctrine through the framework of Cleveland's developmental history.

1. Cleveland's Historical Lakefront Development Plans: The Real Mistake on the Lake[52]

To understand the public trust doctrine's impact on Cleveland's lakefront, it is important to consider the area's developmental history—a history mirrored by many other Great Lake waterfront cities. Cleveland was established at the confluence of Lake Erie and the Cuyahoga River. Its waterfront location contributed to the city's rise as a commercial and industrial center in the Midwest.[53] As an epicenter of industry, railroads quickly built tracks linking both local areas and metropolitan areas such as Baltimore, Pittsburgh, Cincinnati, and Columbus to growing

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different from the object for which the trust was created voided the title. In contrast, Ohio courts have found lands within the public trust may be devoted to purposes unrelated to the trust without voiding the title if such purposes are incidental to and accommodate trust uses.

Other courts have similarly found that using trust land adversely to public trust purposes can void a private landowner's title to the land. *See Bos. Waterfront Dev. Corp.*, 393 N.E.2d at 367 (interpreting the public trust doctrine as a condition subsequent; therefore, if a current use did not satisfy the public purpose requirement, the state could reclaim title).

[49] *Cleveland's Downtown Lakefront Plan*, THE CITY OF CLEVELAND PLANNING COMM'N (Apr. 2012), http://planning.city.cleveland.oh.us/lakefront/may2012/april2012CPC presentation.pdf.

[50] Michelle Jarboe McFee, *Cleveland Lakefront RFQ Documents Reveal Details About Potential Projects, Development Teams,* CLEVELAND.COM, Sept. 3, 2013, http://www.cleveland.com/business/index.ssf/2013/09/cleveland_lakefront_rfq_docume.html.

[51] Shively v. Bowlby, 152 U.S. 1, 26 (1894).

[52] In the 1960s, Cleveland was nicknamed "the mistake on the lake" largely because of the city's "growing economic malaise," pollution, shrinking employment opportunities, declining schools, budget crises (the city eventually declared bankruptcy), riots, and increasing crime. David Stradling & Richard Stradling, *Perceptions of the Burning River: Deindustrialization and Cleveland's Cuyahoga River*, 13 ENVTL. HISTORY 515, 530 (Jul. 2008).

[53] *See* Keating et al., *supra* note 6, at 129.

Cleveland.[54] The railroads expanded by filling in portions of Lake Erie, and soon much of Cleveland's lakefront included artificially filled land used for docks, businesses, service sheds, heavy industry and warehouses.[55]

Early city plans evidence an insensitivity to water resources, focusing instead on grand public buildings centered around a public mall.[56] A 1903 plan has been described as, "designed to impress the public with a built environment, rather than enhance a natural lakefront."[57] In the 1930s, significant fill was added to Cleveland's lakefront as part of an effort to create jobs to offset high unemployment rates; however, the city failed to utilize this new land to maximize public utility. Several development plans were created to capitalize on Cleveland's waterfront resources and restore the lakefront to "what the Maker intended it to be, a source for profit and advantage in the commercial development of the city."[58] However, because the railroads occupied such vast areas of the lakefront, they "impeded other development by acquiring waterfront rights and holding them so that others could not use them."[59] The railroads' hold on waterfront property complicated development for decades and ultimately contributed to the piecemeal development of the area surrounding Cleveland's lakefront.[60]

Even in these early years, residents realized that the industrialization of the waterfront was adversely affecting their most valuable resource. John Stockley, one of the very first landowners to fill into Lake Erie, later disparaged, "You're letting the railroads ruin the most beautiful thing we have"—the lake.[61] In later years, the focus of lakefront development plans became transportation, and a limited access highway, known as the Shoreway, was completed after World War II.[62] This roadway connected the east and west sides of town but cut off the lakefront from much of the surrounding areas.

In the decades following the decline of Cleveland's industrial supremacy, Cleveland became notorious as "the mistake on the lake."[63] While the epithet

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[54] *Id.* at 131.

[55] *Id.*

[56] Further insensitivity can be seen in the development of Cleveland's highways. *Id.* at 130 ("As manufacturing operations shifted or were abandoned altogether, many of these sites were converted to highway uses as the automobile began to dominate urban transportation after World War II[.] Unfortunately, these roadways resulted in numerous cities being severed from their water bodies. . . . The highways built at this time reflected an anti-urban attitude as well as gross insensitivity to rivers and other water bodies. . . . Pollution of the nation's waterways further exacerbated the image of the waterfront at the time as derelict, abandoned territory." (internal quotation marks omitted)).

[57] *See id.* at 134 ("The plan was designed to impress the public with a built environment, rather than enhance a natural lakefront.").

[58] *Id.* at 136 (internal quotation marks omitted).

[59] *Id.* at 138 (internal quotation marks omitted).

[60] *Id.* at 130.

[61] *Id.*

[62] *Memorial Shoreway*, THE ENCYCLOPEDIA OF CLEVELAND HISTORY, *available at* http://ech.cwru.edu/ech-cgi/article.pl?id=MS3.

[63] Stradling & Stradling, *supra* note 52, at 530.

generally referred to Cleveland's highly polluted Cuyahoga River and its tendency to catch fire, it also aptly describes Cleveland's piecemeal lakefront development and devastated urban environment resulting from over industrialization and poor planning.[64]

While many plans have been proposed to create a cohesive and publicly accessible lakefront, none have managed to enable effective utilization of Cleveland's waterfront. Rather, over the years, the lakefront has experienced more "piecemeal" development with the addition of parks, a sports stadium, and more recently, the Rock and Roll Hall of Fame, a science center, and some public transportation access.[65] However, Cleveland has yet to develop "an accepted balance between public uses and private development," and Cleveland's underutilized lakefront remains the true mistake on the lake.[66] Since the 1990s, Cleveland has enjoyed an "unexpected renaissance" and has begun to rebuild itself since the city's industrial decline.[67] Revitalizing the lakefront is essential to sustaining this resurgence, and creating a public-private balance must become a priority for future development plans. Therefore, imposing confusing and ambiguous restrictions on waterfront land use will only compound the dilemma the city currently faces. To enable the best use of Cleveland's waterfront for the benefit of the public, Ohio's public trust doctrine must be clarified to enable the redevelopment the city so desperately needs.

2. The Evolution of Ohio's Public Trust Doctrine

While some states have a robust and well-defined common law or statutory public trust doctrine, Ohio's policies remain unclear.[68] Many states have clarified and modernized their public trust jurisprudence to incorporate the needs of the modern metropolis. This has allowed waterfront areas to experience economic growth while protecting the public's interests.[69] In contrast, Ohio's doctrine remains

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[64] *Id.*

[65] Keating et al., *supra* note 6, at 152.

[66] *Id.*

[67] Barney Warf & Brian Holly, *The Rise and Fall and Rise of Cleveland*, 551 ANNALS AM. ACAD. POL. & SOC. SCI. 208 (May, 1997), *available at* http://www.jstor.org/discover/10.2307/1047948?uid=3739840&uid=2&uid=4&uid=3739256&sid=21101535466653.

[68] State v. Cleveland & P.R. Co., 113 N.E. 677, 679 (Ohio 1916) ("It may be safely said that there is scarcely any question which has caused greater conflict of opinion or produced more diverse results that that relating to the title of land under water. In many instances different conclusions have been arrived at in the same jurisdiction under various circumstances. Courts have differed in the method of reasoning, as well as the grounds upon which they have arrived at their conclusions.").

[69] Massachusetts adopted a modified public trust doctrine in 1983 that allowed for economic development of its waterfront. *See* Susan Diesenhouse, *Spurring Growth on Boston's Waterfront*, N. Y. TIMES (Nov. 1 2011), http://www.nytimes.com/2011/11/02/business/spurring-growth-on-bostons-waterfront.html?pagewanted=all&_r=0 (discussing the development of a $900 million office and laboratory complex located on Boston's waterfront that preserves public access to the shore and greenspaces).

Similar growth can be found in New York. Battery Park City, a newly developed mixed-use complex in lower Manhattan near Wall Street, is often cited as a model of successful mixed-

unclear because neither the courts nor the legislature have clearly defined how public trust land can be used without jeopardizing private titles.[70] While Ohio originally allowed trust land to be used only for "navigational purposes," trust land use is now governed by the equally unclear "public use" standard.[71]

As early as 1911, Ohio common law allowed trust land to be used for broad navigational purposes. In *White v. City of Cleveland*, the state of Ohio granted public trust land to the City for "park purposes."[72] The City leased part of the artificially filled land to a private boat company and authorized the company to construct a passenger station, ticket offices, freight warehouses, and structures incidental to the freight and passenger business. The court found changing the land's purpose from park to transportation uses was acceptable because it aided the common law public purposes of navigation and commerce. In so holding, the court broadly interpreted public use to "embrace all such facilities and instrumentalities as will aid and further that purpose."[73] The *White* court also addressed the property interest the City acquired in the public trust land, finding that in the absence of express legislative intent to grant fee simple title the city only acquired an easement in the land "in aid of the very purpose for which the state holds such lands in trust."[74]

In 1916, the Ohio Supreme Court subsequently narrowed the *White* Court's interpretation of navigation and commerce. The Ohio Supreme Court noted in *State v. Cleveland & P.R. Co.*, that regulating the public trust was the state legislature's responsibility.[75] Pointing to the absence of legislation and referring to public trust land's historically narrow uses of navigation and water commerce, the Court found that, "pending appropriate legislation, [littoral rights] can be exercised only in aid of navigation and commerce, *and for no other purpose*."[76] In doing so, the Court affirmatively restricted the purposes for which privately owned filled land could be used based on the public's traditional rights. The Court declined to modify or expand traditional trust uses, leaving the door open for the legislature to adopt "appropriate

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use waterfront development. Battery Park City is a balanced community of commercial, residential, retail, and park space within 92-acres on Manhattan's lower west side. With more than five million square feet of environmentally sustainable construction on its site, Battery Park City is the largest "green" neighborhood in the world. BATTERY PARK CITY AUTHORITY, http://www.batteryparkcity.org/ (last visited Nov. 10, 2012).

[70] *Compare* White v. City of Cleveland, 21 Ohio Dec. 311 (Ohio Ct. Comm. Pleas 1911) (holding general private boating company's construction of ticket terminals and passenger stations fell under the umbrella of "navigation" and therefore did not violate the public trust), *with* State *ex rel.* Squire v. City of Cleveland, 17 Ohio Supp. 137, 145 (Ohio Ct. Comm. Pleas 1945) (declining to determine whether a freeway comported with navigational purposes).

[71] OHIO REV. CODE ANN. § 1506.10 (West 2012) (stating that public trust lands can be used "for the public uses to which they may be adapted").

[72] *White*, 21 Ohio Dec. at 313-16.

[73] *Id.* at 330.

[74] *Id.* at 331.

[75] State v. Cleveland & P.R. Co., 113 N.E. 677, 681 (Ohio 1916) ("[T]he power to prescribe such regulations [defining the public trust] resides in the Legislature of the state.").

[76] *Id.* at 682 (emphasis added).

legislation" to broaden trust uses.[77] The *White* and *P.R. Co.* cases established a link between public rights and the uses to which the land could be put, requiring public trust land to be used only in furtherance of navigation and commerce.[78]

Inspired by *Cleveland & P.R. Co.*, the Ohio legislature subsequently passed the Fleming Act which codified the common law public trust doctrine and established the state's default title to artificially filled land.[79] The Fleming Act, as originally enacted in 1917, did not broaden the scope of the public's rights in this land, but reconfirmed them as "the [traditional] public rights of navigation and fishery."[80]

In 1945, the Ohio Supreme Court did not redefine permitted trust land uses but advocated for a broad interpretation of "navigation". *State* ex rel. *Squire v. City of Cleveland* involved a takings claim by littoral owners claiming the City interfered with their littoral rights to wharf out to navigable water.[81] Because the Fleming Act allowed municipalities to build on filled land, title to which was in the state for navigational purposes, the court was asked to determine if construction of a freeway comported with the city's rights.[82] The court declined to determine whether a freeway was consistent with navigation but opined that navigation should be interpreted broadly because "it would be ridiculous that the dead hand of the past has impressed an irrevocable and inalienable trust upon the resources of the state, limited to obsolete and antiquated public uses."[83] The court further found that "the law should be flexible enough to be applied to a constantly progressive civilization, and by this opinion we do not mean to express any limitation with reference to situations as they may arise in the future."[84] Through *Squire*, Ohio courts seemed to advocate for a more expansive, broad interpretation of navigation as it applied to the state's public trust doctrine.

In the 1950's, the Ohio Supreme Court altered the public trust doctrine by redefining and broadening the "navigability" test used to determine whether an area

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[77] *Id.*

[78] *Id.* (finding a littoral owner's rights can only be exercised in aid of navigation and commerce, and "what he does is therefore in furtherance of the object of the trust, and is permitted solely on that account").

[79] Thomas v. Sanders, 413 N.E.2d 1224, 1228 (Ohio Ct. App. 1979); State *ex rel.* Squire v. City of Cleveland, 17 Ohio Supp. 137, 145 (Ohio Ct. Comm. Pleas 1945) ("There can be little doubt that the decision in the *Cleveland & P.R. Co.* case inspired the preparation and enactment of the Fleming Act.").

[80] State *ex rel.* Squire v. City of Cleveland, 82 N.E.2d 709, 721 (Ohio 1948) ("On March 20, 1917 . . . the General Assembly passed the Fleming Act. . . . Section 3699-a . . . provided: 'It is hereby declared that the waters of Lake Erie . . . do now and have always . . . belonged to the state of Ohio as proprietor in trust for the people of the state of Ohio, subject to . . . *the public rights of navigation and fishery* and further subject only to the right of littoral owners . . . to make reasonable use of the *waters* in front of or flowing past their lands. . . . Any artificial . . . fills or otherwise beyond the natural shore line . . . shall not be considered as having prejudiced the rights of the public in such domain.'" (emphasis added)).

[81] *Id.* at 709.

[82] *Id.*

[83] *Id.* at 729-30.

[84] *Id.*

falls within the public trust.[85] The traditional test used to determine when a body of water is held in the public trust is whether it is capable of commercial navigation (the "navigability test").[86] The public right of navigation is also one of the traditional rights the public possess in the trust resources.[87] Courts often treat the ideas synonymously, so an expansion of the navigability test could lead to an expansion to the public's right of navigation. In *Mentor Harbor Yachting Club v. Mentor Lagoons, Inc.* and *Coleman v. Schaeffer*, the court expanded the navigability test to include not only traditional commercial navigation but recreational boating as well.[88] The *Mentor* court considered the waterway's increased use for recreational boating and the decreased use for commerce.[89] With this in mind, the court expanded the public trust doctrine's scope to include waterways that could accommodate recreational use as well as traditional commercial vessels.[90] Under this theory the

[85] *See* Coleman v. Schaeffer, 126 N.E.2d 444, 446 (Ohio 1955); Mentor Harbor Yachting Club v. Mentor Lagoons, Inc., 163 N.E.2d 373, 378 (Ohio 1959).

[86] PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 1233 (2012).

[87] White v. City of Cleveland, 21 Ohio Dec. 311, 328 (Ohio Ct. Comm. Pleas 1911).

[88] *Coleman*, 126 N.E.2d at 446 ("[T]he definition or test of navigability to be applied to our inland lakes must be sufficiently broad and liberal to include all the public uses, including boating for pleasure, for which such waters are adapted. So long as they continue capable of being put to any beneficial public use, they are public waters." (quoting Lamprey v. State, 53 N.W. 1139 (Minn. 1893))).

In a discussion of the change in the concept of navigability, the following summary appears in 56 AM. JUR. *Venue—Wharves* § 181, 648-49:

> There is, however, much authority for the view, which has been spoken of as being the better rule, that it is not necessary that the water be capable of commerce of pecuniary value, and that boating or sailing for pleasure should be considered navigation as well as boating for mere pecuniary profit. And the expression is frequently used that navigability for pleasure is as sacred in the eye of the law as navigability for any other purpose. It has been held that the term "navigable," as used in a statute relating to the ownership of submerged land, includes waters which are naturally available for use by the public for boating, fishing, etc., although they may not be susceptible of use for general commercial navigation.

Furthermore, in the case of *Lamprey*, the court stated:

> The division of waters into navigable and non-navigable is merely a method of dividing them into public and private, which is the more natural classification; and the definition or test of navigability to be applied to our inland lakes must be sufficiently broad and liberal to include all the public uses, including boating for pleasure, for which such waters are adapted. So long as they continue capable of being put to any beneficial public use, they are public waters.

Lamprey, 53 N.W. at 1143.

[89] *Mentor*, 163 N.E.2d at 378 (finding the increased recreational use of water has been accompanied by a corresponding lessening of their use for commerce).

[90] State *ex rel.* Brown v. Newport Concrete Co., 336 N.E.2d 453, 457 (Ohio Ct. App. 1975) (finding the *Coleman* and *Mentor* courts' legal construction balanced harmony with the nature of the public's water use). This view is in accord with the court in State v. Cleveland & P.R. Co., 113 N.E. 677, 680 (Ohio 1916), finding "[i]f navigation is held supreme, the very purpose for which it exists may be defeated by its own demands." (quoting 1 FARNHAM ON

court held, "We are in accord with the modern view that navigation for pleasure and recreation is as important in the eyes of the law as navigation for a commercial purpose."[91]

In *State* ex rel. *Brown v. Newport Concrete Co.*, an Ohio appeals court pointed out the continuing lack of clarity in Ohio's public trust statute.[92] The court specifically noted the lack of any statutory definition of the term "navigable waters" and upheld the expanded navigability test applied by the *Mentor* and *Coleman* courts.[93] The distinction between navigability and the public right of navigation is a muddy one, and courts have sometimes addressed them as a single concept. For example, a Toledo municipal court found that hunting was a protected public trust right under the recreational use prong of the newly expanded navigability test.[94] Following this reasoning, the public's right of navigation could logically be expanded to encompass all of the additional uses considered in determining a waterway's navigability.[95]

However, even after adopting the expanded navigability test, courts continued to strictly define the public's right of navigation, limiting the ways filled land could be used. In *Thomas v. Sanders*, an Ohio appellate court found that artificially filled public trust land, title to which was held by a private party, could only be used in aid of navigation.[96] The court found, "the state, as trustee for the people, cannot…permit a diversion of it to private uses different from the object for which the trust was created…So long as the [owner] maintained [the land] . . . in aid of navigation it was exercising its right to do so."[97] In light of these decisions, Ohio courts' varying interpretations of the navigation, public rights, and land use restrictions continued to be unclear until the legislature again took action to clarify the public trust doctrine.

In 1988, the Ohio legislature revised the Fleming Act with two significant changes.[98] First, the legislature explicitly applied the public trust to artificially filled

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WATER AND WATER RIGHTS 521). The Ohio Supreme Court encouraged a flexible view of navigation that would ultimately facilitate the purposes of the public trust doctrine. *Id.*

[91] *Mentor*, 163 N.E.2d at 378.

[92] *Brown*, 336 N.E.2d at 457.

[93] *Id.*

[94] Toledo v. Kilburn, 654 N.E.2d 202, 206 (Toledo Mun. Ct. 1995) ("[T]he regulation of hunting is a regulation in furtherance of the aid of navigation and water commerce, as that definition is to include recreational and commercial use."). This seems to be an incorrect application of the recreational use test to the public right of navigation question.

[95] Interestingly, other jurisdictions have also expanded the public trust doctrine to encompass "the preservation of the land in their natural state, so that they may serve as ecological units for scientific study, for open space, and as environments which provide food and habitat for birds and marine life." Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971).

Further, by meeting the expanding needs of modern civilization, it has been argued that the public trust has now come full circle to coincide with the principles of old Roman Law once again. *See* Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 223 (1980).

[96] Thomas v. Sanders, 413 N.E.2d 1224, 1231 (Ohio Ct. App. 1979).

[97] *Id.*

[98] OHIO REV. CODE ANN. § 1506 (West 2012) (effective March 15, 1988).

land.[99] Second, instead of basing the doctrine on protecting specific public rights, the legislature now broadly established that trust resources could be used for "the public uses to which they may be adapted."[100] In doing so, the legislature embraced the

[99] OHIO REV. CODE ANN. § 1506.11 (West 2012) ("'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 international boundary line with Canada.").

The public trust doctrine clearly applies to all land underlying navigable water. State v. Cleveland-Pittsburgh Ry., 25 Ohio C.D. 630, 651 (Ohio Ct. App. 1914). However, courts have only more recently applied the trust to artificially filled land. *Id.* The ownership of waterfront land differs from that of other land. The word "littoral" means "of or relating to the coast or shore of an ocean, sea, or lake," and "littoral rights are those ownership rights of a property owner whose land abuts a lake to the use and enjoyment of the waters and land underlying the lake." 53 OHIO JUR. *Harbors, Marinas, and Wharves* § 10 (3d ed.). Under Ohio law, a littoral owner automatically acquires title to shoreline property gained gradually and imperceptibly through the operation of natural causes. Lake Front E. 55th St. Corp. v. City of Cleveland, 7 Ohio Supp. 17, 30 (Ohio Ct. Comm. Pleas 1939); s*ee, e.g.*, Lamb v. Rickets, 11 Ohio 311 (1842); Baumhart v. McClure, 153 N.E. 211, 211 (Ohio 1926). However, when a littoral owner fills in land underlying a body of water by his own actions, he does not gain title to the newly created land. State *ex rel.* Merrill v. Ohio Dep't of Natural Res., 955 N.E.2d 935, 949 (Ohio 2011). Title to this filled land is vested in the state of Ohio as part of the public trust. *Id*; OHIO REV. CODE ANN. § 1506 (West 2012). Thus, all land created by artificially filling areas of Lake Erie, by default, falls within the scope of the public trust doctrine and is therefore held in trust for the people by the State of Ohio. *See Merril*, 955 N.E.2d at 949 (holding that artificial filling of the lakebed would not diminish lands subject to the public trust and expand littoral property). Interestingly, some states do not include artificially filled land in their public trust. *See, e.g.*, Greater Providence Chamber of Commerce v. State, 657 A.2d 1038 (R.I. 1995) (finding public trust does not apply to filled lands and owners hold title in fee simple absolute).

Because the doctrine has been applied to filled land, it impacts a significant amount of Ohio's waterfront. *See generally* Keating et al., *supra* note 6 (discussing many locations where artificial fill has been added to Ohio's shoreline, including land north of the shoreway, North Coast Harbor, Burke Lakefront Airport, and much land underlying the former railroads). Nine of Ohio's counties have been designated as coastal counties by the Ohio Department of Natural Resources. OHIO DEPT. OF NATURAL RESOURCES, OFFICE OF COASTAL MANAGEMENT, OHIO COASTAL ATLAS, http://www.dnr.state.oh.us/tabid/23367/Default.aspx**.** Cuyahoga County alone has nearly 30 miles of shoreline, with much of the area near Cleveland consisting of artificial fill. *See* OHIO DEPARTMENT OF NATURAL RESOURCES, COUNTY MAPS, http://www.dnr.state.oh.us/Portals/13/Atlas_Maps_GIS/D-CMA_locatorMaps/cuyahoga_5_cuyahoga_river_at_mouth.pdf and http://www.dnr.state.oh.us/Portals/13/Atlas_Maps_GIS/D-CMA_locatorMaps/cuyahoga_8_burke_lakefront_airport.pdf (indicating artificially filled land in blue).

[100] OHIO REV. CODE ANN. § 1506.10 (West 2012) ("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." (emphasis added)).

Ohio Supreme Court's recommendations in *Squire*, allowing for the modernization of the public trust and the general trend to expand the doctrine.[101] Since codification, Ohio courts have not addressed trust land use under the new, expanded doctrine and the myriad questions surrounding the trust's traditional navigation requirements are still not easily answered. The question now turns from "what is a navigational purpose?" to "what is a public use?"

III. DISCUSSION

A. What is a Public Use?

Although the Ohio legislature intended to clarify the murky public trust doctrine in 1988, the new public use restriction remains uncertain. Ohio courts have not yet specifically addressed the limits of public use as the legislature redefined it in 1988.[102] However "public use" has been the subject of several recent United States Supreme Court cases relating to Fifth Amendment takings. Under the Fifth Amendment of the United States Constitution, a governmental taking must be for a legitimate public use, which the court equates with public purpose.[103] In this context the court has defined public purpose to include anything that results in a public economic benefit.[104] In *Kelo v. City of New London*, the Supreme Court found the following to be consistent with the public purpose requirement: building a private hotel, restaurants, shopping facilities, recreational and commercial marinas, residences, and a commercial research facility.[105]

The broad public purpose test embraced in *Kelo* can be reconciled with some states' public trust doctrines. For example, the Massachusetts Supreme Judicial Court endorsed a broad definition of public purpose in a proposed bill, which would encompass "any…purpose for which any real estate has been, could now be, or may in the future be lawfully used."[106] On the other hand, some jurisdictions have interpreted public purpose more narrowly. For example, the Illinois Supreme Court prevented a private company from constructing a steel mill on public trust land, finding the legislature's proposed public purpose was only incidental to the "direct

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[101] State *ex rel.* Squire v. City of Cleveland, 82 N.E.2d 709, 730 (Ohio 1948).

[102] Since the Fleming Act's revision, cases interpreting the public trust doctrine have focused primarily on the trust's boundary line and the state's ability to enter into submerged land leases. *See, e.g.*, Beach Cliff Bd. of Tr. v. Ferchill, No. 81327, 2003 WL 21027604 (Ohio Ct. App. May 8, 2003); Sandusky Marina Ltd. P'ship v. Ohio Dep't of Natural Res., 701 N.E.2d 302 (Ohio Ct. App. 1998); Shnittker v. State, No. OOAP-976, 2001 WL 410280 (Ohio Ct. App. Apr. 24, 2001); Manifold v. Gaydos, No. OT-06-021, 2007 WL 431569 (Ohio Ct. App. Feb. 2, 2007).

[103] *See* Thompson v. Consolidated Gas Corp., 300 U.S. 55, 80 (1937); Kelo v. City of New London, 545 U.S. 469, 480 (2005) (equating the terms "public use" and "public purpose" as having identical meanings).

[104] *Kelo*, 545 U.S. at 485 ("It would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests. Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose.").

[105] *Id.*

[106] Opinion of the Justices to Senate, 424 N.E.2d 1092, 1110 (Mass. 1981).

and dominating purpose of private gain."[107] In light of these varying standards, it is clear that applying the *Kelo* takings interpretation of public purpose to public trust law is not a perfect fit.

Ohio's historical public trust doctrine jurisprudence can be reconciled with the *Kelo* public purpose test; consequently, it is appropriate to apply the *Kelo* to this state's public trust doctrine. In *White*, the question presented was whether public trust land, originally appropriated for a public park, could be leased to a private company that restricted the public's access to the waterfront.[108] The court found this private activity an acceptable public use because, "it fills an undisputed necessity existing in regard to these common carriers by water, who are themselves engaged in fulfilling their obligations to the general public, obligations which could not otherwise be properly or effectually performed; and in filling the necessity for such accommodation, the city or the state is only performing its public duty."[109] Furthermore, the court found that when a legislature states that a use benefits the public, "the courts should not lightly disregard such declarations."[110] This interpretation is consistent with *Kelo*, which equates generally private uses with a public benefit.

If the scope of Ohio's public trust doctrine is defined using *Kelo's* definition of public purpose, the revised Fleming Act will permit land to be used in any way that ultimately or tangentially benefits the public.[111] These uses are relatively unlimited. Such scope is inconsistent with the doctrine's historical objective to protect the valuable water resources of the state for the people and to "attack a legal system of land ownership that is environmentally unsound."[112] Applying the *Kelo* public purpose interpretation to the public trust doctrine, in essence, extinguishes the public trust doctrine altogether. Allowing public trust land to be used for any purpose without regard to public rights will destroy any protections that the public trust doctrine once provided. However, the question remains unanswered: If the *Kelo* interpretation is too broad, under what test should Ohio's public purpose requirement be judged? This question has no immediate answer, and Ohio's legislature and courts have yet to provide guidance on this issue.

Clearly, differing interpretations of Ohio's public trust doctrine will achieve different results. If the doctrine is interpreted too narrowly it can prevent beneficial development. Waterfront land can be used to benefit the public, and redevelopment plans can bring millions of dollars into declining urban neighborhoods.[113] Renewal plans stimulate the local economy and increase land values and tax revenue to

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[107] People *ex rel.* Scott v. Chi. Park Dist., 360 N.E.2d 773 (Ill. 1976).

[108] White v. City of Cleveland, 21 Ohio Dec. 311 (Ohio Ct. Comm. Pleas 1911).

[109] *Id.* at 324-25 (citing *In re* City of New York, 31 N.E. 1043 (1892)).

[110] *Id.*

[111] *See* Kelo v. City of New London, 545 U.S. 469, 485 (2005).

[112] Timothy Patrick Brady, *But Most of it Belongs to Those Yet to be Born: The Public Trust Doctrine, Nepa, and the Stewardship Ethic*, 17 B.C. ENVTL. AFF. L. REV. 621, 645 (1990).

[113] *See* Amanda Abrams, *Southwest Waterfront: A Neighborhood Where a Change is Gonna Come*, URBAN TURF (Dec. 2, 2010), http://dc.urbanturf.com/articles/blog/southwest_waterfront_a_neighborhood_where_a_change_is_gonna_come/2718.

blighted areas.[114] As discussed above, unclear title restrictions may prevent much-needed public and private redevelopment in waterfront areas. Conversely, an overbroad doctrine may allow unfettered development to restrict the public's access to the waterfront.[115]

B. Issues Stemming from Ohio's Unclear Public Trust Doctrine

Failing to define how Ohio public trust land can be used creates several problems relating to waterfront development. First and foremost, when there is no clear law defining how public trust land can be used land owners could jeopardize their private title unwittingly. Furthermore, such ambiguities could lead to financing problems, and may cause years of litigation that will likely hurt the very people the doctrine was meant to benefit—the people of Ohio.

First, because the nebulous "public purpose" requirement can be interpreted in many ways, it is impossible to know exactly what purposes are allowed under the Fleming Act. For example, the state of Ohio could argue that the private film studio which a development team proposed to construct on Cleveland's waterfront does not meet the public purpose requirement as historically interpreted under Ohio law.[116] The City could conversely argue that private business operations benefit the public at large and do fulfill the public purpose requirement as more recently defined in the Supreme Court's *Kelo* decision. If the state wins, it could void Cleveland's private title to the land at issue and halt construction or otherwise take over the project. At the very least, this could result in years of litigation which would negatively impact Cleveland's economy and may stifle the City's desire and ability to seek out new projects. Moreover, since the proposed film studio is only a part of the overall development project, it is unclear whether a allowing for a partially private use could comport with either or both interpretations of "public purposes."

Second, although arguably not the case in the Cleveland example, uncertain title restrictions may lead developers to shy away from investing in projects on public trust land. Developers do not want to risk dealing with the legal ramifications of an undefined title restriction that could "mak[e] financing difficult to obtain by obstructing the alienability of property to the extent that it obscures clear title to

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[114] *Downtown Waterfront URA: Overview*, Portland Dev. Comm'n, http://www.pdc.us/our-work/urban-renewal-areas/downtown-waterfront/overview.aspx (last visited Nov. 17, 2012) ("The Downtown Waterfront Urban Renewal Area (DTWF URA) is one of Portland's most successful examples of urban renewal and tax increment financing. Since 2001, assessed land values in the DTWF URA have increased an average of four percent annually, from a total of $653 million to $918 million.").

[115] *See, e.g.*, Karen L. Ferguson, *This Land is Our Land: Private Interests in Public Lands*, 2 MICH. L. & POL'Y REV. 187, 245-46 (1997) ("The future portends of continued urbanization and the risk of major loss of natural qualities. The state . . . is in the best position to protect such lands from risk. Once the lands are in private hands all options for the public are lost.") (internal quotations and citations omitted).

[116] Jarboe McFee, *supra* note 50. In response to the City of Cleveland's RFQ, a local real estate developer submitted a proposal that included a film studio and theater college that would build upon the recent film-industry traffic in Cleveland, the site of several movies filmed in 2012 and 2013.

land."[117] Given the cost of major development projects, the risks of uncertain title may be too much to bear.[118]

In Rhode Island, a littoral land owner seeking to develop its land faced insurmountable financing difficulties because various title companies involved in the financing transactions were concerned with the public trust implications of

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[117] Hoffman, *supra* note 41, at 484-85; *see also* Keating et al., *supra* note 53, at 135 ("A 1916 decision of the Ohio Supreme Court had found the State of Ohio to be the trustee of the people and hold the rights to the land under the water of Lake Erie. Without clear title to the land, no planning or development could proceed."). As illustrated by Massachusetts litigation over the city of Boston's waterfront: "[Uncertain title restrictions] particularly frightened Boston waterfront owners, as it appeared to significantly cloud the title to their properties. *Boston Waterfront* dredged up the very real fear that if formerly tidal or submerged lands were utilized for something other than a public purpose, the state government had the right to reclaim those lands in defense of the public trust." William J. Bussiere, *Extinguishing Dried-Up Public Trust Rights*, 91 B. U. L. REV. 1749, 1762-63 (2011) (internal quotation marks omitted). Developers fear title loss even more when the law leaves these restrictions essentially undefined.

These uncertainties were articulated by the Mississippi legislature and included in tidelands legislation:

> The Legislature finds that certainty and stability of the land titles of riparian and littoral property owners along the banks of the navigable rivers and waterways on the borders and in the interior of the state and along the shores of the tidally affected waters of the state are essential to the economic welfare of the state and to the peace, tranquility and financial security of the many thousands of citizens who own such lands; that a dispute has developed with respect to such lands bordering on tidally affected waters, calling into question titles and legal issues believed secure and determined from the date of statehood; that this dispute has cast a doubt and cloud over the titles to all littoral lands and all riparian lands along the rivers and shorelines of the coastal area to such a degree that land sales are being prevented, business and home purchasing has been made difficult or impossible, industrial financing based on such titles has become unavailable, and homeowners and other owners have been rendered apprehensive as to their security in their ownership. Economic growth and development in the coastal counties are at a virtual standstill, creating a constantly increasing and incalculable loss of dollars to the area as well as the loss of countless new jobs for the average citizens of this state. The Legislature finds that this dispute has already caused extensive harm, is intolerable, and immediate resolution is required and would serve the higher public purpose, in order that public trust tidelands and submerged lands may be utilized through their normal interface with the fast lands in furtherance of all the usual purposes of the trust.

MISS. CODE ANN. § 29-15-1 (2012).

[118] Many waterfront development projects cost millions or billions of dollars. *See* Abrams, *supra* note 113 ("The biggest news for the area is the projected renovation of the Waterfront, slated to begin in 2012. Occurring in three phases that won't be completed until 2018, the $1.5 billion, 26-acre project will result in a radically changed area, one with 60 percent open space in the form of public piers, parks, plazas, pedestrian streets, and a farmers market to complement the fish market."); Elaine Howard, *City of Salem South Waterfront Urban Renewal Feasibility Study*, at 35, CITY OF SALEM, OREGON (Mar. 2007), http://www.cityofsalem.net/Departments/UrbanDevelopment/UrbanRenewalAreas/Documents/SWF/swf_ur_feasibility_study_02_07.pdf (finding total costs of the project to be approximately $8.5 million for the primary phase and approximately $4.6 million for the second phase).

ownership and use.[119] When the Rhode Island Supreme Court subsequently clarified the public trust doctrine and held that it was extinguished in lands granted by the state and improved by the owner,[120] there sprung "a ray of hope upon which to resolve [this] title and project financing dilemma."[121] Based on the clarifying opinion, the littoral owner gained fee simple title to the land and resolved its financing difficulties.[122] Ohio has no such "ray of hope" to combat title uncertainties and development challenges. While this Author does not contend the Rhode Island interpretation is the correct one, this Author applauds Rhode Island's effort to bring clarity to this murky doctrine.

Finally, placing restrictions on artificially-filled land presents unique problems when the original shoreline cannot be clearly determined. In *State ex rel. Merrill*, the Ohio Supreme Court found that artificial fill cannot alter the boundary of the public trust; the line remains where water usually stands when free from disturbing causes.[123] The court declined to discuss exactly how the natural shoreline might be determined when the land was artificially filled and the water no longer stands at the original shoreline.[124] This compounds the uncertainty permeating Ohio's public trust because locating much of Lake Erie's natural shoreline may be challenging or impossible when the waterfront has been filled in for decades.[125] Further, if the original shoreline is indeterminable, it is impossible to know with certainty which land is impressed with the public trust.

C. The Public Trust: An Affirmative or Negative Restriction?

To understand the varied approaches states have used to define their respective public trust doctrines it is helpful to appreciate the differences between affirmative and negative use restrictions. A thorough survey of various states' public trust doctrines reveals two divergent theories which prescribe how trust land can be used. These theories, based on real estate law terminology, can be described as either affirmative use restrictions or negative use restrictions. These restrictions define the scope of permitted uses and ultimately determine whether a state's doctrine will be interpreted broadly or narrowly.

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[119] Providence & Worcester R. Co. v. Pine, 729 A.2d 202, 205 (R.I. 1999).

[120] Greater Providence Chamber of Commerce v. State, 657 A.2d 1038, 1044 (R.I. 1995).

[121] *Providence & Worcester R. Co.*, 729 A.2d at 205.

[122] *Greater Providence Chamber of Commerce*, 657 A.2d at 1044.

[123] State *ex rel.* Merrill v. Ohio Dep't of Natural Res., 955 N.E.2d 935, 949 (Ohio 2011).

[124] *Id.*

[125] *See* Arno v. Commonwealth, 931 N.E.2d 1, 4 (Mass. 2010) ("[B]ecause actual high and low water marks can change over time, notably pursuant to licenses to fill fiats and submerged lands with soil, the starting point for determining the public's rights in tidelands (filled or unfilled) must be the historic, or 'primitive,' high and low water marks. Absent some fixed date in the relatively recent past to which fact finders could turn . . . [a court] could only direct the inquiry back to the very beginning."); *see also* White v. City of Cleveland, 21 Ohio Dec. 311 (Ohio Ct. Comm. Pleas 1911) (discussing the impact of artificially filled land in Lake Erie as early as 1911).

An affirmative use restriction only allows land to be used for purposes which the legislature has specifically allowed.[126] For example, Idaho's public trust doctrine requires that "the state must demonstrate *not only* that certain public uses will not be interfered with or only minimally interfered with; it must demonstrate that the purpose for the encumbrance of the state-owned lands is in fact a public one."[127] Furthermore, Idaho's public trust statute limits authorized land uses to: "navigation, commerce, recreation, agriculture, mining, forestry, or other uses."[128] States that apply such an affirmative use restriction create a strong public trust doctrine which allows land to be used only for these limited purposes.

On the other hand, negative use restrictions permit land to be used for any purpose that does not violate or impede specific uses or rights.[129] For example, Michigan allows trust land to be used as long as the use does not interfere with the public rights.[130] Applying this negative use restriction employs a broader approach to the public trust doctrine's scope because it permits land use for any general purpose so long as it does not impede the public's rights. Michigan's negative use restriction has been codified in The Great Lakes Submerged Lands Act, which is "essentially a codification of the public trust doctrine for the Great Lakes."[131] This Act allows for the sale or disposition of public trust land and the filling of submerged land "whenever…the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be *impaired*…"[132] The Act further states that the state may sell, lease or permit filling in submerged land, "after finding that the public trust will not be impaired or

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[126] John G. Cameron, Jr., *Restrictive Covenants, Reciprocal Negative Easements, and Building and Use Restrictions Don't Underestimate the Strength of Use Restrictions*, PRAC. REAL EST. L. 47, 50 (Sept. 2010); Dean v. Hanson, No. 99 10739 CH, 2000 WL 35532059, at II (Mich. Cir. Ct. Nov. 30, 2000).

[127] Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1097 (Idaho 1983) (Bakes, J., concurring).

[128] IDAHO CODE ANN. § 58-1203 (West 2013).

[129] Distinguishing between affirmative and negative restrictions is founded in real estate law and provides a good analogy to the two interpretations of the public trust doctrine. *See* Cameron, *supra* note 126, at 47, 50 ("Affirmative/Negative Restrictions. Whether the restriction is stated in the affirmative or the negative has an important bearing on how it will be construed. Affirmative use restrictions (those stating that property must be used in a certain way) will preclude all other uses. However, negative use restrictions (those stating that property may not be used for enumerated purposes) allow the property to be used for all other purposes.").

[130] Hilt v. Weber, 233 N.W. 159, 164 (Mich. 1930) (emphasis added); *see also* Obrecht v. Nat'l Gypsum Co., 105 N.W.2d 143, 150 (Mich. 1960) ("The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.'").

[131] Eric Nelson, *The Public Trust Doctrine and the Great Lakes:* Glass v. Goeckel, 11 ALB. L. ENVTL. OUTLOOK J. 131, 152 (2006) (citing Chris A. Shafer, *Public Rights in Michigan's Streams: Toward a Modern Definition of Navigability*, 45 WAYNE L. REV. 9, 85 (1999)).

[132] MICH. COMP. LAWS ANN. § 324.32502 (West 2013) (emphasis added).

substantially injured."[133] Courts interpreting this Act have held that the Act does not limit authorized use of public trust lands to only those uses which benefitted the public interest.[134] In fact, the state need not make a finding that use of public trust land is beneficial to the public interest; the state need only show that the public rights are not *impaired*.[135]

Ohio has historically embraced a narrow interpretation of the public trust doctrine's use restriction. The doctrine was originally an affirmative use restriction which limited the purposes for which trust land could be used.[136] An early Ohio case stated that "[littoral rights] can be exercised only in aid of navigation and commerce, and for no other purpose."[137] The court in *White* found that land held under the public trust "must embrace all such facilities and instrumentalities as will aid and *further* [the public purposes of navigation and commerce]."[138]

The Fleming Act redefined Ohio's affirmative use restriction and effectively ameliorated any limits which had been imposed under the traditional doctrine. The Fleming Act, as revised in 1988, is technically consistent with the traditional affirmative use restriction, stating that lands held in trust by the state of Ohio may be used "for the public uses to which they may be adapted."[139] However, the Act's arguably unlimited and undefined public purpose requirement is directly at odds with the doctrine's fundamental tenet of limiting how trust land can be used. For, under the *Kelo's* broad interpretation, a public purpose is essentially *any* purpose.[140]

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[133] MICH. COMP. LAWS ANN. § 324.32505 (West 2013).

[134] Ferguson, *supra* note 115, at 210.

[135] Superior Pub. Rights, Inc. v. State Dept. of Natural Res., 263 N.W.2d 290, 297 (Mich. Ct. App. 1977) ("Plaintiff interprets the aforementioned section to require the defendant DNR to find that every private use of public trust lands is in itself beneficial to the public interest before authorizing the use. Such an interpretation is clearly erroneous.").

[136] *See* OHIO REV. CODE ANN. § 1506 (West 2012) (effective March 15, 1988) (stating that public trust land can be used "for the public uses to which they may be adapted").

[137] State v. Cleveland & P.R. Co., 113 N.E. 677, 682 (Ohio 1916) (emphasis added).

[138] White v. City of Cleveland, 21 Ohio Dec. 311, 317 (Ohio Ct. Comm. Pleas 1911) (emphasis added). The court went on to state, "[the] right of the riparian owner includes the right of access to navigable water, and the consequential right to wharf out to navigable water, so as to make his right practicable and available, *in aid of the very purpose for which the state holds such lands in trust*." *Id.* at 331 (emphasis added). However, the court seems to contradict this statement in the very next sentence, stating, "[i]n fact such trust must be held to include this right on the part of the riparian owner to wharf out, so long as he does not interfere with the public right of navigation and commerce." *Id.* Interestingly, the Ohio Legislature imposes only a negative use restriction based on traditional public rights on land that the state owns and leases: "Whenever the state . . . determines that any part of the territory can be developed and improved . . . 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 applicant." OHIO REV. CODE ANN. § 1506.11 (West 2012).

[139] OHIO REV. CODE ANN. § 1506.10 (West 2012).

[140] Kelo v. City of New London, 545 U.S. 469, 469 (2005); C/S 12th Ave. LLC v. City of New York, 32 A.D.3d 1, 10-11, (N.Y. App. Div. 2006) (citing *Kelo* and finding that the term "public use" broadly encompasses any use which contributes to the health, safety and general welfare of the public, and that this use only needs to be rationally related to a conceivable public purpose).

With this definition, the traditional limits which Ohio's public trust doctrine imposed become ineffective. This overbroad interpretation would no longer resemble an affirmative use restriction because it would give littoral owners carte blanche to use the land for whatever could be deemed a public purpose.

Interpreting the public purpose requirement narrowly would maintain the integrity of Ohio's historical affirmative use restriction but, as discussed in part IIIB, such an interpretation could prohibit beneficial waterfront development. The key to clarifying Ohio's public trust doctrine must necessarily come by balancing these two interpretations. Ohio must adopt a public trust doctrine that balances public rights while allowing for the highest and best use of Ohio's valuable and limited waterfront land.

D. Using Public Trust Land in Other States: Permitted Public Trust Purposes

Each state defines its public doctrine independently, creating vast differences between each states' interpretation. As discussed in section B2, Ohio's doctrine employs a generic "public purpose" test to determine whether land use is permitted under the public trust statute but does not further establish what uses are permitted under this standard. Other states have created tests through which they can determine whether a use is permitted under their public trust doctrine.

1. Massachusetts' Public Trust Balancing Test

In contrast to Ohio's undefined public purpose test, Massachusetts took action to define allowable public trust land use. Under Massachusetts' early public trust doctrine, land could be used for "all useful purposes."[141] The state later codified its public trust, requiring trust land to be used for a "proper public purpose."[142] Due to this unclear standard, land owners and investors were hesitant to develop waterfront property.[143] Massachusetts addressed this problem by enacting a licensing procedure for privately owned trust land utilizing a public purpose test in which the public benefits must outweigh the public detriments.[144]

"The main thrust of the legislation is to limit development in the regulated areas so far as possible to 'water-dependent uses,' which understandably conflicts with the desires of developers who regard waterfront sites as very attractive for such things as hotels, restaurants and condominiums, which the regulations specifically decree to be not water-dependent."[145] A regulatory agency is invested with the power, akin to

[141] Home for Aged Women v. Commonwealth, 89 N.E. 124, 129 (Mass. 1909) (finding the doctrine distinguished navigation and fishing as "principal," but not exclusive, purposes for which public trust land could be used).

[142] MASS. GEN. LAWS ANN. ch. 91, § 2 (West 2012).

[143] *See* Jane F. Carlson, *The Public Trust and Urban Waterfront Development in Massachusetts: What is a Public Purpose?*, 7 HARV. ENVTL. L. REV. 71, 71 (1983) (finding that Massachusetts' unclear doctrine led to uncertainty because owners did not know when the state might assert the condition subsequent and retake title to the land).

[144] MASS. GEN. LAWS ANN. ch. 91, § 18B (West 2012); William L. Lahey, *Chapter 91 Regulations: The Commonwealth Moves Toward Statewide Zoning*, 35 BOSTON B.J. 21, 24 (Mar./Apr. 1991).

[145] EDWARD MENDLER, MASSACHUSETTS CONVEYANCERS' HANDBOOK WITH FORMS § 13:12 (4th ed.).

zoning discretionary permit power, to apply a balancing test determine whether a proposed use is appropriate and to govern design and dimensions of a development.[146] The balancing test is applied more strictly to state-owned trust land; requiring a public purpose that provides a greater public benefit than public detriment to the land.[147] In addition, the regulations impose land-use controls such as setback requirements and height limitations on many buildings abutting the coast.[148]

The public purpose test utilizes the following factors: "[the] purpose and effect of the development; the impact on abutters and the surrounding community; enhancement to the property; benefits to the public trust rights in tidelands or other associated rights, including, but not limited to, benefits provided through previously obtained municipal permits; community activities on the development site; environmental protection and preservation; public health and safety; and the general welfare."[149] In 2007, the Massachusetts legislature limited the areas to which the public trust applies by exempting landlocked owners from the Chapter 91 licensing requirements when title to landlocked property was privately held before 1975.[150]

In sum, the Massachusetts' plan seeks to balance the interests of the public by preserving access to water resources against those of developers and proponents of economically beneficial land use. While preserving the public's rights, the legislature has taken control of land use to allow for economic growth and development. This control permits the state to effectuate the true spirit of the public trust doctrine: to preserve water resources for the public *for their benefit*.

2. Wisconsin's Balanced Approach to an Affirmative Use Restriction

Wisconsin's public trust doctrine seems to be based upon an affirmative use restriction somewhat similar to Ohio's; however, Wisconsin applies a balancing test that weighs divergent public interests when determining whether to permit public trust land use. Like Ohio, Wisconsin places an affirmative use restriction on public trust land. The Wisconsin Court of Appeals articulated this affirmative restriction in *State v. Village of Lake Delton*, permitting land use only when it furthered the interests of the trust. The court held, "whether the power is exercised by the legislature or by a delegee it must be exercised *for the benefit of the public*."[151] In *State v. Bleck*, the Wisconsin Supreme Court later held, "[A]lthough the state holds the beds of navigable waters in trust for the public, it may authorize limited encroachments upon the beds of such waters *where the public interest will be*

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] MASS. GEN. LAWS ANN. ch. 91, § 18B (West 2012).

[150] Moot v. Dep't of Envtl. Prot., 923 N.E.2d 81, 84 (Mass. 2010) ("Section 18 no longer requires a license for fill on landlocked tidelands, or for uses or structures within such tidelands. This does not, however, entirely dispose of the public's rights in landlocked tidelands, which G.L. c. 91 continues to require the department to 'preserve and protect.'").

[151] State v. Village of Lake Delton, 286 N.W.2d 622, 629 (Wis. Ct. App. 1979) (emphasis added).

served.[152] This articulation is congruent with Ohio's R.C. 1506.10 and subsequent interpretations allowing trust land use *for* public purposes rather than allowing uses which do not hinder public rights.

Wisconsin imposes a balancing test upon the public trust analysis which allows some measure of clarification. For example, in *Lake Delton*, the Wisconsin Court of Appeals considered both the public's interest in hunting and fishing and the public's economic interest in using a water resource for water skiing shows to attract tourists. The court found that that "[some] public interests must yield to other public interests served by the proposal [to use the lake for water skiing exhibitions]."[153] The court found public rights are not absolute and "must yield if other public uses are to exist at all. The uses must be balanced and accommodated on a case by case basis."[154] This balancing test is to be applied before granting a permit for a proposed project.[155]

In contrast, Ohio's affirmative restriction does not apply any such balancing factors in determining whether a public purpose is permissible. Rather, under a broad interpretation of public purpose, it gives carte blanche to all uses without consideration of what public rights might be impaired. Under this interpretation, Ohio's public trust doctrine may become overbroad, allowing public rights to be abrogated completely.

3. The Rhode Island Interpretation

The State of Rhode Island has taken a much narrower view of the public trust doctrine, finding it extinguished in artificially filled land. In *Greater Providence Chamber of Commerce v. State*, the Rhode Island Supreme Court addressed whether creating land by filling below mean high tide extinguishes the public-trust rights in the reclaimed land.[156] The court found, "[A] littoral owner who fills along his or her shore line, whether to a harbor line or otherwise, with the acquiescence or the express or implied approval of the state and improves upon the land in justifiable reliance on the approval, would be able to establish title to that land that is free and clear."[157] The title will vest in fee simple absolute so long as the littoral owner "has not created any interference with the public-trust rights of fishery, commerce, and navigation."[158] Therefore, in contrast to Ohio or Massachusetts law which finds use of artificially filled land limited by the public trust, Rhode Island law allows littoral owners to completely extinguish public trust limitations so long as their use does not initially obstruct basic public rights.

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[152] State v. Bleck, 338 N.W.2d 492, 497 (Wis. 1983) (emphasis added). Interestingly, the Supreme Court also articulated a negative use restriction in *Bleck*, finding: "DNR may grant a permit to a riparian to place a structure only if that structure does not materially obstruct navigation, or reduce the effective flood flow capacity of a stream, or if it is not detrimental to the public interest." *Id.*

[153] *Village of Lake Delton*, 286 N.W.2d at 631.

[154] *Id.* at 632.

[155] Village of Menomonee Falls v. Wis. Dep't. of Natural Res., 412 N.W.2d 505, 510 (Wis. Ct. App. 1987).

[156] Greater Providence Chamber of Commerce v. State 657 A.2d 1038, 1044 (R.I. 1995).

[157] *Id.*

[158] *Id.*

Such a lenient interpretation essentially nullifies the fundamental tenet of the public trust doctrine—to protect the nation's water resources for the use and benefit of the public. While Rhode Island law does initially protect against interfering with the public rights of fishery, navigation and commerce, it does nothing to protect these rights once title has transferred to the littoral owner in fee simple. A balance between Ohio's restrictive historical interpretation and Rhode Island's lenient interpretation of the public trust doctrine must be struck to enable both littoral owners and the public use of and access to this valuable resource.

E. A Proposed Solution for Ohio

In light of Cleveland's plans to move forward with lakefront development on public trust land, it is imperative that Ohio's public purpose requirement is clearly defined to promote the highest and best use of lakefront property.[159] Rather than creating an absolute ban on development or allowing for unfettered growth,[160] Ohio should define its public purpose requirement by implementing a balancing test to allow developers and landowners to plan new projects without voiding their titles while protecting public interests in water resources.

Following Massachusetts' and Wisconsin's leads, Ohio should consider the following factors in determining whether a public trust land use comports with the public trust doctrine:

> the purpose and effect of the development;
> the impact on abutters and the surrounding community;
> enhancement to the property;
> the impact on the shoreline as a whole, including the impact on public water access;
> whether the development is water dependant or if there are other equally suitable locations;
> the degree of public access to the development; and
> the environmental impact of the development.

Under this test, the following specific examples should meet acceptable trust uses: revitalization of underutilized waterfront properties; promotion of regional and local commerce, employment, economic development; and community renewal.[161] Any project built upon public trust land should retain the people's access to water resources. For example, the Cleveland Waterfront Plan should include public parks or a boardwalk open to the public as an integral part of the development plan.

Furthermore, Ohio's public trust doctrine should be applied according to the title holder of the land at issue. A more stringent standard should be required when applying the public trust to state-owned land and a more lenient standard should be applied to privately-owned land. The reasoning for applying distinct scrutiny levels is twofold. First, owners holding title to trust land should be able to exercise

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[159] *See Cleveland Asks Prospective Lakefront Developers to Start Lining Up*, IDEASTREAM.COM (June 3, 2013), http://www.ideastream.org/news/feature/54072.

[160] As might be the case if Ohio followed Rhode Island's lead by extinguishing the public trust in privately owned land.

[161] S. 371, 187th Gen. Court (Mass. 2011), *available at* http://www.malegislature.gov/Bills/187/Senate/S00371.

discretion with land the state granted to them, subject to public rights. Second, the state must knowingly and deliberately grant private owners title to land within the public trust. Knowledge that private title holders will enjoy broader uses may prevent the state from granting the land initially, providing an incentive to keep the shoreline publicly held by the state and ensuring its use to benefit the public. While considering the factors listed above, in determining allowable uses for state-owned trust land, the main consideration should be whether it serves a public purpose that provides a greater public benefit than public detriment *and* furthers the public's rights.[162] This heightened test for publicly owned trust land will serve as an additional protection for the lakefront's shoreline.

Finally, Ohio should consider extinguishing public trust restrictions from landlocked property when it was filled before 1975.[163] Regulating land separated for years from the very resource sought to be protected is contrary to the doctrine's original intent. Once severed from the water, land use restrictions no longer protect the shoreline and waterways, but impede valuable land resources from being utilized.[164] "Such [landlocked] property is valueless in its present state for trust purposes," and limiting its use no longer benefits the public.[165] Applying the public trust doctrine to filled land which no longer abuts the water is simply contrary to the public trust doctrine's original intent to protect the nation's navigable waterways. While extinguishing the public trust from *all* filled land might promote private filling and the subsequent destruction water resources, extinguishing it from existing land, filled decades ago and no longer retaining its public trust attributes, will not significantly impact the public's rights.

Cleveland's Lakefront Development Plan seeks to develop the very land that would be impacted by extinguishing the public trust from land filled prior to 1975. This would comport with the Ohio legislature's historical attempt to exclude Cleveland's metropolitan area from the public trust. When the original Fleming Act was enacted in 1917, the legislature expressly excluded the area surrounding Cleveland, including submerged and filled and near downtown, from the public trust.[166] The Ohio Supreme Court subsequently found this provision unconstitutional because it was not a law of general applicability and repealed the exclusionary provision.[167] However, enacting this language is evidence that the legislature intended to exempt this land from the trust and allow the metropolitan waterfront to be developed unhindered.

The public trust doctrine has a significant impact on developing and revitalizing Ohio's waterfront. The doctrine also undoubtedly has considerable environmental

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[162] *See* MASS. GEN. LAWS ANN. ch. 91, § 14 (West 2012).

[163] *See also* City of Long Beach v. Mansell, 476 P.2d 423, 437 (Cal. 1970) (suggesting that when filled public trust land is cut off from water access it is no longer useful for trust purposes and can be freed from the trust).

[164] *See* City of Berkeley v. Super. Ct., 606 P.2d 362, 374 (Cal. 1980) ("[W]e believe that in balancing the interests at stake, the public right in [landlocked] parcels may be adequately protected by our holding that only the tidal portions thereof are subject to the trust.").

[165] *Id.*

[166] *See* State *ex rel.* Squire v. City of Cleveland, 82 N.E.2d 709, 722-23 (Ohio 1948).

[167] *Id.* (finding the Fleming Act violated OHIO CONST. art. II, § 26 and art. XIII, § 1).

consequences. An overbroad public use requirement may lead to unfettered construction to the detriment of Ohio's natural shoreline. On the other hand, imposing overly harsh restrictions on development and land use may lead to the shoreline's ossification, leaving the waterfront a veritable wasteland. Neither scenario benefits Ohio's environment, and the public's interests demand a balanced approach to using and developing the state's waterfront resources. Some scholars have viewed the public trust as a legal vessel for environmental protectionism, focusing on the individual's right to freely access and enjoy nature.[168] However, while the environmental effects of Ohio's public trust doctrine are no doubt far reaching, this topic is beyond the scope of this Article, which focuses on the doctrine within the context of Cleveland's Lakefront Development Plan.

IV. CONCLUSION

Waterfront redevelopment has significant potential to assist cities, including Cleveland, in revitalizing urban areas. This reinvestment in crucial waterfront neighborhoods will benefit the very people the public trust doctrine was created to protect by preventing the ossification of Ohio's invaluable shoreline. Ohio must adopt a clear public trust doctrine to facilitate the highest and best use of its valuable land and water resources by clearing up murky titles and ephemeral use restrictions that hinder the land's development.

[168] *See generally* Sax, *supra* note 10.