

No. 23 \_\_\_\_\_

**In the Supreme Court of the United States**

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Judson and Mary Hawkins

Petitioners

vs.

The Ohio Department of Natural Resources

Respondent

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On Petition for Writ of Certiorari to the  
Ohio's Tenth District Court of Appeals

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**PETITION FOR A WRIT OF CERTIORARI**

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## I.

### QUESTIONS PRESENTED FOR REVIEW

This case involves state executive agency actions in relation to individual property owners and whether state statutes and administrative rules can be capriciously and arbitrarily interpreted in such a manner as to deprive an individual property owner of any chance to win against administrative agency actions. The questions raised are the following:

- (1) Does the Due Process Clauses of the Fifth and Fourteenth Amendment to the United States Constitution guarantee a substantive right to prevail against the state when supported by the facts?
- (2) Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution permit a state administrative agency to interpret statutes and administrative rules in such a manner that deny an individual a procedural right to prevail at trial and upon appeal?

## II.

### **PARTIES TO THE PROCEEDINGS**

The sole Petitioners here (Appellants below) are Judson and Mary Hawkins. The Respondent (Appellee below) is the Ohio Department of Natural Resources

III

**RELATED PROCEEDINGS**

None

#### IV.

### TABLE OF CONTENTS

Questions presented for review.....	I
Parties to the Proceedings.....	II
Related Proceedings.....	III
Table of Contents.....	IV
Table of Authorities.....	VI
Opinions of the courts below.....	1
Statement of the Jurisdictional Grounds.....	2
Statutory and Constitutional Provisions.....	3
Statement of the Case.....	4
Statement of the Proceedings.....	5
Facts Relevant to the Question.....	6
Stages in the Proceedings in which the Constitutional Issues were raised.....	14
Reasons for Allowing this Petition for.....	20
First Question presented for review.....	20
Second Question presented for review.....	30
Conclusion and Prayer for Relief.....	36
Petitioners' Appendix	
Appendix A--- Court of Appeals Opinion (Sept. 28, 2023).....	A1
Appendix B --- Franklin County Court of Common Pleas Opinion and Order (Oct. 22, 2022) .....	A27
Appendix C --- Ohio Supreme Court Order Declining Jurisdiction (Jan. 23, 2024).....	A53
Appendix D---Agency Hearing Officer's Report and Recommendation Nov. 27, 2019.....	A54

## V.

Appendix E --- Constitutional	
Provisions.....	A117
Fifth Amendment.....	A117
Fourteenth Amendment.....	A117
Ohio Constitution, Section 1,	
Article16.....	A117
Appendix F --- Statutory Provisions	
R.C. 1506.10.....	A118
R.C. 1506.06.....	A120
R.C. 1506.08.....	A125
R.C. 119.12.....	A126
R.C. 1506.09.....	A136
R.C. 1506.99.....	A138
R.C. 1506.02.....	A139
R.C. 1.47.....	A143
Appendix G ---Administrative Rules	
Oh. Admin R. 1501-6-11.....	A144
Oh. Admin R. 1501-6-23.....	A146
Oh. Admin R. 1501-6-21.....	A149

## VI.

### TABLE OF AUTHORITIES

Black’s Law Dictionary, Revised Fourth Edition.....	21
Boley v. Goodyear Tire and Rubber Co., 125 Ohio St. 3d 510, 2010-Ohio-2550, 929 N.E. 2d 448.....	23
Cleveland Board of Education v. Loudermill, 470 U.S. 532, at 541; 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1984).....	30
Daniels v. Williams, 474 U.S. 327, 331; 88L.Ed. 2d 662, 106 S. Ct. 662 (1986).....	20.
London Guarantee & Accident Co. v. Woefle, 8 <sup>th</sup> Circuit Court of Appeals (1936), 83 F. 2d 325.....	24
Mathews v. Eldridge (1975), 424 US. 319; 96 S. Ct. 893; 47 L.Ed. 18.....	32, 33, 34
Nebbia v. New York (1933), 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed 940, 89 A.L.R. 1469.....	31.
N.Y. State Rifle and Pistol Ass’n. v. Bruen (2022), 597 US 1; 142 S.Ct. 2111; 213 L. ed. 2d 387.....	31
Ruther v. Kaiser (2012), 134 Ohio St. 3d 408; 2012-Ohio-586; 983 N.E. 2d 291.....	25
State ex rel. Merrill v. Ohio Department of Natural Resources (2011), 130 Ohio St. 3d 30; 2011-Ohio-4612; 955 N.E.2d 935.....	27
Stolz v. J & B Steel Erectors (2018), 155 Ohio St. 3d 567; 2018-Ohio-5088; 122 N.E.3d 1228.....	25
West Virginia v. EPA (2022) 142 S. Ct. 2587, at 2607; 213 L. Ed. 2 <sup>nd</sup> 896; 52 ELR 20077.....	23

**OPINIONS OF THE COURTS BELOW**

- (1) The Judgement Entry and Opinion of the Ohio Court of Appeals for the Tenth District affirming the judgment of the Court of Common Pleas, Franklin County, Ohio, rendered on September 28, 2023, Case No. 22AP-689. (Pet. App. A, at pg. A1).
- (2) The Judgment Entry and Opinion of the Court of Common Pleas, Franklin County, Ohio, rendered on October 18, 2022, Case No. 20CVF-3321. (Pet. App. B at pg. A27)
- (3) The Judgment Entry of the Supreme Court of Ohio declining to accept jurisdiction filed on the 23 day of January, 2024, Case No. 2023-1422. (Pet. App. C at pg. A53)
- (4) Report and Recommendation of the Hearing Officer before the Ohio Department of Natural Resources, filed on November 27, 2019. (Pet. App. D at pg. A54)



**STATEMENT OF THE GROUNDS ON WHICH THE  
JURISDICTION OF THIS COURT IS INVOKED**

The judgment of the Supreme Court of Ohio was entered on January 23, 2024. No Motion for Rehearing was filed. The jurisdiction of this Court is invoked pursuant to the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States and Rule 10 (c) of the Rules of Practice of the Supreme Court of the United States. A state court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court. The Supreme Court of Ohio has declined to accept jurisdiction of that appeal (Pet. App. A52)

**THE CONSTITUTIONAL AND STATUTORY  
PROVISIONS WHICH THE CASE INVOLVED**

1. U.S. Constitution, Fifth Amendment (Pet. App. E at pg. A113)
2. U.S. Constitution, Fourteenth Amendment (Pet. App. E at pg. A113)
3. Art. I, Section 16 of the Ohio Constitution (Pet. App. E at pg. A113).
4. R.C. 1506.10 (Pet. App. F at pg. A118)
5. R.C. 1506.06 (Pet. App. F at pg. A120)
6. R.C. 1506.08 (Pet. App. F at pg. A125),
7. R.C. 119.12, (Pet. App. F at pg. A126)
8. R.C. 1506.09 (Pet. App. F at pg. A136)
9. R.C. 1506.99 (Pet. App. F at pg. A138)
10. R.C. 1506.02 (Pet. App. F at pg. A143)
11. R.C. 1.47 (Pet. App. F at pg. A139)
12. Ohio Administrative Rule 1501-6-11  
(Pet. App. G at pg. A144)
13. Ohio Administrative Rule 1501-6-23  
(Pet. App. G at pg. A146)
14. Ohio Administrative Rule 1501-6-21  
(Pet. App. G at pg. A149)

## STATEMENT OF THE CASE

The Petitioners' substantive and procedural due process rights, pursuant to Art. I, Section 16 of the Ohio Constitution and the Fifth and Fourteenth Amendments of the United States Constitution, have been denied by the Ohio Department of Natural Resources (hereinafter referred to as the ODNR) and the courts of Ohio. The ODNR included Petitioners' property within a Coastal Erosion Area (hereinafter referred to as a CEA) contrary to statutory definition. Petitioners upon appeal have found that the law permits an objection, an evidentiary hearing, and an appeal, but there exists no procedural mechanism whereby they may prevail upon the law and the facts of the case.

ODNR has always acknowledged it lacked the facts necessary to include Petitioners' property within R.C. 1506.06(A)'s statutory definition of a CEA (Pet. App. F, at pg. A120). The inclusion of Petitioners' property was justified solely upon the ODNR's practice of "averaging" individual property within an aggregate of five-hundred (500) feet of coastline (i.e. a CEA). Once included within this CEA an individual property owner has no legal recourse to obtain an exception. The courts of Ohio have affirmed and adopted that statutory interpretation. At this moment, and pursuant to Ohio precedent, an individual may object to inclusion, he may have a hearing, he may appeal, but despite the facts and the statutory passages that speak to an exception, the individual property owner has no substantive or procedural rights to win.

**STATEMENT OF THE PROCEEDINGS**

- (1) Petitioners were notified by ODNR correspondence that their property was included within a preliminary designation of a CEA on January 12, 2018 (Pet. App. D, at pg. A57).
- (2) The Petitioners objected to their inclusion within a CEA and requested an evidentiary hearing. That hearing was held on August 12, 2019. The Hearing Officer adopted the ODNR's position. (Pet.'s App. D at pg. A113, sub. par. 6)
- (3) The Petitioners appealed to the Franklin County Court of Common Pleas. A hearing occurred on October 9, 2020. The decision of the ODNR Hearing Officer was affirmed. (Franklin County Court of Common Pleas, 20 CV-3321. (Pet. App. B, at pg. A51)
- (4) The Petitioners appealed to Ohio's Tenth District Court of Appeals. The decision of the Franklin County Court of Common Pleas was affirmed on September 28, 2023, Case No. 22 AP-689. (Pet. App. A, at pg. A1)
- (5) The Petitioners appealed to the Ohio Supreme Court. That court declined to accept jurisdiction on January, 23, 2024. (Pet. App. C, at pg. A53)

### FACTS RELEVANT TO THE QUESTION

The pertinent history is as follows: the Petitioners purchased property on Lake Erie's southern shore in 1990. They renovated an existing cottage in 1992 and took occupancy in March of 1993. (ODNR Hearing Tr., pg. 16, Pet. App. D, at pg. A61)

In 1998 R.C. 1506.06 (A) (Pet. App. F, at pg. 120) was adopted. It defines "Coastal Erosion Areas" as the following;

\*\*\*, which are the land areas anticipated to lost by Lake Erie-related erosion within a thirty-year period if no additional approved erosion control measures are completed within that time. The preliminary identification shall state the bluff recession rates for the coastal erosion areas and shall take into account areas where substantial filling, protective measures, or naturally stable land has significantly reduced recession." (R.C. 1506.06(A), (Pet. App. F, at pg. A120).

Inclusion within a CEA places restrictions on the right to build upon or transfer the property. Inclusion within a CEA also exposes the individual to potential injunctive, civil and criminal penalties (See R.C. 1506.09 (Pet. App. F, at pg. A136) and R.C 1506.99 (Pet. App. F, at pg. A138).

The statutes also provide for removal from inclusion within a CEA; "Any affected \*\*\*, or private landowner may file with the director a written objection to the

preliminary identification \*\*\*.” R.C. 1506.08, (Pet. App. F, at pg. A125). R.C.1506.08 grants an affected property owner the right to appeal pursuant to R.C. 119.12, (Pet. App. F, at pg. A126) which reads, in pertinent part; “(A) Any party adversely affected by any order of an agency issued pursuant to an adjudication may appeal from the order of the agency to the court of common pleas of the county designated in division (B) of this section.”

In 1998 Petitioners sloped their bluff and installed anchor stone to secure the gradient. (Pet. App. D, at pgs. 62) Due to rising lake levels additional stone and blocks were added over the years in order to repair and maintain the previously placed stone (Pet. App. D, at pg. 62), These efforts included the addition of twenty-nine (29) feet of stone and blocks to their western neighbor’s property (Pet. App. D, at pg. 61). Due to their efforts the Petitioners suffered approximately one foot of erosion between 1998 and 2015. (Pet. App. D, at pg. 63)

In 1999 R.C. 1506.02 (Pet. App. F, at pg. A139) was adopted. It mandates that the ODNR, “Shall adopt and may amend or rescind rules under Chapter 119. of the Revised Code for the implementation, administration, and enforcement of the coastal erosion program and the other provisions of this chapter.” (R.C. 1506.02(A)(3).

Significant to the constitutional issues herein is ODNR’s failure to adopt any administrative rule providing an empirical method of determining a post “preliminary designation” objection to inclusion

within a CEA; nor has the ODNR adopted any administrative rule whereby a private property owner may request approval for “erosion control measures.”<sup>1</sup>

Throughout these proceedings the only administrative rule referenced and relied upon by ODNR and the courts to deny Petitioners’ due process is Ohio Administrative Rule 1501-6-11 (Pet. App. G, at pg. A144). This rule, however, pertains solely to the method used to calculate recession to the shoreline. Furthermore, nothing in Ohio Admin. R. 1501-6-11, nor, indeed, any of the Ohio’s existing administrative’ rules address a request for an exception to property erroneously included within a CEA. In short, the rules relied upon by the ODNR and the courts do not limit ODNR’s ability to grant exceptions.

On January 12, 2018 Petitioners received correspondence from the ODNR (Pet. App. D, at pg. 57, and ODNR Hearing Record, Appellants’ and Appellee’s Joint Exh.1) in which the ODNR informed Petitioners they were included within a preliminary designation of a CEA. That same correspondence went on to inform the Petitioners;

A landowner may not feel that erosion is a problem or may have a different perspective on their property’s erosion history, **for example, grading or other earth-moving activities**

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1.The only rule concerning permit applications is Ohio Admin.R. 15-1-6-23 pertaining to “permanent structures.” Nothing Petitioners have done to their property post 1992 falls within a definition of a “permanent structure”. (Pet. App., pg. A144)

**interpreted as erosion by our mapping methods may have been undertaken to improve the property stability.** Landowners who can document that the CEA maps are in error may file an objection within 120 days of \*\*\*. An objection must show that ODNR made an error in calculation of the amount of recession that occurred at a property between 2004 and 2015. The latest CEA designation is based upon changes measured only between those years. (ODNR Hearing, Appellants' and Appellee's Joint Exh.1) (emphasis added)

Obviously, in January of 2018 the ODNR acknowledged an individual's right to object and appeal. That knowledge is manifest in several other documents. In a May 11, 2018 (Pet. App. D at pg. 57; Rec. of Pro., E 3186-A24) the ODNR wrote to Petitioners: "We have received your objection, postmarked May 2, 2018, to the preliminary designation of a Lake Erie coastal erosion area at your property referenced above. Your objection will be carefully reviewed in light of the **site conditions** and the information you have provided" (emphasis added)

Also in January of 2018 (Rec. of Pro. E3186-A14) the ODNR published a CEA Update in which it wrote;

**"A landowner may not feel that erosion is a problem or may have a different perspective on their property's erosion history; \*\*\*. That is why these**



**updated 2018 CEA designations are preliminary.** Landowners who can document that the preliminary CEA maps are in error may file an objection\*\*\*. An objection must show that ODNR made an error in calculating the amount of recession that occurred at a property between 2004 and 2015.” (emphasis added)

Based upon these representations the Petitioners objected and provided the necessary facts and data concerning their individual property. A site visit occurred on June 7, 2018. Despite acknowledging that Petitioners’ property did not fall within a CEA, the ODNR refused them an exception. In an August 8, 2018 letter (Pet. App. D, at pg. 57; Rec. of Pro., E3186-A26) it wrote;

“As we discussed during my visit to your property on June 7, 2018, we measured very little to no erosion at your property itself. \*\*\*However, the methodology by which the maps are drawn uses an averaging function that takes into account erosion up to 200 feet away from a given spot. About, 34.5 feet of erosion measured immediately west of your property is the reason that a CEA has been designated at your property.”

Petitioners appealed that denial and on August 12, 2019 an evidentiary hearing took place. During testimony ODNR stated its practice. ODNR required

an anticipated loss of fourteen feet over a thirty-year time period to establish a CEA. (Pet. App. D, at pg. 103, sub. par. 20). ODNR calculated Petitioners' loss as one-tenth of a foot (1/10) per year over the next thirty years (i.e. three feet).

Q. In fact, you determined that the Hawkins property is losing one-tenth of an inch per year?

A. One-tenth of a foot.

Q. One-tenth of a foot, I apologize. One-tenth of a foot?

A. Right.

Q. Which would be 1.4 inches?

A. Yeah, roughly. (ODNR Hearing Tr., pg. 155)

The ODNR also confirmed it had insufficient facts to deny an exception because of western erosion. In fact, ODNR had made no effort to calculate the effect of Petitioners' placement of stone upon their western neighbor's property:

Q. Well, have you undertaken any scientific analysis to calculate the effect that the Hawkins' measures have had on the property to the west?

A. No.

Q. So you can't say that the efforts the Hawkins have taken or the efforts the Appellants have taken would not prevent their western neighbors from losing 14 feet in the 30 years?

A. I would not make that statement.

Q. No, you wouldn't, but you cannot discount it. You haven't taken any measures to determine the effect that the Hawkins measures have had on the property immediately to the west?  
 A. No, I've not done that. (ODNR Hearing Tr., pages 189-190)

The best that the ODNR could establish was that the western erosion had the "potential to eventually flank" Petitioners' property. (Pet. App. D, at pg. A101, sub. par. 8; ODNR Hearing tr., pgs. 201-202)

The ODNR's practice was best set forth in a series of questions and answers between the ODNR Hearing Officer and the ODNR's expert;

"Q. Do you ever read that language from the statute as one that would create an exception to the smoothing out process that's used in the rules? In other words, we have one piece of property and a group of five transects that because of the amount of erosion control that they've implemented, has had no erosion, but when it's blended together with the properties within those five points, it suddenly has a very large anticipated erosion rate. That could be argued by some to say that doesn't sound fair. What's your response to that?  
 A. My response to that is unfortunately that is a feature of the Code. It does sometimes occur that you'll have two

properties, one with a great deal of observed stability and the next one with a great deal of recession or erosion.

And because of the five-point moving average, one property—I should say one property’s measurements will affect the process through recession. So it may also be that the eroding property doesn’t have as much as it might because of the stable property to the next of it. It’s a quirk or an artifact of the way a recession is met along the shore.

Q. Is it your understanding that within the context of the rules, the Department does not have the discretion to exempt out a property where those erosion control methods have been utilized successfully from the calculation of the five transects?

A. No, there’s no means to do that. (ODNR Hearing tr., pg. 209, line 23 through pg. 211, line 6; see also Pet. App. D, at pg. 82-83)

The hearing officer accepted ODNR’s practice; “Data shows that the Hawkins property eroded a foot between 2004 and 2015. In contrast, the adjacent property immediately to the west has suffered significant recession of 34.9 feet.” (Pet. App D, at pg. A100, sub. par. 6) He went on to rule, over Petitioners’ objection, that neither statute nor administrative ruled provided a procedural right to an exception;

“Neither R.C. 1506.06 nor Ohio Adm. Code 1501-6-10 through 1501-6-13 provide for excepting out any property correctly and accurately included within a CEA pursuant to the methodology set forth in the rules.” (Pet. App, pg. A113, sub. Par. 6).

### **STAGES IN THE PROCEEDING IN WHICH THE CONSTITUTIONAL ISSUES WERE RAISED**

Petitioners have repeatedly raised the issue of their individual rights to a meaningful proceeding;

“The inclusion of Appellants’ property within the CEA is, indeed, based solely upon the loss of land to the west of Appellants’ property. In short, the ODNR has, and can only, include Appellants’ property within the CEA by averaging the loss of properties that have undertaken no effort to protect their bluff. Based upon the law to be discussed the inclusion of Appellants’ property by averaging is improper and unconstitutional.” (Rec. of Proc., E3186-B85, Petitioners’ ODNR Hearing Brief and Statement of Facts and Exhibit List, pg. 3.), also incorporated within Petitioners’ opening argument, (ODNR Hearing Tr., pg. 6)

Petitioners supplemented this argument in their written closing argument;

“\*\*\*. Mr. and Mrs. Hawkins have a constitutionally protected right to protect and maintain their property and ONDR in its interpretation of the statutes and its adoption of its own rules not only violates those constitutionally protected rights but also goes so far as to eliminate any meaningful right to appeal.” (Rec. of Proc., E3186-G27, Appellants’ Written Closing Argument before the Hearing Officer, pg. 6).

The Petitioners again raised their legal right to prevail in their Appellants’ Brief before the Franklin County Court of Common Pleas;

“The Hearing Officer’s opinion, \*\*\* dictates that, even though a property owner has individual rights concerning his property and has taken individual action to protect and maintain his property, and has a right to appeal ODNR’s decision, if his neighbors have done nothing to protect their property and the ODNR has adopted no rules for individual exceptions the adversely affected property owner has no right to an exception and no meaningful recourse under the law.” (Appellants’ Brief before the Franklin County Court of Common Pleas, pg. 13).

A hearing before the Franklin County Court of Common Pleas was held on October 9, 2020. That court issued its decision on October 18, 2022 (Pet. App. B, at pg. A27). In its decision the Court found that the ODNR had followed its own methodology (Pet. App., at pg. A49). It also addressed the constitutional issues raised by Petitioners. Concerning Petitioners' citation of *State ex rel. Merrill* (2011), 130 Ohio St. 30; 2011-Ohio-4612; 955 N.E.2d 935, the court ruled;

“While dicta and not determinative of the Supreme Court Decision, there is no dispute that Appellants’ have a protected property interest in their home and property. At issue, is whether the ODNR’s action of including a portion of their property in the CEA, without finding that it had the discretion to grant Appellants an exemption deprived them of that interest and whether it did so without adequate procedural rights.” (Pet. App. B, at pg. A47).

The Court then ruled concerning these rights; “As to constitutionally protected freedoms, the Ohio Constitution characterizes private property as ‘inviolable,’ but only insofar as they are ‘subservient to the public welfare.’” (Pet. App., pg. A47), citing the Ohio Constitution. Art. 1, § 19) The Court then affirmed the Hearing Officer.

The Petitioners appealed the above referenced decision to Ohio's Tenth District Court of Appeals. In their Appellants' Brief before the Tenth District, the Petitioners contested the lower court's ruling. They argued;

How can this court square the lower courts determination with Art. I, Section 16 of the Ohio Constitution; 'All courts shall be open and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.'? If Appellants are only included within a 'coastal erosion area' because of their neighbors' lack of initiative, and they have no individual right to an exception, how are they provided with due process. (Appellants' Brief, pg.38)

The ODNR referenced the due process argument in its Appellee's Brief before the Tenth District; "Appellants' due process rights were not violated during the administrative appeal or during the common pleas court proceedings. Courts are required to presume the regularity and validity of the proceedings absent a record that demonstrates otherwise." (Appellee's Brief, pg. 37)

The Petitioners again raised the due process argument in their Reply Brief before the Tenth District, citing *State v. Hochhausler* (1996), 76 Ohio St. 3d 455, 668 N.E. 2d, 1996-Ohio-374;



Due process under the Ohio and United States Constitution demands that the right to notice and an opportunity must be granted at a meaningful time and in a meaningful manner' \*\*\*. The Appellee concedes, and the lower court recognized, that Appellants have an individual right to appeal, and an individual right to be heard. Despite that recognition, both the ODNR, and the lower tribunals have decided there exists no duty to provide for a successful appeal. (Appellants' Reply Brief, pg. 18).

The Tenth District Court of Appeals confirmed the lower court's rulings, stating that:

“In their fourth assignment of error, the Hawkinses Assert that ODNR's refusal to grant an exception from the Lake Erie CEA designation violated their constitutional rights. As explained above, we conclude that R.C. 1506.06 does not provide for an individual exception for a property that is determined to be within a Lake Erie CEA. The Hawkinses argue that the lack of an individual exception violates their constitutional rights.” (Pet. App. A, pg. A19, sub. par. 23)

The Petitioners appealed to the Ohio Supreme Court, again raising the due process questions;

In addition to the above referenced questions of substantial public and great general interest this case also poses a significant constitutional question. Prior to this decision the parameters for a constitutional review of executive agency decisions were clear and specific. The agency decision was either constitutional or unconstitutional depending upon the facts of case, the constitutional mandates, and precedent. No longer. An individual may have a right to object, and appeal, but the court of appeals has determined that, ‘Nothing in R.C. 1506.06 requires ODNR to grant individual exceptions to properties that are found within Lake Erie CEAs.’ \*\*\*. This decision is at odds with all previous concepts of due process which have heretofore included, not merely a timely hearing, but a meaningful hearing. The decision offends the Fourteenth Amendment, as well as Sec. I, Sec. 16 of the Ohio Constitution, and heretofore accepted precedential standards of due process.” (Appellants Memorandum in Support of Jurisdiction, pg. 2)

The Ohio Supreme Court declined to accept jurisdiction on January 23, 2024, and from that decision the Petitioners bring this Petition for Writ of Certiorari (Pet. App., pg. A53)

## REASONS FOR ALLOWING THIS PETITION FOR WRIT OF CERTIORARI

**(1) Does the Due Process Clauses of the Fifth and Fourteenth Amendment to the United States Constitution guarantee a substantive right to prevail against the state when supported by the facts?**

For the first time a state administrative agency has denied an individual of any substantive right to prevail on the facts and the law in an administrative hearing; and, for the first time, the courts of Ohio (and, one hopes, any courts, anywhere) have ruled that this practice satisfies due process.

This ruling contradicts the very essence of due process as enumerated in Article I, Section 16 of the Ohio Constitution and the Fifth and the Fourteenth Amendments to the United States Constitution. The doctrine of substantive due process protects an individual's liberty against, "\*\*\* certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331; 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986).  
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That due process guarantees a substantive as well as a procedural opportunity to obtain a legal remedy, i.e. to be heard in a fair and impartial manner and to prevail upon the facts and the law is embodied in the very definitions of the words "hearing" and "trial".

A “hearing” is defined as, “Proceeding of relative formality, \*\*\*, with definite issues of fact or of law to be tried, in which the parties proceeded against have the right to be heard, and is much the same as a trial\*\*\*.” Black’s Law Dictionary, Revised Fourth Edition, pg. 852. A “trial” is defined as, “A judicial examination, in accordance with law of the land, of a cause, either civil or criminal, of the issues between the parties, whether of law or fact, before a court that has jurisdiction over it.” Black’s Law Dictionary, Revised Fourth Edition, pg. 1675. A “fair and impartial trial” is defined as, “One where accused’s legal rights are safeguarded and respected.” Black’s Law Dictionary, Fourth Edition, pg. 714.

These concepts of substantive due process have been adopted in Chapter One, General Provisions of the Ohio Revised Code, R.C 1.47:

“In enacting a statute, it is presumed that: (A) Compliance with the constitutions of the state and of the United States is intended; (B) The entire statute is intended to be effective; (C) A just and reasonable result it intended; (D) A result feasible of execution is intended.” (Pet. App. F, at pg. A143)

Neither the lower courts, nor the ODNR (despite acknowledging the duty of individual analysis) have followed the legislative rules of statutory interpretation pursuant to R.C. 1.47.

The ODNR has also failed to adopt any administrative rules to implement the legislative

intent, or to deal with objections individually. Instead, the ODNR has simply failed (or refused) to follow the meaning and substance of the statutory language. This the ODNR cannot do pursuant to the relevant statutes. R.C. 1506.06(A) clearly speaks to the recognition that individual efforts, pre-approved or otherwise, may exempt individual property from inclusion within a CEA; “The preliminary identification **shall** state the bluff recession rates for coastal erosion areas and **shall** take into account areas where substantial filling, protective measures, or naturally stable land has significantly reduced recession.” (Pet. App. F, at pg. A120) (emphasis added)

R.C. 1506.06(A) also limits objections to individuals; “; a private landowner may object only to the landowner’s land” (Pet. App. F, at pg. A121, last sentence of sub. par. A). R.C. 1506.06 (B) pertains to the objections’ review process. “The director shall review all objections filed under division (A) of this section. The director may then modify the preliminary identification of Lake Erie coastal erosion areas.” (Pet. App. F, at pg. A121). See also R.C. 1506.06(C); “Whenever the preliminary identification of a Lake Erie coastal erosion area is modified as a result of an objection, the director shall so notify the affected municipal corporation, county, or township and shall publish a notice of the modification in a newspaper of general circulation in the affected locality.” (Pet. App. F at pg. A122)

And, finally, R.C.1506.6 (D);

“After the director has ruled on each objection filed Under division (B) or (C) of this section, the director shall make a final identification of the Lake Erie coastal erosion areas and shall notify by certified mail the appropriate authority of each affected municipal corporation, county, and township of the final identification. The final identification may be appealed under section 1506.08 of the Revised Code.” (Pet. App. F at, pg. A122)

Common rules of statutory interpretation are applicable to the above referenced statutes; “It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *West Virginia v. EPA* (2022) 142 S. Ct. 2587, at 2607; 213 L. Ed. 2<sup>nd</sup> 896; 52 ELR 20077, citing *Davis v. Michigan Dept. of Treasury*, 489 U. S. 803, 809, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989). This was also (until this case) the rule in Ohio;

“Our role, \*\*\*, is to evaluate a statute as a whole and \*\*\* giv[e] such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless it is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative. Indeed, as we determined in \*\*\*, statutes ‘may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word phrase, sentence and part of an act.’” *Boley v. Goodyear Tire and Rubber Co.*, 125 Ohio St. 3d

510 (P.21), 2010-Ohio-2550, 929 N.E. 2d 448, citing *St. ex rel. Myers v. Bd. of Edn. of Rural School Dist. Of Spencer Twp., Lucas County*, (1917), 95 Ohio St. 367, 116 N.E. 516; *Weaver v. Edwin Shal Hosp.*, 104 Ohio St. 3d 390, 2004 Ohio 6549, 819 N.E. 2d 1079; *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, 36 O.O. 554, 78 N.E. 2d 370.

Clearly, the Ohio State Legislature intended a constitutional outcome pursuant to R.C. 1.47 and the ODNR, and the lower courts failed to follow that mandate by failing to interpret the relevant statutes and administrative rules to effectuate the legislative intent.

But whatever the legislative intent, Petitioners have a substantive right to prevail against state action where the facts and the law so dictate. This has long been a protected constitutional guarantee recognized by the Federal Courts:

“The purpose of a trial, however, is to seek for and, if possible, find the truth and to do justice between the parties according to the actual facts and the law, and any rule which stands in the way of ascertaining the truth and thus hampers the administration of justice must give way.” *London Guarantee & Accident Co. v. Woefle*, 8<sup>th</sup> Circuit Court of Appeals (1936), 83 F. 2d 325.

These definitions and the concepts of a fair trial have been followed throughout the history of these United States. The Fifth and Fourteenth Amendments guarantee individuals procedural and substantive protections from wrongful state actions (Pet. App. E, at pg. A117).

The due process rights pursuant to the Fourteenth Amendment have been replicated in the Ohio Constitution, Section 1, Article 16. (Pet. App. E, at pg. A117)

That clause has been interpreted by the Ohio Supreme Court as equivalent to the Fourteenth Amendment to the Constitution of the United States in *Stolz v. J & B Steel Erectors* (2018), 155 Ohio St. 3d 567; 2018-Ohio-5088; 122 N.E.3d 1228, Paragraph 12. The Ohio Supreme Court has further stated in regards to Article I, Section 16 that it includes a, “right to remedy” and that remedy applies only to existing vested rights and that the legislature determines what injuries are recognized and what remedies are available.” *Ruther v. Kaiser* (2012), 134 Ohio St. 3d 408; 2012-Ohio-586; 983 N.E. 2d 291, at paragraphs 12 and 13, citing, *Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 193, 2008 Ohio 546, 883 N.E. 2d 938 (1990).

An objective reading of the pertinent statutes clearly establishes that the legislature has established substantive individual rights to object, and to a meaningful appeal process. In fact, “a private landowner may object only with respect to the landowner's land” (R.C. 1506.06(A), Pet. App. F, at



pg. 121, final sentence of sub. par. A)

The ODNR cannot satisfy this aspect of the doctrine of due process by ignoring the law, failing to adopt administrative rules and interpreting its own administrative rules (which speak not at all to individual exceptions) for its own convenience, and the lower courts erred by permitting the practice.

In order to affirm the Hearing Officers denial of a right to an exception the Franklin County Court of Common Pleas erroneously relied upon Article I, Section 19 of the Ohio Constitution and the state's police powers to deny Petitioners due process. This provision reads;

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

But that clause does not grant the state authority to sanction individuals for their constitutionally guaranteed right to protect and maintain their own property. Nor does it deny Petitioners of due process. The substantive and procedural rights of due process afforded to individuals are not subservient to the public welfare. Maintaining the right to substantive and procedural due process is a “public welfare” that the state and the courts are obligated to protect.

Furthermore, Ohio’s legislature never granted ODNR “police powers” sufficient to deny due process. The ODNR was granted authority to act over the waters of Lake Erie, and its’ authority over the abutting land was limited by the State Legislature when it adopted the Fleming Act, i.e. R.C. 1506.10 (Pet. App. F, at pg. A118). The Ohio Supreme Court has so ruled in *State ex rel. Merrill v. Ohio Dep’t of Natural Resources* (2011), 130 Ohio St. 3d 30; 2011-Ohio-4612; 955 N.E.2d 935;

“At present, R.C. 1506.10 provides: ‘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, \*\*\*, do now and always have, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state, for the public uses to which they may be adapted, *subject to* the powers of the

United States government, to the public rights of navigation, water commerce, and fishery, *and to the property rights of littoral owners*, including the right to make reasonable use of the waters in front of or flowing past their lands. Any artificial encroachments by public or private littoral owners, which interfere with the free flow of commerce in navigable channels, whether in the form of wharves, piers, fills, or otherwise, beyond the natural shoreline of those waters, not expressly authorized by the general assembly, acting within its powers, or pursuant to section 1506.11 of the Revised Code, shall not be considered as having prejudiced the rights of the public in such domain. This section does not limit the right of the state to control, improve, or place aids to navigation in the other navigable waters of the state or the territory formerly recovered thereby.’ Subsequently, \*\*\*, we held that the Fleming Act did ‘not change the Concept of the declaration of the state’s title as \*\*\*.’ Instead, the act merely reiterated this court’s pronouncement in that case. Thus, we affirmed that ‘littoral owners of the upland have no title beyond the natural shoreline; they have only the right of access and wharfing out to navigable waters.’ \*\*\*. *From that holding, it follows that the converse is also true, if*

*a littoral owner has no property rights lakeward of the shoreline, then the territory of the public trust does not extend landward beyond the natural shoreline.*” State ex rel Merrill, *supra*, at pages 53-54. (Emphasis added)

The court went on to define the word, “shoreline”;

“Thus, we need not further comment on or clarify the effect of these processes on the property line because the parties generally have no dispute regarding them. *Accordingly, the territory of Lake Erie held in trust by the state of Ohio for the people of the state extends to the natural shoreline, which is the line at which the water usually stands when free from disturbing causes.*” State ex rel. Merrill, *supra*, at page 58-59.

State ex rel. Merrill, *supra*, was cited repeatedly by Petitioners throughout these proceedings. Indeed, the Franklin County Court of Common Pleas referred to the case as “dicta” and not controlling (Pet. App. B, at pg. A47). But it is certainly controlling concerning the Petitioners’ rights to protect, maintain and otherwise enjoy their property. And it also sets forth the extent of ODNR’s “police powers”, upon which the lower courts relied to deny Petitioners the very right to prevail against state action. The individual right to prevail against the state based on the law and the facts of this case is substantive, and those rights

cannot be deprived through the exercise of the police powers granted to the ODNR.

**(2) Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution permit a state administrative agency to interpret statutes and administrative rules in such a manner that deny an individual a procedural right to a meaningful hearing?**

Petitioners' rights to due process are not only substantive but also procedural, and neither police powers nor administrative practice can deprive individuals of this right. Especially since the right to procedural due process is an enumerated right set forth in the Fifth Amendment to the United States Constitution (as well as Ohio's Constitution as referenced above), and a right to proceed without a right to prevail upon the facts and the law is meaningless.

This Court has already addressed this question; "The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Bd. of Educ. V. Loudermill*, 470 U.S. 532, at 541; 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1984).

This Court has also previously considered police powers in relation to the due process clauses of the Fifth and Fourteenth Amendments and in relation to the states and decided the following;

“The Fifth Amendment, in the field of federal activity, 14<sup>+</sup> and the Fourteenth, as respects state action, 15<sup>+</sup> do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts. *Nebbia v. New York* (1933), 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed 940, 89 A.L.R. 1469, at pg. 950.

Since *Nebbia*, *supra*, the U.S. Supreme Court has, in an analogous case, ruled upon specifically enumerated constitutional rights vis a vis a state’s regulatory powers. In *N.Y. State Rifle and Pistol Ass’n. v. Bruen* (2022), 597 US 1; 142 S. Ct. 2111; 213 L. ed. 2d 387, this Court established procedural safeguards concerning state regulatory actions concerning individual rights;

“In keeping with *Heller*, we hold that when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s ‘unqualified command’.” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, *supra*, at page 17.

More specific to agency decisions, and this case, this Court has established a set of criteria concerning the due process requirements before an individual can be deprived of a property interest. In *Mathews v. Eldridge* (1975), 424 US. 319; 96 S. Ct. 893; 47 L.Ed. 18, this Court ruled the following:

“This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. \*\*\*. The ‘right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and

hardships of a criminal conviction, is a principle basic to our society.’\*\*\*. The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’ *Mathews v. Eldridge*, supra, at page 32, citing *Wolff v. McDonnell*, 418 U.S. 539, 557-558(1974); *Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931); *Joint Anti-Fascist Comn. McGrath*, 341 U.S. 123, 168 (1951); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

This Court has also set forth the considerations necessary to determine a due process violation in relation to administrative agencies;

“Due process is flexible and calls for such procedural protections as the particular situation demands.’ \*\*\*. Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. \*\*\*. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such



interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews v. Eldridge, supra, at page 334, citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972), Arnett v. Kennedy, 416 U.S. 134, at 167-168, and Goldberg v. Kelly, 397 U.S. 254, at 264-271.

Obviously, the ONDR has not followed a procedure consistent with due process. It hasn't even followed its previously stated acknowledgement that individual property was entitled to individual consideration and an individual exception.

The individual interest in due process is so fundamental to this country's sense of fairness and order that it was included within the first eight amendments to the Constitution of the United States, as well as the Fourteenth Amendment and the Ohio Constitution. In addition, the risk of an erroneous deprivation of Petitioners' interest through the adopted procedures herein is total and absolute.

As it stands now Petitioners have no right at all to a meaningful hearing because the ODNr and the courts have decided that once included within a "preliminary designation" (not even a final

designation) of a CEA, individuals have no right to an exception despite favorable facts and law.

And the ODNR has no viable interest in thwarting the clear legislative intention of providing Petitioners with an exception where appropriate. The ODNR's viable interest lies in promoting constitutional guarantees.

In addition, excluding Petitioners from a CEA when Petitioners' property clearly does not fall within the definition does no harm to the community at large. Nor does it impose significant additional fiscal or administrative burdens on the ODNR. It would merely be obligated to inform the objecting landowner and the local governmental agencies of its exception, R.C. 1506.06(B) (Pet. App. B, at pg. A118)

In the final analysis, Petitioners have done no wrong to the State of Ohio, its people, or their neighbors. In fact, they have benefited the community by protecting a portion of the lake shore from erosion. They have done nothing in relation to their property which is not protected by the constitutions of the United States and the State of Ohio. In the exercise of these rights they have prevented their property from falling within the definition of a CEA.

Despite the lawful use of their property the ODNR has impaired their property rights by imposing restrictions upon its sale, and also by subjecting Petitioners to the prospect of civil and/or criminal penalties if they violate sections of R.C. 1506.01, et seq. (Pet. App. F, at pgs. 136, and 138)

But most egregiously, and pertinent to this request, both the ODNR and the lower courts have recognized that Petitioners' property does not fall within the definition of property that exposes individuals to these penalties. Rather than grant the Petitioners the exception to which the facts, the law, and the constitutions demand, the ODNR and the lower courts have justified a denial of an exception by simply pronouncing that,

As explained above, we conclude that R.C. 1506.06 does not provide for an individual exception for a property that is determined to be within a Lake Erie CEA. (Tenth District Court of Appeals, Pet. App., pg. A19-20, sub. par. 23)

### **CONCLUSION AND PRAYER FOR RELIEF**

If the ODNR's conduct in interpreting and administering the law cannot be considered as arbitrary, capricious and unreasonable than nothing can. In fact, the ONDR has never referenced any legal justification for its practice other than, in essence, to claim, "that's the way we do it". The ODNR has never, at any time, recognized any statutory or constitutional restraints, nor adopted any, despite legislative mandate to do so. It has simply dismissed any individual right to any meaningful hearing. Once included within a "preliminarily designated" CEA one has no hope of lawfully obtaining an exception. The ODNR has never stated the parameters for obtaining

an exception, nor has it explained how, or why the granting of an exception in this case would interfere with, or limits its legislative purpose or goals.

The lower courts have approved this practice and made it the law of Ohio, and for almost all appeals from agency actions because almost all agency appeals go to the Tenth District Court of Appeals. (R.C. 119.12, Pet. App. F, at pgs. 126-127, sub. par. (B)(2))

The lower courts' decisions are completely contrary to the concept and very essence of due process, substantive or procedural. At this time in Ohio an individual may have the benefit of the facts and recognized rules of statutory construction and this will avail him not at all. Specific to this case, once included within the ONDR's preliminary (once again, not final) designation of a CEA the individual may object, he may have a hearing, he may appeal, but he has no meaningful procedural rights because the courts have decided;

“As explained above, we conclude that R.C. 1506.06 does not provide for an individual exception for a property that is determined to be within a Lake Erie CEA.” (Tenth District Court of Appeals, Pet. App., pg. A19-20, sub. par. 23)

The above decision violates the constitutionally guaranteed rights set forth in the U.S Constitution's Fifth Amendment, and Fourteenth Amendment. This Court should not tolerate such a diminution of

individual liberty without, at a minimum, a full judicial review. A hearing without a chance to win is not “meaningful”

For all these reasons the Petitioners request this Court to grant their petition for writ of certiorari and to grant Petitioners a full review of this case.

Respectfully submitted

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## **APPENDIX**

## APPENDIX

### TABLE OF CONTENTS

Petitioners' Appendix	
Appendix A Court of Appeals Opinion (Sept. 28, 2023).....	A1
Appendix B --- Franklin County Court of Common Pleas Opinion and Order (Oct. 22, 2022) .....	A27
Appendix C --- Ohio Supreme Court Order Declining Jurisdiction (Jan. 23, 2024).....	A53
Appendix D---Agency Hearing Officer's Report and Recommendation, Nov. 27, 2019.....	A54
Appendix E --- Constitutional Provisions.....	A117
Fifth Amendment.....	A117
Fourteenth Amendment.....	A117
Ohio Constitution	
Section 1, Article 16.....	A117
Appendix F --- Statutory Provisions	
R.C. 1506.10.....	A118
R.C. 1506.06.....	A120
R.C. 1506.08.....	A125
R.C. 119.12.....	A126
R.C. 1506.09.....	A136
R.C. 1506.99.....	A138
R.C. 1506.02.....	A139
R.C. 1.47.....	A143
Appendix G ---Administrative Rules	
Oh. Admin R. 1501-6-11.....	A144
Oh. Admin R. 1501-6-23.....	A146

Oh. Admin R. 1501-6-21..... A149



A1

**APPENDIX A**

**IN THE COURT OF APPEALS OF OHIO TENTH  
APPELLATE DISTRICT**

Judson J. Hawkins et al.,

Appellants-Appellants,

v.

Ohio Department of Natural Resources,

Appellee-Appellee.

No. 22AP-689

(C.P.C. No. 20CV-3321)

(REGULAR CALENDAR)

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**DECISION**

Rendered on September 28, 2023

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On brief: Judson J. Hawkins, prose. Argued: Judson J. Hawkins.

On brief: Dave Yost, Attorney General, Brian A. Ball,  
and

Gene Park, for appellee. Argued: Brian A. Ball.

APPEAL from the Franklin County Court of Common  
Pleas

DORRIAN, J.

{¶1} Appellants, Judson J. Hawkins and Mary M. Hawkins ("the Hawkinses"), appeal from a judgment of the Franklin County Court of Common Pleas affirming an adjudication order issued by the director of appellee, the Ohio Department of Natural Resources ("ODNR"), concluding that a portion of the Hawkinses' real property is located within a Lake Erie Coastal Erosion Area ("Lake Erie CEA"). For the reasons that follow, we affirm.

### I Facts and Procedural History

{¶2} In January 2018, ODNR notified the Hawkinses it had preliminarily identified their property in Eastlake, Ohio, as being within a Lake Erie CEA. The Hawkinses filed a written objection with ODNR, asserting their property had not lost any ground to erosion despite a rise in the water level of Lake Erie since 1998. ODNR Geology Program Supervisor Mark Oxner-Jones visited the Hawkinses' property on June 7, 2018. Following that visit, ODNR sent the Hawkinses a letter confirming that a portion of their property was in a Lake Erie CEA.

{¶3} The Hawkinses filed an administrative appeal and requested a hearing, which was held on August 12, 2019.<sup>1</sup> Mary testified that Judson had

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<sup>1</sup> Prior to filing their administrative appeal, the Hawkinses filed a premature appeal in the Franklin County Court of Common Pleas that was ultimately dismissed for failure to exhaust administrative remedies. *Hawkins v. Ohio Dept. of Natural Resources*, Franklin C.P. No. 19CV-455 (May 6, 2019) (dismissal order).

purchased the property in October 1990 and that the couple had made extensive alterations to the existing two- bedroom cottage on the property that were completed in March 1993. During the construction, the Hawkinses installed vertical and horizontal drainage pipes to reduce erosion caused by the flow of surface water. As of March 1993, the portion of the property adjacent to Lake Erie consisted of "a horizontal surface of approximately 150 feet from the house and then there was a rather abrupt bluff leading to about a 40 or 50-foot beach before you entered the water." (Aug. 12, 2019 Tr. at 17.) In autumn 1998, the Hawkinses had a portion of their yard and bluff excavated and graded to improve lake access, resulting in a "walkable slope" at a "1 to 8 ratio."<sup>2</sup> (Aug. 12, 2019 Tr. at 17-18.) As part of that modification, approximately 480 tons of "anchor stone" was placed at the bottom of the slope to maintain the correct ratio. (Aug. 12, 2019 Tr. at 24.) Additional anchor stone was installed on three occasions beginning around 2010. Eventually, the Hawkinses had 11 large concrete blocks weighing approximately 38,000 pounds each installed to secure the anchor stone and prevent it from being pulled into Lake Erie. The area bounded by the large concrete blocks extended onto the neighboring property to the west, with permission from the Hawkinses' neighbor. Mary testified she walked the property and observed the bluff line "[a]lmost daily" and had not seen any erosion, but she acknowledged that ODNR claimed

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<sup>2</sup> Although her testimony was not entirely clear, it appears Mary was referring to a ratio of 1 foot in elevation decline for every 8 feet of horizontal run.

there had been 1 foot of erosion between 2005 and 2014. (Aug. 12, 2019 Tr. at 43.) She further testified that the owners of the two neighboring properties to the west had done nothing to protect their property from erosion during the 24 years the Hawkinses lived at the property.

{¶4} Oxner-Jones testified that for the 2018 Lake Erie CEA designation, ODNR identified areas anticipated to have 14 or more feet of shoreline recession during the next 30 years. In accordance with a procedure set forth in the Ohio Administrative Code, shoreline recession at the Hawkinses' property was measured along a transect, identified as transect number 360-13, located at approximately the midpoint of the property. The landform chosen for measurement along transect 360-13 was the crest of the bluff on the Hawkinses' property. During ODNR's original calculations, the Hawkinses' property was measured to have had 2.5 feet of shoreline recession between 2004 and 2015. After visiting the Hawkinses' property, Oxner-Jones made a small adjustment to the mapping, resulting in a measurement of 1.1 feet of shoreline recession on the Hawkinses' property. This constituted approximately 1/10 of a foot of shoreline recession per year from 2004 to 2015. Over the same period, the neighboring properties to the east had no shoreline recession, while the neighboring property immediately to the west had approximately 34.9 feet of shoreline recession and the next western property had 16.1 feet of shoreline recession. Applying a center-weighted moving average calculation to determine anticipated shoreline recession, ODNR estimated the transect on the Hawkinses' property would have 26.5 feet of recession

over the next 30 years.<sup>3</sup> Oxner-Jones explained that under this center-weighted moving average calculation, the Hawkinses' property was "included in the coastal erosion area because a certain amount of recession \* \* \* ha[d] been measured to the west" of their property.<sup>4</sup> (Aug. 12, 2019 Tr. at 194.)

{¶5} John Matricardi, a civil engineer hired by the Hawkinses, testified that in his opinion the anchor stone and concrete blocks placed on the Hawkinses' property were adequate to last 30 years and would prevent the Hawkinses' shoreline from receding more than 14 feet over the next 30 years. Matricardi conceded ODNR correctly applied the procedure set forth in the Ohio Administrative Code for making the Lake Erie CEA determinations, but argued an exception should have applied to the Hawkinses' property because the measures they took extended beyond their property boundary. Matricardi also conceded the possibility of flanking erosion on the western side of the Hawkinses' property, but asserted

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<sup>3</sup> ODNR's "Final 2018 CEA Map Data Sheet," which was introduced as an exhibit at the hearing, included the following values for the transect located on the Hawkinses' property (360-13) and the two neighboring transects on either side:

<sup>4</sup> Oxner-Jones testified the Hawkinses' property had been identified as being within a Lake Erie CEA during the prior round of mapping conducted in 2010. Mary testified she was unaware of any prior Lake Erie CEA designation.

it would not cause more than 14 feet of shoreline recession.

{¶6} The hearing officer issued a report and recommendation finding, based on the evidence presented at the hearing, that the northern 20 to 25 percent of the Hawkinses' property, which did not include their house, had been identified as being within a Lake Erie CEA. The report further found that although only 1.1 feet of shoreline recession had occurred on the Hawkinses' property between 2004 and 2015, the property immediately to the west had experienced 34.9 feet of recession and the next westernmost property had experienced 16.1feet of recession over the same time span. The hearing officer found there was evidence that the erosion at the western neighboring properties was likely to continue and potentially flank the Hawkinses anchor stone and concrete blocks, causing shoreline recession on the Hawkinses' property. Because of the recession on the western neighboring properties, under the center-weighted moving average calculation applied by ODNR, 26.5 feet of future recession was predicted for the transect on the Hawkinses' property. The hearing officer concluded that the governing statutes and rules did not provide for individual exceptions from a Lake Erie CEA designation. The hearing officer further concluded that the Hawkinses failed to establish by the preponderance of the evidence that ODNR erred in applying the statutes or rules and finding a portion of their property to be within a Lake Erie CEA. The hearing officer recommended that the director affirm ODNR's action to include the northern portion of the Hawkinses' property in the final identification of the Lake Erie CEA.

{¶7} The Hawkinses filed a written objection to the hearing officer's report and recommendation, incorporating by reference the arguments asserted in their trial brief and closing argument. On May 14, 2020, the director of ODNR issued an adjudication order approving and confirming the hearing officer's report and recommendation, with minor spelling, typographical, and grammatical corrections.

¶8} The Hawkinses appealed the director's order to the Franklin County Court of Common Pleas, asserting error in four of the hearing officer's conclusions of law. The court conducted a hearing on the appeal on October 9, 2020. The common pleas court issued a decision and final judgment on October 18, 2022 affirming the director's order. The court found there was reliable, probative, and substantial evidence to support ODNR's determination that a portion of the Hawkinses' property was within a Lake Erie CEA. The court further found ODNR correctly and accurately followed the statutory and regulatory procedure when making that determination and rejected the Hawkinses' claim that the order violated their constitutional rights.

## II. Assignments of Error

{¶9} The Hawkinses appeal and assign the following four assignments of error for our review:

[I.] The term "due deference" means deference when appropriate. A decision by an executive agency is not entitled to "due deference" when it is unsupported by the facts and the law, and a trial court in affirming such a decision errs prejudicially.

[II.] R.C. 1506.06(A) requires that successful efforts to prevent loss of property to erosion entitle an individual property owner to an exception from his property being included within a designated coastal erosion area.

[III.] An administrative agency's rules must conform to the statutory mandates. It's [sic] interpretation of its own rules is not entitled to deference by an appellate court when the rules violate statutory mandates, and the recognition by a litigant that the agency will follow its own rules is not a concession that those rules are applied in a lawful manner.

[IV.] An individual lake front property owner has a constitutionally guaranteed right to protect and maintain his shoreline including the right to recover land lost to avulsion in the absence of any hazard to the public trust.

### III. Analysis

#### A. Standard of review

{¶10} A party adversely affected by the final identification of a Lake Erie CEA may appeal under R.C. Chapter 119. R.C. 1506.08. In an appeal under R.C. 119.12, the common pleas court reviews the entire record to determine whether an agency's order is supported by reliable, probative, and substantial evidence and is in accordance with law. *Watkins v. Ohio Bd. of Edn.*, 10th Dist. No. 22AP-694, 2023-Ohio-2595, pg. 16. Evidence is reliable when it can be confidently trusted and has a reasonable probability of being true, probative when it tends to prove the issue in question and is relevant to determining the issue, and substantial when it has importance and



value. *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992).

{¶11} On appeal to this court, we review for abuse of discretion a common pleas court's determination that an agency's order was supported by reliable, probative, and substantial evidence. *Watkins* at pg. 17. An abuse of discretion occurs when a decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). "However, 'on the question of whether the agency's order was in accordance with law, this court's review is plenary.'" *Watkins* at ,r 17, quoting *Leslie v. Ohio Dept. of Dev.*, 171 Ohio App.3d 55, 2007-Ohio-1170, ,r 44 (10th Dist.).

B. Whether ODNR complied with the statutory requirements in identifying Lake Erie CEAs

{¶12} The gravamen of the Hawkinses' appeal is set forth in their second and third assignments of error, in which they claim ODNR failed to comply with R.C. 1506.06 in designating a portion of their property as a Lake Erie CEA. The Hawkinses argue there was no evidence their property would have more than 14 feet of actual shoreline recession over the next 30 years, and they were only included within a Lake Erie CEA because of the center-weighted moving average calculation used by ODNR to estimate anticipated shoreline recession. The Hawkinses argue ODNR failed to comply with R.C. 1506.06 because its method of identifying Lake Erie CEAs did not account for the erosion-reducing effect of the anchor stone and concrete blocks placed on their property.

# 1. Creation of the Lake Erie coastal management program and determination of Lake Erie CEAs

{¶13} The General Assembly created the Lake Erie coastal management program in 1988, and subsequently amended the program in 1994 and 1996. Am. Sub. S.B. No. 70,142 Ohio Laws, Part I, 120; Am. Sub. S.B. No. 182, 145 Ohio Laws, Part I, 1868; Am. Sub. H.B. No. 119, 146 Ohio Laws, Part I, 1971. Under the coastal management program, the director of ODNR is required to identify Lake Erie CEAs, "which are the land areas anticipated to be lost by Lake Erie-related erosion within a thirty-year period if no additional approved erosion control measures are completed within that time." R.C. 1506.06(A).

{¶ 14} ODNR must first make a preliminary identification of Lake Erie CEAs, using "the best available scientific records, data, and analyses of shoreline recession" and "tak[ing]into account areas where substantial filling, protective measures, or naturally stable land has significantly reduced recession." R.C. 1506.06(A). The preliminary identifications are then published, and each affected landowner is notified by certified mail. R.C. 1506.06(A). A landowner affected by a preliminary identification of a Lake Erie CEA may file a written objection with the director of ODNR that includes "verifiable evidence or documentation \* \* \* that some portion of a Lake Erie coastal erosion area should not have been included in the areas defined by the preliminary identification." R.C. 1506.06(A). The director of ODNR must review all written objections and may modify the preliminary identification; the

director must then make a final identification of Lake Erie CEAs. R.C. 1506.06(B) through (D). ODNR must review and may revise the identification of Lake Erie CEAs at least once every ten years, "taking into account any recent natural or artificially induced changes affecting anticipated recession." R.C. 1506.06(E).

{¶ 15} The process ODNR uses for identifying Lake Erie CEAs is set forth in Ohio Adm. Code 1501-6-10 through 13. Using currently available imagery, ODNR creates base maps of the Lake Erie shoreline. Ohio Adm. Code 1501-6-11(A)(1).<sup>5</sup> ODNR then compares the base maps to historical maps to determine the annual rate at which the shoreline has moved landward due to erosion, i.e., shoreline recession.<sup>6</sup> Shoreline recession is measured at

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<sup>5</sup> Ohio Adm. Code. 1501-6-11(A)(1) provides:

Base maps shall be constructed using the most currently available imagery. Types of base map imagery may include, but are not limited to, aerial photographs, remote sensing imagery, digital data, or some combination thereof. Criteria used to select base map imagery shall include, but are not limited to, complete synoptic coverage of the Ohio shore where the shore is centrally located on the images, adequate geographic reference points, and resolution that is adequate to map a base recession line and identify cultural and physiographic features on the imagery.

<sup>6</sup> The historical imagery used to determine recession may be selected from 10 to 30 years prior to the year of the base map. Ohio Adm. Code 1501-6-11(A)(4). "For each transect, the annual recession rate in feet per year shall be calculated by dividing the measured recession distance by the time period in years between the recession lines." Ohio Adm. Code 1501-6-11 (C).

uniformly spaced points along transects that are perpendicular to the base recession line. Ohio Adm. Code 1501-6-n(B).<sup>7</sup> The annual shoreline recession rate is then used to calculate anticipated recession distance over the next 30 years along each transect. For the 2018 Lake Erie CEA identification ODNr measured annual shoreline recession along 14,175 transects spaced 100 feet apart.<sup>8</sup>

{¶ 16} ODNr applies a "center-weighted moving average" calculation to determine the anticipated recession distance along each transect. Ohio Adm. Code 1501-6-12. In this calculation, the recession distance at the subject transect is averaged together with the recession distances at each of the two neighboring transects on either side. The recession distance at the subject transect is weighted by a factor of 5, the recession distances for the transects on either side of the subject transect are weighted by a factor of 3, and the recession distances for the next outer

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<sup>7</sup> Ohio Adm. Code 1501-6-u(B) provides:

Recession distances shall be measured at points uniformly spaced along the base recession line. The recession distance at each point shall be measured from the base recession line along a transect oriented at a right angle to the general trend of the base recession line \* \* \*. Each transect shall be uniquely identified and the measured recession distance shall be recorded and used to calculate the annual recession rate."

<sup>8</sup> Oxner-Jones testified that the transects used when determining the recession rate were established in the early 1990s.

transects are weighted by a factor of 1. Ohio Adm. Code 1501-6-12. During the 2018 calculations, ODNR designated as Lake Erie CEAs those areas found to have an anticipated recession distance of 14 feet or more over the next 30 years.

{¶ 17} A person who has received written notice that all or part of a parcel of real property is within a Lake Erie CEA may not sell or transfer their interest in that property without disclosing that fact to a buyer. R.C. 1506.06(F). No permanent structure that lies or will lie, in whole or in part, on land within a Lake Erie CEA can be erected, constructed, or redeveloped without a permit issued by ODNR. R.C. 1506.07(B);<sup>9</sup> Ohio Adm.Code 1501- 6-22(A).

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<sup>9</sup> R.C. 1506.07(B) provides: No person shall erect, construct, or redevelop a permanent structure on land within a Lake Erie coastal erosion area without a permit issued in accordance with rules adopted under [R.C. 1506.07(A)]. The director shall grant a permit under those rules if the proposed site is protected by an effective erosion control measure approved by the director that will protect the permanent structure or if both of the following criteria are met:

- (1) The structure will be movable or will be situated as far landward as applicable zoning resolutions or ordinances permit;
- (2) The person seeking the authorization will suffer exceptional hardship if the authorization is not given.

The approval of an effective erosion control measure by the director for the purposes of this division does not create liability on the part of the director, the department of natural resources, or the state, municipal corporation, county, or township

## 2. Identification of a Lake Erie CEA on the Hawkinses' property

{¶18} Based on the ODNR maps and Oxner-Jones's visit, the Hawkinses' property was determined to have experienced 1.1 feet of shoreline recession between 2004 and 2015, an annual recession rate of 0.1 feet per year. The two transects immediately to the east of the Hawkinses' property each had no shoreline recession, while the two transects immediately to the west had 34.9 feet (3.2 feet per year) and 16.1 feet (1.5 feet per year) of recession, respectively. Applying the center-weighted moving average calculation set forth in Ohio Adm. Code 1501-6-12, this resulted in an anticipated

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regarding the future protection of the site for which the measure was approved.

The director shall not require a permit for the erection, construction, or redevelopment of a permanent structure on any parcel of property within a Lake Erie coastal erosion area if that property is not adjacent to Lake Erie.

For purposes of R.C. Chapter 1506, "[p]ermanent structure" is defined as "any residential, commercial, industrial, institutional, or agricultural building, any mobile home as defined in [R.C. 4501.01(C)], any manufactured home as defined in [R.C. 3781.06(C)(4)], and any septic system that receives sewage from a single-family, two-family, or three-family dwelling, but does not include any recreational vehicle as defined in [R.C. 4501.01]." R.C. 1506.01(F). "Erosion control structure" is defined as "a structure that is designed solely and specifically to reduce or control erosion of the shore along or near Lake Erie, including, without limitation, revetments, seawalls, bulkheads, certain breakwaters, and similar structures." R.C. 1506.01(1).

shoreline recession distance at the transect located on the Hawkinses' property of 26.5 feet over the next 30 years. Because this exceeded the 14-foot recession threshold, ODNR designated a Lake Erie CEA on the northern portion of the Hawkinses' property.

**3. Whether the ODNR's determination of Lake Erie CEAs complies with the statutory requirements.**

{¶19} The Hawkinses argue that ODNR's method of identifying Lake Erie CEAs, as applied to their property, fails to comply with the requirement under R.C. 1506.06(A) that ODNR "shall take into account areas where substantial filling, protective measures, or naturally stable land has significantly reduced recession." The Hawkinses assert ODNR "never made any attempts, scientific or otherwise, to take into account the effect the stone placed by [the Hawkinses] would have on erosion as mandated by R.C. 1506.06(A)." (Appellants' Brief at 35.) The Hawkinses further argue there was no evidence to establish there was no evidence to establish their property would have more than 14 feet of shoreline recession over the ensuing 30-year period.

{¶ 20} At the administrative hearing, Matricardi testified that ODNR's method for determining Lake Erie CEAs did not account for the effect of the Hawkinses' anchor stone and concrete blocks, which extended onto the adjacent property. Contrary to Matricardi's testimony, however, Oxner-Jones explained that ODNR's process accounted for the effect of protective measures such as those taken by

the Hawkinses through the selection of the point used to measure the recession distance:

Q: [I]n your interpretation of the rules, do those rules take into consideration that mandate that's in the statute?

A: I think we do.

Q: How do they do that?

A: They do that by how we pick the recession feature. That's the feature along the transect that we use to monitor bluff retreat. If the history of erosion at that property is such that we see that that property is stable, we will pick a recession feature that reflects that.

In the case of the Hawkins property, we chose the same recession feature for all three rounds of maps. It was always the crest of the bluff. So by choosing that same recession feature each time, that was taking into account the observed stability at that property.

Q: And indirectly, whatever measures that were taken by the property owners to achieve that particular measurement point, is that what you're saying?

A: Exactly. To the extent they put something in front of their property that increased its stability and that stability is reflected in the stability of the bluff crest and we picked that bluff crest, then



in the process of picking that bluff crest, our mapping is reflecting the effect of whatever measures they put in. (Aug. 12, 2019 Tr. at 208-09.)

This testimony, which the hearing officer found to be credible and relied on in his decision, establishes that ODNR's method was designed to comply with the statutory requirement of accounting for protective measures taken to reduce shoreline recession.

{¶21} The Hawkinses further argue that the common pleas court's decision *Turtle Bay Ltd. Partnership v. Ohio Dept. of Natural Resources*, Franklin C.P. No. ooCVFo6- 5493 (Apr. 11, 2001), establishes that a landowner is entitled to an individual exception from a Lake Erie CEA designation based on the effectiveness of erosion control measures. However, *Turtle Bay* involved a different factual scenario presenting the question of when ODNR is required to consider the effectiveness of erosion control measures. The *Turtle Bay* case arose from a challenge to a Lake Erie CEA identification made in 1996, which was based on ODNR's comparison of shoreline maps from 1973 to 1990 to determine annual and anticipated shoreline recession rates. A landowner appealed a Lake Erie CEA designation, arguing ODNR failed to comply with R.C. 1506.06 because it did not consider the effect of an erosion control structure erected in 1996. The common pleas court ultimately affirmed ODNR's designation of the property as being within a Lake Erie CEA because it concluded that R.C. 1506.06 required ODNR to consider "what historic effect structures built during the period studied have had in order to anticipate what future recession will occur."

Turtle Bay at 4. Because the structure in question had been built after the mapping used to determine recession rates, ODNR had no historic basis to consider the effect of the structure. The court concluded the structure constructed in 1996 would be considered in the next round of Lake Erie CEA determinations once ODNR had historical data reflecting its actual effect, at which point the designation could be removed if the structure was successful in reducing shoreline erosion. Thus, contrary to the Hawkinses' claim, the Turtle Bay decision did not hold that ODNR must grant individual exceptions to a Lake Erie CEA designation. Rather, the court concluded that under R.C. 1506.06, ODNR must consider the actual effect of erosion control measures based on historical data.

{¶22} The General Assembly has mandated that ODNR identify Lake Erie CEAs using "the best available scientific records, data, and analyses of shoreline recession." R.C. 1506.06(A). Oxner-Jones testified that the center-weighted moving average calculation set forth in Ohio Adm. Code 1506-6-12 was selected by a working group during the original process of coastal erosion area mapping in the 1990s because it "was found to most closely predict recession characteristics that matches what we see on the Lake Erie shoreline." (Aug. 12, 2019 Tr. at 207-08.) The Hawkinses have not presented any evidence to establish that the center-weighted moving average used by ODNR is not the "best available" scientific method to analyze shoreline recession. Rather, the Hawkinses argue they are entitled to an individual exception from ODNR's method of calculating Lake Erie CEAs due to the purported effectiveness of their

erosion control measures. The Hawkinses object to ODNR's use of the center-weighted averaging method, which has the effect of considering erosion occurring on neighboring properties when determining anticipated shoreline recession on the Hawkinses' property. However, R.C. 1506.06 does not require ODNR to measure shoreline recession based on individual property boundaries nor does it prohibit the use of averaging across property boundaries in determining anticipated shoreline recession. Instead, R.C. 1506.06 requires ODNR to "take into account areas where substantial filling, protective measures, or naturally stable land has significantly reduced recession." Oxner-Jones's testimony establishes that ODNR satisfied this statutory mandate through the selection of the recession feature used to measure shoreline recession. Nothing in R.C. 1506.06 requires ODNR to grant individual exceptions to properties that are found to be within Lake Erie CEAs. Accordingly, we reject the Hawkinses' argument that ODNR failed to comply with R.C. 1506.06 and overrule their second and third assignments of error.

**C. Whether the Lake Erie CEA designation infringed the Hawkinses' constitutional rights**

{¶23} In their fourth assignment of error, the Hawkinses assert that ODNR's refusal to grant an exception from the Lake Erie CEA designation violated their constitutional rights. As explained above, we conclude that R.C. 1506.06 does not provide for an individual exception for a property that is determined to be within a Lake Erie CEA. The

Hawkinses argue that the lack of an individual exception violates their constitutional rights.

{¶ 24} The Supreme Court of Ohio has held that a regularly enacted statute " 'is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality.'" *Roosevelt Properties Co. v. Kinney*, 12 Ohio St.3d 7, 13 (1984), quoting *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 147 (1955). See *State v. Grevious*, \_ Ohio St.3d \_, 2022-Ohio-4361, ,¶ 9 ("As always, we begin our review of a statute with the presumption that it is constitutional."). This presumption "applies equally to administrative regulations." *Kinney* at 13. See *Burneson v. Ohio State Racing Comm.*, 10th Dist. No. 03AP-925, 2004-Ohio-3313, ¶ 36 (citing *Kinney* and stating that courts accord legislatively authorized regulations a strong presumption of constitutionality). Before a statute may be declared unconstitutional, it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible. *Buckeye Inst. v. Kilgore*, 10th Dist. No. 21AP-193, 2021-Ohio-4196, ¶ 18.

{¶ 25} "Ohio has always considered the right of property to be a fundamental right." *Norwood v. Horney*, no Ohio St.3d 353, 2006-Ohio-3799, ¶ 38. Article I, Section 1 of the Ohio Constitution declares that all people have certain inalienable rights, including "acquiring, possessing, and protecting property." Article I, Section 19 further declares that

"[p]rivate property shall ever be held inviolate, but subservient to the public welfare." "There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces." Norwood at, pg. 38.

{¶26} The Hawkinses do not claim that the Lake Erie CEA designation constitutes a taking of their property; accordingly, we do not address that question here. Rather, citing *State ex rel. Merrill v. Ohio Dept. of Natural Resources*, 130 Ohio St.3d 30, 2011-Ohio-4612, the Hawkinses argue they have a right to recover land lost to erosion and, by extension, a right to an exception from inclusion within a Lake Erie CEA. At issue in *Merrill* was the determination of "the proper boundary between property abutting Lake Erie owned by private individuals and the territory of Lake Erie held in trust by the state for all Ohioans." *Merrill* at , ¶ 1. As to that issue, the court concluded "the territory of Lake Erie, held in trust by the state of Ohio for the people of the state, extends to the natural shoreline, which is the line at which the water usually stands when free from disturbing causes." *Id.* at, ¶ 63.

{¶ 27} Although the *Merrill* decision generally recognized that property rights are fundamental and strongly protected by the Ohio Constitution, the Hawkinses fail to establish how those general principles entitle them to an exception from a Lake

Erie CEA designation. In an aside, the Merrill decision noted that the parties to the case agreed that artificial fill could not extend a littoral owner's property except where a littoral owner reclaimed land stripped away due to sudden changes caused by avulsion. *Id.* at, pg 58. That was not part of the holding of the case and the court expressly stated that it "need not further comment on or clarify the effect of [accretion or erosion] on the property line." *Id.* Moreover, even if Merrill could be construed to recognize a constitutional right to reclaim land lost due to erosion or to protect property from erosion, the Hawkinses fail to establish why that would necessarily entitle them to an exception from inclusion within a Lake Erie CEA. Because the Hawkinses fail to demonstrate that the statute and regulations are clearly incompatible with their constitutional property rights, we reject the Hawkinses' constitutional argument and overrule their fourth assignment of error.

**D. Whether the common pleas court applied appropriate deference in its review**

{¶28} Finally, we turn to the Hawkinses' first assignment of error, in which they argue the common pleas court gave excessive deference to the director's order. The Hawkinses claim the common pleas court erred by concluding it was unable to make factual findings or determine the credibility of witnesses. They further argue the common pleas court erred by stating that courts typically defer to an

administrative agency's interpretation of its own rules.

{¶ 29} With respect to its standard of review for factual issues, the common pleas court correctly stated that its role was not to make factual findings or determine the credibility of witnesses. See *Physician's Ambulance Serv., Inc. v. Ohio Dept. of Medicaid*, 10th Dist. No. 20AP-32, 2020-Ohio-6842, pg. 45 ("In an R.C. 119.12 appeal, the court of common pleas must give due deference to the administrative resolution of evidentiary conflicts, and where the agency's decision is supported by sufficient evidence and the law, the common pleas court lacks authority to reverse the agency's exercise of discretion even if its decision is admittedly harsh."); *Gardenhire v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 19AP-54, 2019-Ohio-4331, pg. 9 ("Review by the common pleas court is neither a trial de novo nor an appeal on questions of law only, but a hybrid review in which the court must assess the evidence regarding the credibility of witnesses and the probative value of the evidence. While the common pleas court will give due deference to the administrative agency's resolution of evidentiary conflicts, the factual findings of the agency are not conclusive before the common pleas court." (Citations omitted.)); *Westlake v. Ohio Dept. of Agriculture*, 10th Dist. No. oSAP-71, 2008-Ohio-4422, ¶ 13 ("Although the trial court must necessarily weigh the evidence presented to the administrative agency and, to a limited extent, may re-evaluate the credibility of the evidence, it must give due deference

to the administrative determination of conflicting testimony, including the resolution of credibility conflicts.").

{¶ 30} With respect to deference to ODNR's interpretation of its own regulations, the common pleas court stated that courts typically defer to an agency's interpretation of its own rules and regulations when that interpretation is consistent with statutory law and the plain language of the rule. After the common pleas court issued its decision in this case, the Supreme Court clarified the scope of judicial deference to administrative agencies under Ohio law. *TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, \_\_ Ohio St.3d \_\_, 2022-Ohio-4677. In *TWISM*, the court rejected mandatory deference, holding "it is never mandatory for a court to defer to the judgment of an administrative agency." *Id.* At, ¶ 42. Instead, the court embraced permissive deference, holding that a court could consider an administrative interpretation when evaluating an ambiguous text and that the weight given to the administrative interpretation should depend on the persuasive power of that interpretation. *Id.*, at. pg. 44-45. In this case, the common pleas court considered the relevant statutory and regulatory provisions and concluded ODNR correctly and accurately followed those provisions and that there was reliable, probative, and substantial evidence to support ODNR's determination. Based on our review of the decision, we do not find the common pleas court gave mandatory deference to ODNR's interpretation of the statutes or regulations in making that determination. Thus, although the



common pleas court's decision cited pre-TWISM language, the court did not err in its application of the law.<sup>10</sup> Accordingly, we overrule the Hawkinses' first assignment of error.

#### IV. Conclusion

{¶¶31} For the foregoing reasons, we overrule the Hawkinses' four assignments of error and affirm the

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<sup>10</sup> The Hawkinses also argue ODNR's decision was not in accordance with law because it incorrectly found they had not obtained permits to install the anchor stone and concrete blocks. The Hawkinses argue no permits were required for the placement of anchor stone or concrete blocks on their property. Although the Hawkinses argue this issue at length, we conclude it is not relevant. The hearing officer's report and recommendation, as adopted by the director of ODNR, concluded that the "erosion control measures implemented by the Hawkins on their property were not approved in accordance with former R.C. 1507.04, former R.C. 1521.22 and/or current R.C. 1506.40." (Report & Recommendation at 46.) Notwithstanding that conclusion, however, the report and recommendation further concluded that in applying the regulations, "ODNR nonetheless takes into account the effects of erosion control measures, even if not approved, on property along Lake Erie by basing its selection of the recession feature used to monitor bluff retreat on the erosion history of the property." (Report & Recommendation at 46-47.) Thus, denying the Hawkinses an exception from the Lake Erie CEA designation did not turn on whether the Hawkinses had obtained permits to install the anchor stone and concrete blocks. Rather, as explained in the report and recommendation, a portion of the Hawkinses' property was included within a Lake Erie CEA because, even accounting for the effect of the anchor stone and concrete blocks, their property was anticipated to exceed the shoreline recession threshold.

A26

judgment of the Franklin County Court of Common  
Pleas.

Judgment affirmed.

BEATY BLUNT, P.J., and JAMISON, J., concur.

**APPENDIX B**

IN THE COURT OF COMMON PLEAS, FRANKLIN  
COUNTY, OHIO CIVIL DIVISION

JUDSON J. HAWKINS, et al.,  
Appellants,

vs.

Case No. 20CVF-3321

OHIO DEPARTMENT OF NATURAL RESOURCES,  
Appellee.

JUDGE HOLBROOK

**DECISION AND FINAL JUDGMENT  
AFFIRMING THE MAY 14, 2020 ADJUDICATION  
ORDER OF THE DIRECTOR OF THE OHIO  
DEPARTMENT OF NATURAL RESOURCES**

This is an administrative appeal from a May 14, 2020 Adjudication Order of the Director of the Ohio Department of Natural Resources ("ODNR"), approving and confirming the November 27, 2019 Report and Recommendation of Hearing Officer Lawrence D. Pratt, Esq. and denying the objection of Appellants to the Report and Recommendation of the Hearing Officer. In that Adjudication Order, the Director of ODNR determined that ODNR properly included Appellants Judson and Mary Hawkins' real property within ODNR's designation of the Lake Erie "costa erosion areas."

## **I. FACTUAL AND PROCEDURAL HISTORY**

Pursuant to the Coastal Management Act, R.C. 1506, the Director of ODNR is required to identify Lake Erie Coastal Erosion Areas (CEAs) along Lake Erie. CEAs are areas of land anticipated to be lost due to Lake Erie-related erosion in a thirty (30) year period if no additional approved erosion control measures are completed within that time. R.C. 1506.06(A). At least once every ten years, the Director shall review and may revise that identification, taking into account any recent natural or artificially induced changes affecting anticipated recession. R.C. 1506.06(E).

In this case, Mr. Hawkins purchased the lake front property in question in October of 1990. R. 406, Tr. p. 16. On May 1, 1991, Mr. and Mrs. Hawkins were married. Id. In the following two years (1992 & 1993), Appellants tore down the original cottage and rebuilt their home, taking occupancy in March of 1993. Id. Reconstruction of the home included sub-surface drainage pipes laid in the Lake Erie yard intended to alleviate surface water pressure. R. 406-407, Tr. p. 16-17. Also in 1993, Appellants' property had what Appellant Mary Hawkins testified was "a rather abrupt bluff leading to about a 40 to 50 feet of beach." R. 407, Tr. p. 17; Appellants' Exh. 15 A-N.

In 1998, Appellants decided to slop the bluff of their property for better access to and enjoyment of their beach and the safety of their children. Appellants hired Polovic Construction to slope the bluff to make it walkable, and placed anchor stone at the toe for the purpose of securing the bluff to maintain a

recommended 1-8 ratio. R. 407-413, Tr. p. 17-23. In 1998, Appellant's property was not included within a coastal erosion area. At the hearing, Appellants asserted that their property was not included with the 2000 CEA and/or they never received notice that their property was included within the 2000 Lake Erie CEA.

Also beginning in 1998, Appellants undertook erosion control efforts as the level of the Lake Erie rose. This included installing anchor stone at the base of the bluff in 1998, additional anchor stone between 2010 and 2012, and 18 to 20-ton concrete foundation blocks in 2014. R. 407-414, Tr. p. 17-24. ODNR asserted that the erosion control structures built by Appellants were done without obtaining a shore structure construction permit as required by former R.C. 1507.04 (effective 1994-2000), former R.C. 1521.22 (effective 2000-2007), and current R.C. 1506.40 (effective 2007-present).

On January 12, 2018, Appellants were served via certified mail with a 2018 preliminary identified CEA, indicating that ODNR recently completed a review of CEA designations, is releasing preliminary revised CEA maps, and "[t]his letter serves to inform you that based upon ODNR's latest review, all or a portion of your property lies within a 2018 preliminary identified coastal erosion area." R. 5. The letter indicated that CEAs were "first finalized in 1992 and last updated in 2010." Id. The letter also indicated that Appellants' property remains within the CEA designations that were completed in 2010. Id. Appellants were notified of their right to file an

objection beginning January 19, 2018 and ending on May 19, 2018, pursuant to R.C. 1506.06(A). Id.

On May 7, 2019, Appellants filed an objection to the preliminary designation with ODNR's Division of Geological Survey, as directed in the packet of material explaining the 2018 CEA update. R. 15-18. On May 11, 2019, ODNR informed Appellants that their objection was received, and ODNR may request permission for a site visit. R. 20. On June 7, 2018, D. Mark Jones, Geology Program Supervisor of ODNR visited Appellants' property. R. 22.

On August 8, 2019, D. Mark Jones, Geology Program Supervisor of ODNR, sent Appellants a letter that stated after review of their objections and all available information, "we were unable to find evidence that the maps are incorrect." R. 22-23. Appellants were informed that the maps remained unchanged, a CEA designation would remain in effect for a portion of their property, and the 2018 preliminary maps would be finalized on or about December 21, 2018. Id. Appellants were also informed of their right to appeal the final erosion designation under R.C. 1506.06(D) pursuant to R.C. 119. Id. However, there is no mention in the letter how specifically a property owner would perfect such an appeal, either within the Department or pursuant to R.C. 119. Id.

On January 10, 2019, the Director of ODNR made a final identification of the Lake Erie CEAs. On January 16, 2019, Appellant filed an appeal of the final determination to this Court in Case No. 19cv455. R. 27. On February 27, 2019, ODNR moved to dismiss

the appeal as premature because an administrative hearing was scheduled for July 1, 2019. R. 53-62. The Department conceded that there has been only one appeal related to the Lake Erie CEA's since 1996, but argued that, pursuant to R.C. 119, an evidentiary adjudication must take place before an appeal to this Court. This Court agreed and dismissed the appeal as premature by Decision and Entry filed on May 6, 2019. R. 127-137.

On February 8, 2019, Appellants requested a R.C. 119 administrative hearing to review the Director's determination pursuant to R.C. 1506.08, 1506.06, and R.C. 119. That same day, the Director of ODNR wrote to Appellant Judson Hawkins confirming receipt of his request for a R.C. 119 hearing, advising him that the hearing date was set for February 25, 2019, and that the Director was continuing the hearing date by her own motion to a mutually agreed upon date. R. 44. The Director of ODNR also advise Appellant of the appointment of Larry Pratt, Esq. as hearing officer for the matter. Id.

A hearing was held on August 12, 2019. Appellants called Appellant Mary Hawkins as a lay witness and John Matricardi, P.E., a civil engineer, as an expert witness. Appellants offered testimony at the hearing that their maintenance measurers were to prevent the lake from "stealing" the existing stones and to prevent loss to the west of their property. Appellants asserted that because of their maintenance efforts they experienced little to no erosion, what would amount to three feet in thirty years. Appellants also offered expert testimony at the hearing that the maintenance measures undertaken by Appellants

was sufficient to prevent the erosion of fourteen feet in thirty years and that the blocks and stone place to the west of the Hawkins property would prevent western "flanking" and prevent erosion to the Hawkins property of more than 14 feet in thirty years. Appellants admitted twenty-eight exhibits into the hearing record.

Additionally, at the hearing Appellants argued that the "ODNR has sought to include Appellants' property within the CEA in the only way it can, i.e. by averaging Appellants' property, which has not suffered erosion, with properties that have." R. 182. Appellants asserted that under the Ohio Constitution and Ohio law their "individual [property] rights are paramount to the ODNR's convenience of lumping homeowners into groups" and that they "have an individual right to protect their property both from erosion and the unreasonable instruction by the ODNR." R. 185.

The State called Dalton Mark Oxner-Jones, CPG, geologist and ODNR Geology Program Supervisor, as an expert witness as well as a fact witness responsible for overseeing the creation, release, and revisions to the preliminary and final 2018 CEA identifications. The State admitted eight exhibits into the hearing record.

Following the hearing, the Hearing Officer issued a forty-eight (48) page Report and Recommendation on November 27, 2019. R. 691-738. The Hearing Officer made findings of fact, including the following:



1. Mr. Matricardi conceded that he was not challenging the accuracy of ODNR's application of its regulations in including the Hawkins property in a CEA, he just believed it just didn't give proper consideration to the Hawkins' erosion control efforts and, using what he characterized as "the straight line method," advocated that the Hawkins property should be excepted from the methodology set forth in the regulations. R. 732, Findings of Fact 43-44.

2. Based on his observations of, "the size of the stone and the fact that it extends almost 29 feet past its property line," and consideration of the property "in the previous ten years ... had basically the same coastal erosion protection system and it stayed exactly the same," Mr. Matricardi opined that the erosion control structure in place would protect the Hawkins' western property line from eroding more than 14 feet in the next 30 years," and therefore ODNR's regulations should not apply to it. R. 733, Finding of Fact 45.

3. Mr. Matricardi's opinion is based on his review of aerial photography provided by ODNR showing the condition of the property over time, ODNR's recession measurements, a site visit to the Hawkins' property, and photos taken by Mr. Matricardi during his site visit. He did not have the benefit of any engineering plans or specifications for the erosion control structures on the Hawkins' property and he did not perform any physical examination of the structural stability of the structures. Id., Findings of Fact 45-46.

4. Mr. Oxner-Jones agreed with Mr. Matricardi that the straightline methodology Mr. Matricardi relied is not recognized in the Ohio Administrative Code. He also opined that the regulatory scheme for identifying CEAs is mandatory and makes no exceptions for other methodologies or for exceptions from a properly identified CEA. R. 734, Findings of Fact 49-50.

5. Mr. Oxner-Jones opined that the regulatory scheme in Ohio Adm. Code 1501-6-10 through 1501-6-13 uses the best scientific records, data, and analysis, as required by R.C. 1506.06(A). Id., Finding of Fact 51.

6. Mr. Oxner-Jones opined that the regulatory scheme in Ohio Adm. Code 1501-6-10 through 1501-6-13 as required by R.C. 1506.06(A) and (E), does account for efforts made in erosion control through the process used in selecting the recession feature along the transect that is used to monitor bluff retreat. If the history of erosion at the property is such that ODNR sees that the property is stable, it will pick a recession feature that reflects that observation. He pointed out that the fact that ODNR chose the same recession feature at the Hawkins transect for all three rounds of maps was indicative that ODNR was taking into account the observed stability at the property. Id., Finding of Fact 52.

7. Mr. Oxner-Jones opined that since the methodology set forth in Ohio Adm. Code 1501-6-10 through 1501-6-13 was applied correctly to the Hawkins property, the final identification of coast erosion areas made on the 2018 CEA correctly included the northern portion of the Hawkins property, and was consistent with his own visual inspection of the property where the

extensive ongoing erosion along the western boundary caused him real concerns about the prospects for continued integrity of the property over time. R. 734-735, Findings of Fact 53-54.

8. "The Hearing Officer finds the expert opinion of Mr. Oxner-Jones more compelling than that of Mr. Matricardi." R. 735, Finding of Fact 55.

The Hearing Officer concluded in significant part:

1. Ohio Adm. Code 1501-6-10 through 1501-6-13 does not provide for the use of an alternative methodology to determine whether property should be included within a CEA. Conclusion of Law #5, R. 736.

2. Neither R.C. 1506.06 nor Ohio Adm. Code 1501-6-10 through 1501-6-13 "provides for excepting out any property correctly and accurately included within a CEA pursuant to the methodology set forth in the rules." Conclusion of Law #6, R. 736.

3. Erosion control measures along Lake Eric must be approved pursuant to R.C. 1507.04 (effective 1994-2000), R.C. 1521.22 (effective 2000-2007), and/or current R.C. 1506.40 (effective 2007-present). Conclusion of Law #8, R. 736.

4. The preponderance of evidence in the record establishes that the erosion control measures implemented by the Hawkins on their property were not approved in accordance with former R.C. 1507.04, former R.C. 1521.22 and/or current R.C. 1506.40. Conclusion of Law #9, R. 736.

5. In applying the methodology set forth in Ohio Adm. Code 1501-6-10 through 1501-6-13, ODNR nonetheless takes into account the effects of erosion control measures, even if not approved, on property along Lake Erie by basing its selection of the recession feature used to monitor bluff retreat on the erosion history of the property. The same is true of the measurements taken at the transect crossing the Hawkins property. Conclusion of Law #10, R. 736-737.

6. Appellants have failed to establish by a preponderance of evidence in this proceeding that ODNR erred in its application of R.C. 1506.06 and Ohio Adm. Code 1501-6-10 through 1501-6-13 to the Hawkins property. Conclusion of Law #11, R. 737.

7. Appellants have failed to establish by a preponderance of evidence in this proceeding that ODNR erred in its inclusion of the northern 20-25% of the Hawkins property within a CEA on the January 10, 2019 Final Identification of the Lake Erie Coastal Erosion Area. Conclusion of Law #12, R. 737.

8. To the contrary, the preponderance of the evidence in this proceeding establishes that ODNR properly applied both R.C. 1506.06 and Ohio Adm. Code 1501-6-10 through 1501-6-13 and correctly and accurately included the northern 20-25% of the Hawkins property within a CEA on the January 10, 2019 Final Identification of the Lake Erie Coastal Erosion Area as more accurately depicted on the 2018 Final Coastal Erosion Area Map for Lake County, Frame 360. R. 736-737. As a result, the Hearing Officer recommended that the Director of ODNR affirm the

actions of ODNR to include the identified northern portion of the Hawkins property in the January 10, 2019 Final Identification of the Lake Erie Coastal Erosion Area. R. 737. Conclusion of Law #13, R. 737.

On December 9, 2019, Appellants filed an objection to the Report and Recommendation of the Hearing Officer. R. 743.

The Director of ODNR approved and confirmed the Report and Recommendation of the Hearing Officer on May 14, 2020, which was attached to the Director's Order. R. 748. On May 14, 2020, the Director of ODNR also issued an Adjudication Order that indicated with due consideration given to the record of proceedings, including, but not limited to, testimony, exhibits, oral argument at the August 12, 2019 hearing, pre-hearing and post-hearing briefs, Appellant's Objections filed on December 9, 2019, and the Report and Recommendation of the Hearing Officer, the Record and Recommendation "is hereby approved and adopted in its entirety with the following exceptions:". R. 745. Eight non-substantive exceptions were made to the Report and Recommendation in the Adjudication Order. R. 746. The Adjudication Order also included a response to Appellants' objection. R. 747.

Appellants timely filed this appeal on May 21, 2020. Upon Appellant's motion and pursuant to Loc. R. 21, the Court held oral arguments on the appeal on October 9, 2020.

## II . STANDARD OF REVIEW

A common pleas court may affirm a Commission's Order "if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law." R.C. 119.12(M). Evidence "is reliable if it can be depended on to state what is true, and it is probative if it has the tendency to establish the truth of relevant facts." *HealthSouth Corp. v. Testa*, 132 Ohio St.3d 55, 2012-Ohio-1871, 969 N.E.2d 232, ¶12. To be "substantial," evidence must have importance and value. *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571, 589 N.E.2d 1303 (1992). In determining whether evidence is reliable, probative, and substantial, a trial court must appraise the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof. *Evans v. Dir. Ohio Dept. of Job and Family Servs.*, 10th Dist. No. 14AP-743, 2015-Ohio-3842, ¶12.

The Court's scope of review in this appeal is limited, and the Court is not permitted to make factual findings or determine the credibility of witnesses, as factual questions remain solely within the Commission's province. *Williams v. Ohio Dept. of Job & Family Servs.*, 129 Ohio St.3d 332, 2011-Ohio-2897, pg. 20; *Tzangas, Plakas & Mannas v. Ohio Bur. Emp. Serv.*, 73 Ohio St.3d 694, 696, 1995- Ohio-206. A reviewing court will not substitute its judgment for an administrative agency's where there is some evidence supporting an administrative order. *Harris v. Lewis*, 69 Ohio St.2d 577, 579, 433 N.E.2d 223 (1982). "For

example, when the evidence before the court consists of conflicting testimony of approximately equal weight, the court should defer to the determination of the administrative body, which, as the fact-finder, had the opportunity to observe the demeanor of the witnesses and weigh their credibility." *University of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111, 407 N.E.2d 1265 (1980). The findings of the Commission are not conclusive, however. *Id.* On questions of law, the court's review is "plenary." *Chirila v. Ohio State Chiropractic Board*, 145 Ohio App.3d 589, 592, 763 N.E.2d 1192 (10thDist. 2001).

Courts typically defer to an administrative agency's interpretation of its own rules. *Rings v. Nichols*, 13 Ohio App.3d 257, 260, 468 N.E.2d 1123 (10thDist.1983), citing *Jones Metal Products Co. v. Walker*, 29 Ohio St.2d 173, 281 N.E.2d 1 (1972). "Equally important, 'such deference is afforded to an administrative agency's interpretation of its own rules and regulations if such an interpretation is consistent with statutory law and the plain language of the rule itself.'" *State ex rel. Saunders v. Indus. Comm'n.*, 101 Ohio St.3d 125, 2004-Ohio- 339, 802 N.E.2d 650 (2004), at141, quoting *OPUS III-VII Corp. v. Ohio State Bd. of Pharm.*, 109 Ohio App.3d 102, 113, 671 N.E.2d 1087 (10thDist. 1996). If some competent, credible evidence supports the Commission's decision, then the court must affirm the decision. *Moore v. Ohio Unemployment Comp. Rev. Comm'n.*, 10th Dist. No. nAP-756, 2012-Ohio-1424, ¶ 20.

### III. LAW AND ANALYSIS

#### A. Applicable Law & Issues on Appeal

Pursuant to R.C. Chapter 1506, ODNR is responsible for identifying and designating Lake Erie coastal erosion areas and administering a permit system for construction or redevelopment of permanent structures within those areas. R.C. 1506.06(A) identifies coastal erosion areas as, "the land areas anticipated to be lost by Lake Erie-related erosion within a thirty-year period if no additional approved erosion control measures are completed within that time." R.C. 1506.06(E) requires ODNR to review its designations at least once every ten years.

R.C. 1506.06(A) requires the director of ODNR to use the "best scientific records, data, and analyses of shoreline recession" to make the preliminary identification of Lake Erie coastal erosion areas. It also requires that the "preliminary identification shall state the bluff recession rates for the coastal erosion areas and shall take into account areas where substantial filing, protective measures, or naturally stable land has significantly reduced erosion." *Id.*

R.C. 1506.07(A), required the director of ODNR, no later than December 31, 1994, to adopt rules "governing the erection, construction, and redevelopment of permanent structures in Lake Erie coastal erosion areas identified under 1506.06 of the Revised Code and such other rules as are necessary to implement this section." The rules "shall include, without limitation, a requirement that any person who intends to erect, construct, or redevelop any



permanent structure in a Lake Erie coastal erosion area obtain a permit to do so from the director ...." R.C. 1506.07(A). See also R.C. 1506.02(A)(3) (Director of ODNR shall adopt rules under R.C. 119 for the implementation, administration, and enforcement of the coastal management program and other provisions of R.C. Chapter 1506.)

Pursuant to R.C. 1506.06 and Ohio Adm. Code 1501-6-10 through 1501-6-13, ODNR's Division of Geological Survey reviews and may revise, at the direction of the Director, the identification of Lake Erie costal erosion areas. The methodology for identify Lake Erie costal erosion areas pursuant to Ohio Adm. Code 1501-6-10 through 1501-6-13 is the erosion is measured along each of 14,175 lines or transects spaced 100 feet apart that run perpendicular to the shoreline. These lines are placed on two sets of high-resolution aerial photography taken at different times (2004 and 2015 for the 2018 CEA identification) superimposed over each other and the degree of erosion between the years represented by the photography is plotted along each line. From this figure the recession rate in feet per year is calculated and multiplied by 30 to arrive at a projected recession rate for that thirty-year time frame for each transect.

The data is then smoothed through a five-point center-weighted moving averaging function set forth in the rules to address irregularities in the coast and to account for projected amount of recession (anticipated recession distance). A threshold figure of projected erosion (14 feet in the 2018 identification) is used to determine whether the area is included in a

CEA. The coastal areas are then delineated on coastal erosion area maps.

Once preliminary identification of the Lake Erie CEA is made by ODNR local governments and private landowners are given notification pursuant to R.C. 1506.06(A). Written objection may be submitted and ODNR rules on such objections pursuant to R.C. 1506.06(A) and (B). ODNR has the discretion to modify the preliminary identification. R.C. 1506.06(B) and (C). After ruling on objections and making any modifications, if any, ODNR has the right to issue a final identification of the Lake Erie CEA. R.C. 1506.06(D). Persons adversely affected by the final identification may appeal pursuant to R.C. 119, R.C. 1506.06(D) and R.C. 1506.08.

At the August 12, 2019 administrative hearing, the parties did not dispute that ODNR correctly and accurately followed the methodology and rules outlined in R.C. 1506.06 and Ohio Adm. Code 1501-6-10 through 1501-6-13 in preparing and adopting the January 10, 2019 Final Identification of the Lake Erie CEA. R. 715. The issue in dispute, as well as in this appeal, was whether the methodology of the administrative rules and R.C. 1506.06(A) excludes consideration of individual property rights of shoreline property owners. Specifically, does Ohio Adm. Code 1501-6-10 through 1501-6-13 violate Appellant's constitutionally protected property rights. Appellants asserted ODNR has the discretion to deviate from its methodology and it should create individual exemptions, including an exception from identification of a CEA for the approximately 20-25% northern portion of the Hawkins property included

within a CEA on the January 10, 2019 Final Identification of the Lake Erie CEA. Id.

In this appeal, Appellants assert that the Hearing Officer erred his sixth, seventh, eighth, and ninth conclusions of law and that Ohio Adm. Code 1501-6-10 through 1501-6-13 improperly exclude the consideration of individual shoreline property owners' rights. Appellants also assert that the rules contained within Ohio Adm. Code 1501-6-10 through 1501-6-13 impose obligations on shoreline property owners not included in R.C. 1506.06(A), that they impermissibly mandate permits not required by statute, and that they impose definitions not included within R.C. 1506.40.

### **B. Arguments On Appeal**

Even though Appellants disagree with the conclusions of the 2018 Lake Erie CEA identification, both Appellants' and Appellee's experts who testified at the administrative hearing agreed that the review was done properly and in accordance with in R.C. 1506.06(A) and Ohio Adm. Code 1501-6-10 through 1501-6-13. The undisputed evidence at the hearing established that R.C. 1506.06 and Ohio Adm. Code 1501-6-10 through 1501-6-13 were followed in their entirety as to the final identification of the CEA with regard to Appellants' property. The review done by ODNR confirmed that a small northern portion of Appellants' property continued to be included within the CEA due to the calculations performed in accordance with the Ohio Administrative Code and supported by the erosion document on the ground to the immediate west of Appellants' property. Both confirmed that the northern portion of Appellants'

property is anticipated to be lost to flanking erosion in 30 years if no additional erosion control measures are completed within that time, which was supported by the expert testimony of D. Mark Oxner-Jones, CPG, a geologist and expert witness in the field of CEA identification along the Lake Erie shore.

Indeed, Appellants' expert, John Matricardi, did not dispute the accuracy of the methodology used by ODNR to generate the preliminary and final CEA identifications as dictated by the applicable Ohio Revised Code and Ohio Administrative Codes. R. 486, 497, 498, 506-507 & 507 (Transcript, p. 96, lines 6-17; p. 107, lines 17-21; p. 108, lines 19-22; p. 116, line 13 top. 117, line 3; p. 117, lines 11-14). He admitted that ODNR calculated the erosion zone according to the applicable rules but asserted there are "certain circumstances where the rules may not apply totally" and the Hawkins' property was one of them because of the erosion system of Appellants. R. 487. He also admitted that the "straight line method" that he proposed for measuring recession distances conflicts with the methods prescribed by the Ohio Administrative Code and that the spacing must be uniform based on the Code. R. 498, 512, 519 (Tr. p. 108, line 9-11; p. 122, lines 10-13; p. 129, lines 1-15).

Consequently, the Court finds there is reliable, probative, and substantial evidence that supports ODNR's identification of the Lake Erie CEAs and that ODNR correctly and accurately followed the procedure outlined in R.C. 1506.06(A) and Ohio Adm. Code 1501-6-10 through 1501-6-13 when it made a final identification of the Lake Erie CEAs on January

10, 2019 and included approximately 20-25% of the northern portion of the Hawkins property within a CEA. The only issue is whether Ohio Adm. Code 1501-6-10 through 1501-6-13 are not in accordance with and violate Appellants' common law property rights.

In this appeal, Appellants note that R.C. 1501.31, re-adopted as R.C. 1521.21(B), states that the chief of the division of water shall adopt rules for the implementation, administration, and enforcement of sections 1521.21 to 1521.36 of the Revised Code, but these sections "do not affect common law riparian rights." App. Br. p. 8. While this is a correct recitation of R.C. 1521.21(B), Chapter 1521 deals with the conservation of water, determination of reasonableness of use of water, regulation of dams, levees and reservoirs, and floodplain management. The Court finds that the provisions of R.C. 1521.21(B) are not applicable to Chapter R.C. 1506 and ODNR's coastal management of Lake Erie. The Court also finds that there is no language regarding common law riparian rights and/or common law property rights in Chapter 1506.

Next, Appellants rely on State ex rel. Merrill v. Ohio Department of Natural Resources, 130 Ohio St.3d 30, 2011-Ohio-4612, and argue "that decision recognized the same individual rights extended to the Appellants herein" and mandates a finding in favor of the Appellants. App. Br. p. 8. In Merrill, the Ohio Supreme Court, in determining the territory of the public trust and boundary of Lake Erie pursuant to R.C. 1506.10, found that the "territory of Lake Erie held in trust by the state of Ohio for the people of the state extends to the natural shoreline, which is the

line at which the water usually stands when free from disturbing causes." Id. at syllabus, ¶3. Appellants correctly note that in paragraph 60 of the Merrill decision, the Ohio Supreme Court stated:

This court has a history of protecting property rights, and our decision today continues that long-standing precedent. In *Cleveland & Pittsburgh RR. Co.*, 94 Ohio St. 61,113 N.E. 677, syllabus, this court acknowledged that a littoral owner has right of access and wharf out to navigable waters, and in *Squire*, we held that if the state or a municipality improperly destroys or impairs that property right, a littoral owner is entitled to compensation. 150 Ohio St. 303, 38 O.O. 161, 82 N.E.2d 709, paragraph six of the syllabus. We recently reiterated our adherence to the principles that protected property rights in *Norwood v. Horney*, 110 Ohio St.3d 353, 2006 Ohio 799, 853 N.E.2d 1115, at 37, where we explained that "the founders of our state expressly incorporated individual property rights into the Ohio Constitution in terms that reinforced the sacrosanct nature of the individual's 'inalienable' property rights. Section 1, Article 1 (Ohio Constitution), which are to be held forever 'inviolable.' Section 10, Article I. (footnote deleted.) Id. We further observed that Ohio has always considered property rights to be fundamental and concluded that "the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon

lightly, no matter how great the weight of other forces." *Id.* at 1138.

While dicta and not determinative of the Supreme Court's decision, there is no dispute that Appellants' have a protected property interest in their home and property. At issue, is whether ODNR's action of including a portion of their property in the CEA, without finding that it had the discretion to grant Appellants an exemption, deprived them of that interest and whether it did so without adequate procedural rights.

As to constitutionally protected freedoms, the Ohio Constitution characterizes private property rights as "inviolable," but only insofar as they are "subservient to the public welfare." Ohio Const. art. 1, § 19. The Ohio Supreme Court has repeatedly held that land regulation ordinances and laws have a presumption of constitutionality. To overcome the constitutionality of R.C. 1506.06(A) and Ohio Adm. Code 1501-6-10 through 1501-6-13, the Appellants were required to prove "unconstitutionality beyond fair debate" and that a law restricting the use of their private property is "clearly, arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Goldberg Cos., Inc. v. Richmond Heights City Council*, 81 Ohio St.3d 207, 1998-Ohio-456, 690 N.E.2d 510, 512 (Ohio 1998). Furthermore, Ohio law requires the Court to scrutinize the constitutionality of the "legislative action" rather than consider "the property owner's proposed use." *Jaylin Invs., Inc. v. Moreland Hills*, 107 Ohio St.3d 339, 2006-Ohio-4, 839 N.E.2d 903, 908 (Ohio 2006). Zoning ordinances, landscaping

restrictions, preservation limitations and regulations, and land use limitations have all be upheld as valid exercises of police power. See, e.g., *Shemo v. Mayfield Heights*, 88 Ohio St.3d 7, 2000-Ohio-258, 722 N.E.2d 1018, 1022 (Ohio 2000).

Here, Appellants did not assert/argue, and there was no evidence at the hearing that supports a finding, that R.C. 1506.06(A) and Ohio Adm. Code 1501-6-10 through 1501-6-13 unconstitutionally burdened Appellants' property rights or that these laws did not substantially preserve and promote the public health, safety, and welfare through the conservation of the Lake Erie shore line. Appellants did not assert/argue, and there was no evidence at the hearing that supports a finding, that R.C. 1506.06(A) and Ohio Adm. Code 1501-6-10 through 1501-6-13 were clearly arbitrary and unreasonable. Nor did Appellants argue/assert, and there was there any evidence offered at the hearing that would support a finding, that R.C. 1506.06(A) and Ohio Adm. Code 1501-6-10 through 1501-6-13 constituted a taking of Appellants' property. The only evidence was that Appellants believe that they should receive an individual exemption to the rules, not that the rules and ODNR's methodology for determining the Lake Erie CEA should be invalidated in their entirety as unconstitutional.

Nor does this Court's decision in *Turtle Bay Limited Partnership v. Ohio Department of Natural Resources*, Franklin C.P. 00CVF06-5493 (April 10, 2001), support Appellants' arguments. In *Turtle Bay*, this Court affirmed the Order of the Ohio Department of Natural Resources including Appellant Turtle Bay



Limited Partnership's property in the Lake Erie CEA. It did so despite Turtle Bay's objection that it would be required to obtain a permit, pursuant to R.C. 1506.07, from ODNR before it could build any structure and would be required to disclose to any prospective buyer, pursuant to R.C. 1506.06, that the land was within the coastal erosion area. It also affirmed the Order even though Turtle Bay argued that it had made improvements for erosion control that were not properly considered by ODNR. The Court found that Turtle Bay could be removed from the CEA in the future once an additional base map became historical imagery, but only "if [Turtle Bay] is successful in showing the amount of recession will be less than nine feet." Decision, p. 5.

Additionally, in affirming the Order of ODNR under R.C. 1506.06(A) as well as methodology used by ODNR under Ohio Adm. Code 1501-6-11 to designate Turtle Bay's property within the CEA, this Court recognized that it "must give due deference to statutory interpretations by an agency that has accumulated substantial expertise and to which the Ohio General Assembly has delegated enforcement responsibility." Decision p. 5, citing *Weiss v. PUC* (2000), 90 OhioSt.3d 15. The Court found that ODNR's interpretation of R.C. 1506.06 and Ohio Adm. Code 1501-6-11 and 13 was reasonable, and that R.C. 1506.06(E) was the protection afforded the landowner because it required a re-mapping of the area be made at least every ten years.

The Court agrees with its prior findings in Turtle Bay regarding the reasonableness of ODNR's interpretation of its CEA identification methodology

and rules, the protection afforded to landowners under R.C. Chapter 1506, and the deference that must be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the Ohio General Assembly has delegated enforcement responsibility. Consequently, this Court finds that the decision of *Turtle Bay Limited Partnership v. Ohio Department of Natural Resources*, Franklin C.P. 00CVF06-5493 (April 10, 2001) supports affirmance of the May 14, 2020 Adjudication Order and a finding that ODNR's final identification of the CEA, which was done in compliance with R.C. 1506.06 and Ohio Adm. Code 1501-6-01 and 13, was in accordance with law.

Finally, the fact that Appellants disagree with the Hearing Officer's findings of facts and conclusions of law does not mean that Appellants were denied due process. App. Br. p. 11. Pursuant to R.C. 119 and 1506.06, Appellants were given notice of the preliminary CEA identification and the opportunity to file a formal objection, which they did. Following the finalization of the CEA, Appellants received a full administrative hearing pursuant to R.C. 119, where they offered expert testimony, lay testimony, 28 exhibits, and several briefs. The Hearing Officer issued a forty-eight page decision that addressed every argument made by the parties, was detailed, was supported by the evidence, and was well-reasoned. Appellants were then given the opportunity to file objections to the Report and Recommendation, which they did.

Nor is there anything in the record that indicates that the ODNR Director failed to consider the transcript,

exhibits, pictures, objections, briefs, and Appellants' objections to the Hearing Examiner's Report and Recommendations before issuing the Adjudication Order. In fact, the record indicates just the opposite - that the Director of ODNR gave due consideration to the record of proceedings, including, but not limited to, testimony, exhibits, oral argument at the August 12, 2019 hearing, pre-hearing and post-hearing briefs, Appellant's Objections filed on December 9, 2019, and the Report and Recommendation of the Hearing Officer. R. 745. The Court is required to presume the regularity and validity of the proceedings absent a record that demonstrates otherwise. *Perry v. Joseph*, 10th Dist. No. 07AP-359, 2008-Ohio-1107, ¶20; *Cowans v. Ohio State Racing Comm'n*, 10th Dist. 13AP-828, 2014-Ohio-1811, ¶39.

Accordingly, upon full review of the record and evidence offered, the Court finds that there is reliable, probative, and substantial evidence that supports the May 14, 2020 Adjudication Order of the Director of the Ohio Department of Natural Resources and that it is in accordance with law.

## DECISION

Based on the foregoing, and upon a review of the entire record, the Court concludes that the May 14, 2020 Adjudication Order of the Director of the Ohio Department of Natural Resources is supported by reliable, probative, and substantial evidence. Moreover, the Court concludes that the May 14, 2020 Adjudication Order of the Director of the Ohio Department of Natural Resources is in accordance

with law. The May 14, 2020 Adjudication Order of the Director of the Ohio Department of Natural Resources is AFFIRMED.

Rule 58(B) of the Ohio Rules of Civil Procedure provides the following:

**(B) Notice of filing.** When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment on the journal, the clerk shall serve the parties in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App. R. 4(A).

**THE COURT FINDS THAT THERE IS NO JUST REASON FOR DELAY.**

**THIS IS A FINAL APPEALABLE ORDER.** Pursuant to Civil Rule 58, the Clerk of Court shall serve upon all parties notice of this judgment and its date of entry.

**IT IS SO ORDERED**

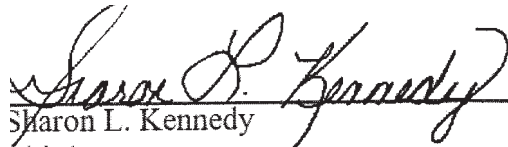
**APPENDIX C**

**The Supreme Court of Ohio**

Judson J. Hawkins et al.	Case No. 2023-1422
v.	ENTRY
Ohio Department of Natural Resources	20CV003321

Upon consideration of the jurisdiction memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Franklin County Court of Appeals; No. 22AP-689)

  
Sharon L. Kennedy  
Chief Justice

The Official Case Announcement can be found at  
<http://www.supremecourt.ohio.gov/ROD/docs/>  
Supreme Court of Ohio Clerk of Comt - Filed January  
23, 2024 - Case No. 2023-1422

**Franklin County Ohio Clerk of Courts of the Common  
Pleas- 2024 Feb 08 8:27 AM-20CV00**

**APPENDIX D**

BEFORE THE OHIO DEPARTMENT OF NATURAL  
RESOURCES  
DIVISION OF GEOLOGICAL SURVEY

In the Matter of:

RECEIVED  
NOV 27 2019

Judson and Mary Hawkins

Final Identification of Lake Erie Coastal Erosion Area

Judson and Mary Hawkins, Appellants.

Lawrence D. Pratt Hearing Officer  
November 27, 2019

ODNRLEGALSERVICES

Report and Recommendation

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## **I. Nature of the Proceedings**

This is an administrative proceeding under R.C. Chapter 119 (the Administrative Procedure Act), R.C. 1506.06 and R.C. 1506.08. It arises from a notice of appeal and request for an administrative hearing filed with the Ohio Department of Natural Resources ("ODNR") on February 8, 2019 by Appellants Judson and Mary Hawkins. The Hawkins appeal from the January 10, 2019 Final Identification of the Lake Erie Coastal Erosion Area ("CEA") issued by ODNR that included a portion of the Hawkins property within the CEA.

## **II. Procedural Background**

Pursuant to the Ohio Coastal Management Act of 1988, R.C. Chapter 1506, the Ohio Department of Natural Resources ("ODNR") is responsible for identifying and designating Lake Erie coastal erosion areas and administering a permit system for construction or redevelopment of permanent structures within the areas. R.C. 1506.06(A) identifies coastal erosion areas as, "the land areas anticipated to be lost by Lake Erie-related erosion within a thirty-year period if no additional approved erosion control measures are completed within that time." R.C. 1506.06(E) requires ODNR to review its designations at least once every ten years and make any revisions of the identification of the CEAs, taking

into account any recent natural or artificially induced changes affecting anticipated recession. The review and any revisions are required to be done in the same manner as the original preliminary and final identification of the CEAs along Lake Erie. (Appellee Exh. 5 at 1.)

The designations are delineated on CEA maps created by the Division of Geological Survey, the Division within ODNR responsible for performing the technical aspects of the review and any revisions. The process includes a preliminary identification of the CEA and notification to affected local governments and private landowners, R. C. 1506.06(A); opportunity for written objections by affected local governments and private landowners, and a ruling on said objections by ODNR, R.C. 1506.06(A) and (B); the discretion for ODNR to modify the preliminary identification and for the affected entities to file written objections to the modifications, R.C. 1506.06 (B) and (C); and, after ruling on the objections, the issuance by ODNR of a final identification, R.C. 1506.06(D). Any person adversely affected by the final identification may appeal it within thirty days in accordance with R.C. Chapter 119. R. C. 1506.06 (D) and R. C. 1506.08. (Appellee Exh. 5 at 1; Oxner-Jones Tr. at 160.)

Creation of the latest CEA maps began with collection of synoptic aerial imagery and LiDAR data in April 2015. The imagery was orthorectified, interpreted, and then used to create preliminary CEA maps by geologists at ODNR's Division of Geological Survey, in accordance with Ohio Adm. Code 1501-6-10 through 1501-6-13. The CEA maps delineating the



preliminary identification of the CEAs were then released in January 2018. As required by R.C. 1506.06, property owners whose property was included in a preliminary identification of a CEA were notified by certified mail. (Appellee Exh. 5 at 1.

On January 12, 2018, Judson J. and Mary M. Hawkins ("the Appellants") were advised in writing by ODNR that "all or a portion of your property lies within a 2018 preliminarily identified coastal erosion area" and advised of the location where the maps could be viewed, of various steps that they could take to further apprise themselves of the nature of the preliminary identification, and of the ability for them to file objections. The letter advised the Appellants that, "[t]he final designation will be appealable in accordance with O.R.C. Section 1506.08." (Oxner-Jones Tr. at 161-162; Joint Exh. I.)

On May 7, 2018, ODNR received a written objection by the Appellants to the preliminary identification, postmarked May 2, 2018. (Oxner-Jones Tr. at 162; Joint Exh. 2.) On May 11, 2018, Geology Program Supervisor Dalton Mark Oxner-Jones responded and acknowledged receipt of the objection. (Oxner-Jones Tr. at 163; Appellee Exh. 3.) On August 8, 2018, after consideration of the objection, including a site visit and review of the measurements and calculations underlying the inclusion of the property in a CEA, ODNR sent a letter to the Appellants containing its ruling denying the objection. The letter further informed the Appellants that, "[t]he 2018 preliminary maps will be finalized on about December 21, 2018. Ohio Revised Code 1506.06(0) guarantees you the

right to appeal the final erosion designation under Chapter 119 of the Revised Code." (Appellee Ex.h. 4.)

The Final Identification of the Lake Erie Coastal Erosion Area was made on or about January 10, 2019. (Appellee Exh. 7, Attachment 5.) The Appellants filed two appeals from the agency action.

On January 16, 2019, the Appellants filed a Notice of Appeal in the Franklin County Court of Common Pleas, Case No. 19CV-01-455, in which they gave notice that, "pursuant to Sections 1506.06(D) and I 19.12(B) of the Ohio Revised Code," the Appellants were appealing the "decision [that] was delivered to Appellants [by ODNR] on August 18, 2018 and finalized on December 21, 2018 with ODNR's finalized adoption of the 2018 preliminary maps." On May 6, 2019, the Court, having found that the proper remedy for the Hawkins was to appeal to ODNR for an administrative hearing pursuant to R.C. 1506.08, R.C. 119.06 and R.C. 119.07, dismissed the common pleas action. *Hawkins v. ODNR*, Franklin Co. C.P. Case No. 19CVF01-455 (May 6, 2019).

On February 8, 2019, the Appellants filed a Notice of Appeal to ODNR in which they stated in pertinent part:

Notice is hereby given that Judson and Mary Hawkins pursuant to Sections 1506.06(D) and 119.12(B) of the Ohio Revised Code hereby appeals an administrative decision by the Ohio Department of Natural Resources (hereinafter referred to as ODNR) to the Ohio Department of Natural Resources. The Plaintiffs/Appellees

do not at this time intend this notice of appeal to constitute a waiver or dismissal of their current appeal to the Franklin Court of Common Please (sic), a notice of which was previously provided to ODNR. ODNR's decision included Appellant's property within ODNR's designation of Appellant's property as within a Lake Erie "coastal erosion area" (a copy was previously provided to ODNR). That decision was delivered to Appellants on August 18, 2018 and finalized on December 21, 2018 with ODNR's finalized adoption of the 2018 preliminary maps.

The decision by ODNR including Appellants within the Lake Erie "coastal erosion areas" is not supported by reliable, probative, and substantial evidence and is not in accordance with the law.

In response to the appeal to ODNR, the Director of ODNR issued the Appellants a letter on the same day that states in pertinent part:

As of today, I am in receipt of your request, as counsel for yourself and Mary Hawkins, for a hearing under Sections 1506.06, 1506.08, and Chapter 119 of the Ohio Revised Code, on the Final Identification of the Lake Erie Coastal Erosion Area (CEA) made on January 10, 2019. I am writing to notify you of my intention to honor your request.

Pursuant to Ohio Revised Code Section 119.07 I am setting the hearing date for February 25, 2019, but pursuant to Ohio Revised Code Section 119.09, I am continuing the hearing date by my own motion. The new hearing date shall be mutually agreed upon by the parties in consultation with the hearing officer. (Appellee Exh. 7, Attachment 4.)

As a result of a February 25, 2019, pre-hearing conference, the hearing was set for July 1, 2019. See February 28, 2019, Pre-Hearing Entry. On June 13, 2019, the Hearing Officer granted the parties' joint request to continue the hearing until August 12, 2019. See June 13, 2019, Modified Pre-Hearing Entry. The matter came on for hearing on that date. The parties submitted their evidence and argument and later submitted post-hearing briefing after which the matter was submitted for consideration.

The witnesses called to testify at the hearing by the Appellants were:

1. Mary Hawkins, co-owner of the property in question (Hawkins Tr. at 1S-57); and
2. John Matricardi, P.E., a civil engineer called as an expert witness on behalf of the Appellants. (Matricardi Tr. at 57-144).

The Appellants presented twenty-eight exhibits. Most were admitted with several of the exhibits admitted either as a joint exhibit or in the format of the same document appearing in Appellee's exhibits, due to better legibility. (Jt. Exhs. 1 and 2, Appellants Exhibits 1-15n; Appellee's Exhs 1-7; Tr. at 4, 131-

144.) The witness called to testify on behalf of the State was:

- a) Dalton Mark Oxner-Jones, CPG, a geologist and expert witness for the State as well as ODNR Geology Program Supervisor overseeing the creation, release and revisions to the preliminary and final 2018 CEA identifications. (Tr. at 18-29.) Mr. Oxner-Jones' testimony is supplemented by eight exhibits. (Appellee Exhs. 1-8; Tr. at pg. 4,219.)

All testimony and exhibits, together with post-hearing arguments, whether or not specifically referred to in this Report, were thoroughly reviewed and considered by this Hearing Officer prior to the entry of the findings, conclusions and recommendation shown below.

### III. Summary of the Evidence

#### A. The Hawkins Property

The property owned by Mr. and Mrs. Hawkins is located at 37811 Lake Shore Boulevard, Eastlake, Ohio. It was purchased in October, 1990. At that time, the property consisted of approximately 150 feet of horizontal surface and then an abrupt bluff leading to a 40 to 50 foot beach. It contained a small two bedroom cottage that the Hawkins did a teardown and rebuild to construct a larger residence into which they moved in 1993. Because it was explained to them that erosion was most likely caused by horizontal surface water eroding the topsoil and then causing the underlying clay to sheer off, the Hawkins also had

three horizontal and two vertical trenches with drainage piping constructed to ease the flow of water to the lake. (Hawkins Tr. at 16-17, 18-19; Appellants Exh. 3, photo of beach.)

In 1998, in order to create a more accessible approach to the lake, the Hawkins had the bluff excavated on a 1 to 8 ratio to make the drop to the beach more gentle and still leave 30 to 40 feet of beach. (Hawkins Tr. at 17-18.) At the same time they paid \$35,000.00 to a contractor, Polovic Construction, to install 500 tons of large anchor stones at the base of the bluff to maintain the grade ratio. (Id at 17-24, Appellants Exh. 3, second and third photos.) Because of rising waters in the lake, the retaining wall had to be reinforced with additional anchor stones on three occasions between 2010 and 2012 at a cost of \$5,000.00 to \$12,000.00 each. (Hawkins Tr. at 24-26, 45.)

In addition, because storms were moving the anchor stone around, the Hawkins had eleven 38,000 pound concrete blocks placed by Huffman Construction adjacent to the anchor stone on or about 2014 at a cost of \$2500.00 each. The stones and concrete blocks were wrapped around the property to the west of the property line to protect against erosion that was occurring to the neighbor's property on that side. (Hawkins Tr. at 26-29, 51-52, 55; photos at Appellants Exhs. 13, 15N.)<sup>1</sup> Mrs. Hawkins testified that the blocks have also shifted because of winter storms and are now "cocked a little bit." (Hawkins Tr. at 48-49,

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<sup>1</sup> Mrs. Hawkins testified that Huffman Construction does "erosion control up and down the lake." (Tr. at 55-56.)

53-54.) No shore structure permit was sought or received from ODNR for the work and the work was not supervised by a certified engineer. (Hawkins Tr. at 45-51.)

Data shows that the Hawkins property eroded a foot between 2004 and 2015. In contrast, the property immediately to the west has suffered significant erosion during the same period. (Hawkins Tr. at 40, 43.)<sup>2</sup>

#### B. Methodology Employed by ODNR in Establishing the 2019 CEA

The 2018 identification of Lake Erie CEAs was supervised by geologist Dalton Mark Oxner-Jones, CPG, Geology Program Supervisor for the Ohio Department of Natural Resources, Division of Geological Survey, where his two primary functions are survey geology and manager of ODNR's core lab and repository in Delaware. (Oxner-Jones Tr. at 145, 149.) Mr. Oxner-Jones has a 1996 Bachelor's from Cleveland State University and a 2000 Master's in Geology from Kent State University. (Id. at 145.) He has been published numerous times in his field, including several related to methods utilized by the Coastal Erosion Area Mapping Program. (Id. at 150; Appellee Exh. 5, Curriculum Vitae) Mr. Oxner-Jones worked in the private sector as a geologist from 1999

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<sup>2</sup> Mrs. Hawkins testified that there has been so much erosion on the neighboring property because the property owners have done nothing to implement erosion control measures. (Tr. at 43)

until 2008 with a series of firms including BBC&M Engineering, Hull Associates, Metcalf and Eddy and Lawhorn and Associates. (Id. at 147-148.) Mr. Oxner-Jones also has had extensive experience in ODNR's program of identifying Lake Erie CEAs. He worked as an intern on the 1998 preliminary and final identifications, as a supervisor over the latter part of the 2010 preliminary and final identifications and then all of the 2018 preliminary and final identifications. (Oxner-Jones Tr. at 146, 151-152.) He was personally involved in the review of the inclusion of the Hawkins property in the 20 I & identification. (Appellee Exh. 5 at 3-5; Id. at 162-167.)

Mr. Oxner-Jones provided an overview of the CEA process. He explained that coastal erosion areas are designated based on the rate of coastal recession or coastal retreat through methodology that is codified in regulation and centered on a five point center-weighted moving average that was selected when the Coastal Erosion Area Program was first conceived in the early 1990s. An erosion working group was put together of about 12 people. It consisted of ODNR officials, property owners, engineering consultants, and local stakeholders that met four times over the course of a year. The group considered three different schemes, a low averaging, a five point moving average and a three point moving average concept. Out of these three different schemes, the five point moving average was found to most closely predict recession characteristics that match what is observed on the Lake Erie shoreline. As a result, the erosion group agreed to a five point center-weighted moving average, and it was codified. (Oxner-Jones Tr. at 204-



205.) Mr. Oxner-Jones testified that the essence of the methodology involves comparing aerial photography to evaluate recession at various points along the shoreline and then applying the five point center-weighted moving average to smooth the data and output to create a more realistic type of recession curve due to irregularities in the coast and to account for potential long-term flanking effects on adjacent properties:

So we have two sets of aerial photography, we have the base map or base imagery and then a comparison set. And we simply overlay one set of photography over the other, and we measure at various points over 14,000 of them, 14,175 of them called transects, and we simply measure how much a particular feature on each transect has receded between the initial aerial imagery and the second aerial photograph.

And because we know how much time separates those two aerial photographs, that allows us to arrive at a recession rate in feet per year for each transect. And then we can multiply that by 30 to arrive at a projected recession rate which is how much that particular transect is projected to recede over the next 30 years.

Of course, there's an averaging function in there which is used to smooth the data and output more to a realistic type of recession curve. Once we have that data, we can apply that to a map, and that's what is published as coastal erosion area maps.

[I]n this latest round of mapping, areas that were projected to receive 14 or more feet over 30 years, those are designated as coastal erosion areas. If the projected recession is less than 14 feet, those areas are not designated as coastal erosion areas.

(Oxner-Jones Tr. at 154-155; Appellee Exh. 5.) For the most recent January 10, 2019 Final CEA Identification, aerial imagery from 2004 and 2015 was used to calculate the amount of erosion that occurred over that eleven year time period. (Appellee Exh. 5 at 2.)

Mr. Oxner-Jones' testimony and written expert report describe the process in more detail. Consistent with the directive in R.C. 1506.06(A) to use, "the best scientific records, data and analysis," the aerial imagery used by ODNR was acquired specifically for mapping shore erosion. In some cases ODNR also uses LIDAR, a form of remote sensing that allows ODNR to determine elevations. The aerial imagery is high-resolution of excellent quality taken during ideal lighting conditions in early spring before "leaf out" and is both orthorectified<sup>3</sup> and georeferenced for accurate measurements. They are put through QA/QC both through their own contractor, and through the Ohio Department of Transportation

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<sup>3</sup> "Orthorectify" means that the photographs have been adjusted to remove various sorts of errors due to parallax or due to the angle at which the camera took the image. Mr. Oxner-Jones explained that when photographs are taken next to a high feature like a bluff or a cliff, the feature can introduce some distortion that needs to be adjusted. (Oxner-Jones Tr. at 156.)

accurate measurements. They are put through QA/QC both through their own contractor, and through the Ohio Department of Transportation. (Oxner-Jones Tr. at 155-156, 176-177; Appellee Exh. 5 at 2)

Ohio Adm. Code. 1501-6-10(R) allows ODNR the discretion to choose which landform to use for the recession line, e.g. the bluff line, the crest of a dune, or other feature. Typically, a landform is picked that can be easily identified on aerial imagery and is likely to be persistent, i.e. it can be identified on two or more aerial images taken at different dates. Recession lines were chosen at the shore-perpendicular digital transects (lines) that are superimposed over aerial imagery at approximate 100-foot intervals. These transects had already been established geographically in the early 90's (Oxner-Jones Tr. at 159; Appellee Exh. 5 at 2)

The locations where the 2004 and the 2015 recession lines intersect the transects were digitized using an on-screen digitizing tool in ArcMap, a geospatial processing program within a computer program called ArcGIS. ArcMap is the main component of the ArcGIS suite of geospatial processing programs, and is used primarily to view, edit, create, and analyze geospatial data. ArcMap allows the user to explore data within a data set, symbolize features accordingly, and create maps. This is done through two distinct sections of the program, the table of contents and the data frame. Based on the digitized locations, a 2004 historic recession line and a 2015 base recession line was created. A Visual Basic for

Applications (VBA) program within ArcMap then automatically calculated the measured recession distances and the annual recession rates for each digital transect. Annual recession rates were then multiplied by 30 years to calculate 30-year recession distances at each transect. (Appellee. Exh. 5 at 2-3; Oxner-Jones Tr. at 159-160.)

The VBA program then applied the five-point center-weighted moving average to the 30- year recession distances to calculate the anticipated recession distance at each digital transect in accordance with Ohio Adm. Code 1501-6-12. The coastal erosion areas were then delineated on coastal erosion area maps in accordance with Ohio Adm. Code. 1501-6-13. (Appellee Exh. 5 at 3.)

For the 2018 CEA mapping, CEAs were delineated only where the anticipated recession distances are equal to 14 feet or greater over a 30-year time period. Mr. Oxner-Jones testified that the 14 feet figure was the result of a rigorous error analysis to arrive at a calculated accuracy limit. At each digital transect, anticipated recession distances equal to or greater than 14 feet were used to delineate the landward edge of the CEAs on the map as measured from the 2004 base recession line. The anticipated recession distance is commonly referred to as the CEA distance which is what is reported in the CEA data tables. (Appellee Exh. 5; Oxner-Jones Tr. at 157-158.)

Mr. Oxner-Jones explained that after the Division of Geological Survey finished its mapping work, the maps and data were shared with the Office of Coastal Management which was given an opportunity to

examine the maps and each transect, to comment on every transect, and share their comments with the Division. Mr. Oxner-Jones and his staff then went back through and looked at each and every comment and made changes as necessary. (Oxner-Jones Tr. at 177.)

### **C. Inclusion of the Hawkins Property Within the CEA Identification**

A portion of the Hawkins property had been included within the identification of CEAs since the second round of final identification of CEAs along Lake Erie in 2010. (See Oxner-Jones Tr. at 170-172, Appellee Exh. 6, the 2010 map of the CEA identification cf. to Appellee Exh. 7, Attachment 5, the 2018 map of the CEA identification.) The 2018 map of the CEAs identifies the northern approximately 20-25% of the Hawkins property within the CEA, as identified by the red line identified as "Landward extent of CEA," a line that runs diagonally from the east southwestwardly across the width of the property. (Appellee Exh. 7, Attachment 5.) The portion of the line affecting the Hawkins property is the land area on either side of the intersecting black line identified as Transect 360-13. (Id.) The line appears to stop well short of the residential structure on the property. Mr. Oxner-Jones described the calculations that led to the inclusion as follows.

Transect identification number (TIO) 2841 (labeled as transect number 360-13 on the CEA map), intersects the Hawkins property at roughly the midpoint between its east and west boundaries. The landform chosen for TIO 2841/.360-13 was the crest of the bluff.

The location of the crest of the bluff was identified in both sets (2004 and 2015) of aerial imagery by the difference in color between the green of the lawn and the brown of the vegetation and soil on the slope face. (Appellee Exh. 5 at 3, Attachment I.)

Per Mr. Oxner-Jones, at the transect immediately east of TIO 2841/360-13 (TIO 2840/360-12), the crest of bluff was also chosen as the landform. Bare soil on the 2015 aerial imagery did not permit identification of the location of the landform based on color difference. However, other evidence, in particular the 2015 LiDAR data, did not suggest erosion had occurred, so the location of the landform was determined to be the same as in the 2004 imagery. At the transect east of TIO 2840/360-12 (TID 2839/360-1 I), the bluff crest was again selected as the landform. At this transect there was also no evidence of erosion, with the lawn having advanced lakeward between 2004 and 2015, possibly due the placement of fill material. (Appellee Exh. 5 at 3.)

Mr. Oxner-Jones related that at the two nearest transects to the west of TIO 2841/360-13 (TJDs 2842/360-14 and 2843/360-15), landforms similar to that at TIO 2841/360-13 were chosen, i.e. the transition between green grass and brown vegetation or soil marking the break in slope that defines the crest of the bluff. Shadows visible on both sets of aerial imagery at the slope break confirmed that the bluff crest at TIDs 2842/360-14 and 2843/360-15 was vertical or nearly vertical, indicating that the soil at the top of the bluff was actively eroding at the time the images were taken. (Appellee Exh. S at 3-4, Attachment 2).

Mr. Oxner-Jones related that when the erosion calculations were shared with ODNR's Office of Coastal Management (Coastal) for further review in 2016, the latter responded on January 2017, without identifying any problems or issues with the landforms chosen at these transects. (Appellee Exh. Sat 4; Oxner-Jones Tr. at 177.)

Per Mr. Oxner-Jones, a preliminary data table was produced as a result of these measurements and calculations. Appellee Exh. 5, Attachment 3, related to the Hawkins property, is an excerpt from a set of preliminary data tables that were released in January 2018 as part of the preliminary identification of CEAs. It shows that, between 2004 and 2015, 2.5 feet of recession was measured at the center of the Hawkins property TIO 2841/360-13; 0.0 feet of recession was measured to the east of the Hawkins property at both TIDs 2839/360-11 and 2840/360-12; *and 34.9 feet and 16.1 feet of recession was measured at to the west of the Hawkins property* at TIDs 2842/360-14 and 2843/360-15, respectively.<sup>4</sup> (Emphasis added.) (Appellee Exh. 5 at 4, Attachments 1-3; Oxner-Jones Tr. at 165-169.)

Mr. Oxner-Jones testified that the amount of recession measured in the property to the west of the Hawkins is "actually very significant." "Erosion is a

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<sup>4</sup> Pointing to photos attached to his expert report, Mr. Oxner-Jones pointed out the features that signified the significant erosion immediately west of the Hawkins property. "So the second figure, a similar thing, you have 2004 on the left and 2015

natural process. It does not recognize artificially or arbitrarily imposed boundaries like property lines." (Oxner-Jones Tr. at 165-166.) He opined that this could represent a continued danger to Hawkins property despite the anchor stones that were placed along that boundary. (Oxner-Jones Tr. at 204.)

The impact of the five-point center-weighted moving average function is that even though only 2.5 feet of recession had been measured at the center of moving average function is that even though only 2.5 feet of recession had been measured at the center of the Hawkins property at TID 2841/360-13, up to 28.0 feet

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again, I selected the recession features similarly. So the yellow crosses indicate the recession feature.

What ... both [pictures] show is that you have black shadows at the top of the bluff, and what these indicate to me is a vertical bluff which I just happened to know from my experience with the soils in that area that when you have those vertical bluffs like that, that indicates vertical or active slumping."

"So slumping was taking place very shortly before these photographs were taken and probably continues after these photographs were taken because these photographs were taken in the springtime which is a wet time of year. So what these photographs show is that you have actively slumping bluff immediately to the west of the Hawkins property."

"I can tell you between 2004 and 2015, which the two photographs represented here, at the transect marked 360-14, that amount of recession is 34-and-a-half feet." (Oxner-Jones Tr. at 168-169; Appellee Exh. 5, Attachment 2.)



of future recession was predicted for that transect due to high measured recession distances immediately to the west of the Hawkins property at TIDs 2842/360-14 and 2843/360-15. Since areas projected to erode more than 14 feet over 30 years are required to be identified as CEAs, the northern portion of the Hawkins property was included in a CEA. (Appellee Exh. 5 at 4.)

On May 7, 2018, the Division received an objection from Mr. and Mrs. Hawkins to the preliminary identification of CEAs as to their property. The letter asserted that ODNR's determination was in error, that Mr. Hawkins had placed anchor stone on the shoreline in 1998, and on three separate occasions reset the original stone and added additional stone to the existing anchor stone, that the lake level had risen 18-24 inches since 1998 and due to wave effect the stones had shifted but still protect the property. The Hawkins included photographs. Mr. Oxner-Jones replied with a letter on May 11, 2018, acknowledging receipt of the objection and called Mr. Hawkins on May 25, 2018, to request a visit to the Hawkins property. (Oxner-Jones Tr. at pg. 162-163; Appellee Exhs. 2 and 3.)

Before visiting the property, Mr. Oxner-Jones re-checked the mapping to ensure that no mistakes were made and to determine if any uncertainties on the aerial imagery could reasonably be re-interpreted in a way that would affect the mapping. (An example of such uncertainty would be tree canopy that obscures the crest of the bluff on the aerial imagery.) Looking at TIDs 2839/360-11 through 2843/360-15, Mr. Oxner-Jones could find no such uncertainties that would

affect the outcome of the mapping. (Appellee Exh. 5 at 4-5.) Per Mr. Oxner-Jones,

I looked at all of the transects that were either crossing the Hawkins property or adjacent to the Hawkins property. And I verified that the recession features were correctly chosen and determined that they were. And I confirmed that the recession rate was correctly calculated, and it was, and I confirmed that the anticipated recession distances were correctly calculated, and they were. (Oxner-Jones Tr. at 166-167.)

Mr. Oxner-Jones and Division employee Josh Novello visited the Hawkins property on June 7, 2018. During the site visit, Mr. Oxner-Jones listened to the Hawkins relate their history on the property and looked at the coast and any evidence that Mr. Oxner-Jones' interpretation of the bluff crest position had been incorrect. His visit confirmed what had been apparent in the aerial imagery: that the top of the slope occurred where the lawn ended and that Mr. Oxner-Jones' Mr. Oxner-Jones was also able to confirm that the erosion measured from aerial imagery at Transects 2842/360-14 and 2843/360-15 had Occurred. (Oxner-Jones Tr. at 163-164; Appellee Exh. 5 at 5.)

After returning to the office, Mr. Oxner-Jones re-visited the aerial imagery in ArcMap and made a small adjustment to the mapping, reducing the amount of recession at TID 2841/360-13 from 2.5 feet to 1.1 feet. The change was an adjustment to ensure that the selection of the landform at that transect

reflected the lakeward edge of the lawn that marked the crest of the bluff as accurately as possible. Mr. Oxner-Jones concluded that the Hawkins property remained within the identification of CEAs due to the significant recession to the immediate west of the Hawkins property, confirmed by the site visit and correctly applied to the Hawkins property using the five-point center-weighted moving average per Ohio Adm. Code 1501-6-12. (Appellee Exh. S at 5; Oxner-Jones Tr. at 164, 181-182; Hawkins Tr. at 40.)

On August 8, 2018, Mr. Oxner-Jones sent a letter to Mr. and Mrs. Hawkins confirming that following the review, the preliminary identification of CEAs as to the Hawkins property would remain in effect. The CEA maps were finalized on January 10, 2019. (Appellee Exh. 5 at 5; Appellee Exh. 7, Attachment 5; Oxner-Jones Tr. at 164-165.)

**D. Opinion of John Matricardi on Inclusion of  
Hawkins Property in the CEA.**

The Appellants called John Matricardi, P.E., a civil engineer, for his opinion as to whether their property should be included within the CEA. Mr. Matricardi is currently Senior Coastal Engineer for KS Associates where he designs permits and does construction inspection for various coastal engineering projects along Lake Erie. Mr. Matricardi is a licensed Professional Engineer in Ohio and Pennsylvania. He has been licensed since 1978, has a degree in engineering from Youngstown State University in 1974 and a Master's degree in environmental engineering from Drexel University in 1982. Mr. Matricardi, has worked for the Naval Facilities

Engineering Command in the Philadelphia Naval Shipyard, the Corps of Engineers in Cleveland as head of the Cleveland construction office, and operated his own engineering firm until absorbed by KS Associates. {Matricardi Tr. at 57-60.) Mr. Matricardi is qualified as a Professional Engineer, to submit erosion control permits and has done over 800 different projects. (Id. at 62.)

However he has never worked for ODNR. (Matricardi Tr. at 60.) He has never had to decide or render an expert opinion as to whether a given section of the shoreline is within a CEA. He concedes that only ODNR is authorized to do a CEA determination. (Id. at 92.) However he has also worked with ODNR regulations in his practice and is familiar with transect lines. (Id. at 93-94.)

In order to render an opinion, Mr. Matricardi did a site visit of the Hawkins property "to actually see the property, see the extent of the shoreline, the adjacent properties, how far the house is back from the top of the bluff, also to take some photographs." (Matricardi Tr. at 65.) Mr. Matricardi found the property to be 75 feet wide with 43.3 feet from Transect Line 360-13/11D 2841 to the western side of the property. He found the anchor stone/concrete blocks on the western border to extend an additional 29 feet in front of the neighboring property. (Id. at 86-87; Appellant Exh. 13.)

Mr. Matricardi was aware that no permit was obtained for the erosion control work, that there were no engineering plans or specifications for the work and did not know whether or not an engineer

supervised the work. {Matricardi Tr. at 104-106.) Nevertheless, although he photographed the fill along the Hawkins' shoreline, Mr. Matricardi did not perform an examination of the structural stability of the fill because the day he visited the site it was raining and, "it was not a good day to be walking down that bluff." (Id. at 103.) Mr. Matricardi's opinion is based on that sole site visit, ODNR measurements, his photos and aerial photography he received from ODNR showing the condition of the property over a span of several years. (Id.) He consulted with no other professional in formulating his opinion. (Id. at 107.)

Mr. Matricardi's opinion does not involve a critique of whether ODNR accurately included the northern portion of the Hawkins property in a CEA under the parameters set forth in its regulations. (Matricardi Tr. at 96, 107-108.) Instead it involves his individual assessment of the Hawkins property and his opinion as to whether the property constitutes a special situation where the regulations should not be applied:

My opinion is that I don't disagree with the way they calculate the fact that it's in the erosion zone according to their rules. My opinion is that their rules do not allow for any special variances in the shoreline other than crunching the numbers and not really looking at the shoreline and whether there's obstacles that could or could not change the way it's looked at whether it should be in the erosion zone or not.

I'm saying in almost all the time, the rules should be applied, but there are circumstances where the rules may not apply totally, and this,

I think, is one of those cases mainly because the erosion system that Mr. Hawkins has on his property extends on to an adjacent property. So because that adjacent property, the next transect is past his erosion system, it counts against him and is not considered to allow his property to not be in the erosion area even though it actually is.

The way the rules are written, they basically restrict everything to every 100-foot section. If something different occurs in that 100-foot section, the rules don't take that into consideration. (Matricardi Tr. at 96-97, 108)

Mr. Matricardi opined that, although ODNR's methodology is one methodology that can be used to obtain an average of erosion recession within a specified distance (Matricardi Tr. at 116-117), there is no mathematical, engineering or erosion mandate that dictates that the history of erosion be examined by the 100 feet distance between transects utilized by ODNR. He speculated that ODNR selected the distance because, "[m]ost properties are in the range of about 100 feet." (Matricardi at 101; Appellee Exh. 7 at 2.) However he opined that using the average erosion over a specified distance rather using the actual property boundaries to identify a CEA, "doesn't consider the facts as to exactly where an erosion control structure starts or stops on a property like it does on Mr. Hawkins' property." (Id. at 116.) Instead of relying on the regulatory methodology for his opinion, the witness utilized his own created methodology that he characterized as "the straight line method," a linear measurement methodology he

concedes has not been codified, is inconsistent with the existing regulations and is confined only to the Hawkins property. (Matricardi at 108, 111-112, 121; Appellee Exh. 7.) Application of his methodology is based primarily on two factors unique to the Hawkins property: a) "the size of the stone and the fact that it extends almost 29 feet past its property line, that that would protect his western property Line from eroding more than 14 feet in the next 30 years," and b) "in the previous ten years, it had basically the same coastal erosion protection system and it stayed exactly the same. May have lost a ... a tenth of a foot total I think." (Id. at 100.) Applying these factors, Mr. Matricardi opined that the erosion recession on the Hawkins property would not exceed the 14 feet threshold in thirty years that would dictate including the property in a CEA. (Id. at 100; Appellee Exh. 7.)

Mr. Matricardi agrees that his methodology is, in essence, carving one piece of property out of the regulatory averaging methodology that would apply to all other property. (Matricardi Tr. at 122.) He characterizes it as,

it's probably just a special situation where it only applies to certain properties. You wouldn't want to do it to every property, I don't think, because [the Hawkins' fill is] not a typical system -- it's the beginning and ending of a system and it kind of gets rid of your averaging. I'm not saying the averaging is bad in a lot of cases because a lot of shore line is very similar and it seems logical to maybe do an averaging system, but it also can penalize the property owner where they have done something that

extends past the transect and a neighbor who either to the east or west has not done anything.

And there is no way to -- they cannot force that neighbor to do anything to help them save the property. In my opinion, it's just a way of helping a person who has tried to do something to his property give proper credit for doing it. (Id. at 121-122.)

Mr. Matricardi conceded that the property to the west of the Hawkins property has suffered significant erosion that will continue despite earlier efforts to protect the property that completely failed. He doesn't believe that the same would happen to the Hawkins property to the extent that the property would suffer more than 14 feet of recession in a 30 year time frame because the Hawkins have installed greater fill. (Matricardi Tr. at 123-126.) He also conceded that the continuing erosion along the western portion of the Hawkins property could reach around and truncate the hardened portion the Hawkins property but also believes that the 29 feet of stone placed on that side would make it unlikely that the erosion would exceed the 4 foot level of erosion. (Id. at 127-128.)

**E. Mr. Oxner-Jones' Rebuttal of Mr. Matricardi's Opinion**

In response to Mr. Matricardi's straight-line methodology, Mr. Oxner-Jones opined what Mr. Matricardi conceded: ODNR cannot ignore the erosion to the west of the Hawkins property in identifying the CEA and still be following the procedures set forth in



the Administrative Code. (Oxner-Jones Tr. at 174-175.) Mr. Oxner-Jones disagreed with Mr. Matricardi on the question of whether the regulatory methodology ignored the lack of erosion on the Hawkins property, pointing out that under the five line center-weighted moving average used by ODNR, each 100 foot section of coastline is considered. (Id. at 175.) He found no justification for the Matricardi methodology and pointed out, as Mr. Matricardi also conceded, his methodology is not supported by the administrative code. (Oxner-Jones Tr. at 176.)

On cross examination, Mr. Oxner-Jones testified that the regulatory methodology utilized by ODNR takes into consideration the directive in R.C. 1506.06 that, "[t]he preliminary identification shall state the bluff recession rates for the coastal erosion areas and *shall take into account areas where substantial filling, protective measures or naturally stable fond has significantly reduced recession.*" (Emphasis added.) He pointed out that any reduction of erosion on the Hawkins property was measured and factored into the five point center-weighted moving average. (Oxner-Jones Tr. at 193-194.) Mr. Oxner-Jones later added that the statutory mandate is met in the process that is used in selecting the recession feature along the transect that is used to monitor bluff retreat. If the history of erosion at the property is such that ODNR sees that the property is stable, it will pick a recession feature that reflects that observation. (Oxner-Jones Tr at 208-209.)

Mr. Oxner-Jones noted that,

in the case of the Hawkins property, we chose the same recession feature for all three rounds of maps. It was always the crest of the bluff. So by choosing that same recession feature each time, that was taking into account the observed stability at that property.

To the extent they put something in front of their property that increased its stability and that stability is reflected in the stability of the bluff crest and we picked that bluff crest, then in the process of picking that bluff crest, our mapping is reflecting the effect of whatever measures they put in. (Oxner-Jones Tr. at 209.)

In response to Mr. Matricardi's opinion about the relative low degree of danger posed by the heavy erosion to the west of the Hawkins property, Mr. Oxner-Jones noted, as summarized above, that, in his opinion, the "very significant" erosion to the west of the Hawkins property could represent a continued danger to the Hawkins property despite the anchor stones that were placed along that boundary, a dynamic that substantiates the inclusion of the Hawkins property within the CEA. (Oxner-Jones Tr. at 204.)

When asked what his response would be to those persons who think that the regulatory scheme unfairly includes within a CEA given properties that have nominal erosion due in part to the implementation of erosion control measures, he pointed out that because of the nature of the methodology, it can actually sometimes work both ways in assessing anticipated recession:

that is unfortunately ... a feature of the Code. It does sometimes occur that you'll have two properties, one with a great deal of observed stability and the next one with a great deal of recession or erosion. And because of the five point moving average... one property's measurements will affect the process through recession. So it may be that the stable property has a CEA designated on it. It may also be that the eroding property doesn't have as much or is not projected to receive as much as it might because of the stable property to the next of it. It's a quirk or an artifact of the way recession is met along the shore.

(Oxner-Jones Tr. at 210.) Mr. Oxner-Jones testified that the regulatory scheme does not provide for carving out such exceptions from a properly calculated CEA. (Oxner-Jones Tr. at 210-211.)

Mr. Oxner-Jones opined that since the five-point center-weighted moving average was applied correctly to the Hawkins property as required by Ohio Adm. Code 1501-6-10 through 1501-6-13, the final identification of coastal erosion areas made on the 2018 maps, including the northern portion of the Hawkins property, was correct. (Oxner-Jones Tr. at 179-180; Appellee Exh. 5 at 4-5.)

#### **IV. Analysis**

In 1996, the General Assembly enacted R.C. 1506.06 that states in pertinent part as follows:

**R.C. 1506.06(A)**

The director of natural resources, using the best available scientific records, data, and analyses of shoreline recession, shall make a preliminary identification of Lake Erie coastal erosion areas, which are the land areas anticipated to be lost by Lake Erie-related erosion within a thirty-year period \_if no additional approved erosion control measures are completed within that time. The preliminary identification shall state the bluff recession rates for the coastal erosion areas and shall take into account areas where substantial filling, protective measures, or naturally stable land has significantly reduced recession.

**R.C. 1506.06(E)**

At least once every ten years, the director shall review and may revise the identification of Lake Erie coastal erosion areas, taking into account any recent natural or artificially induced changes affecting anticipated recession. The review and revision shall be done in the same manner as that provided for original preliminary and final identification in this section.

This statutory mandate has been interpreted and applied by ODNR through the enactment of a regulatory scheme set forth in Ohio Adm. Code 1501-6-10 through 1501- 6-13. Those provisions state in pertinent part as follows:

**Ohio Adm. Code 1501-6-10**

(A) "Annual recession rate" means the average rate, expressed in feet per year, at which the recession line moves landward. The annual recession rate shall be based on a time period not less than ten years nor greater than thirty years prior to the year that the base-map imagery was acquired. In no case shall the annual recession rate used to calculate the anticipated recession distance be less than zero.

(B) "Anticipated recession distance" means the center-weighted moving average of distances, equal to thirty times the annual recession rate, as determined at five consecutive transects. Anticipated recession distances less than thirty times the "calculated accuracy limit" (refer to paragraph (H) of this rule) shall be equal to zero.

(I) "Coastal erosion area" means those land areas along Lake Erie anticipated to be lost due to Lake Erie-related erosion within a thirty-year period if no additional approved erosion control measures are completed within that time. These areas include land lakeward of the base recession line where anticipated recession distances are greater than zero and extend landward from the base recession line for a distance equal to the anticipated recession distance. Where anticipated recession distances are equal to zero, coastal erosion

areas shall not be designated either lakeward or landward of the base recession line.

**Ohio Adm. Code 1501-6-11**

The process of determining annual recession rates shall include preparation of recession-line base maps, measurement of recession distances on the recession-line maps, and calculation of annual recession rates.

(B) Recession distances shall be measured at points uniformly spaced along the base recession line. The recession distance at each point shall be measured from the base recession line along a transect oriented at a right angle to the general trend of the base recession line (figure I). Each transect shall be uniquely identified and the measured recession distance shall be recorded and used to calculate the annual recession rate.

C) For each transect, the annual recession rate in feet per year shall be calculated by dividing the measured recession distance by the time period in years between the recession lines. The minimum annual recession rate shall be zero feet per year.

**Ohio Adm. Code 1501-6-12**

The anticipated recession distance in feet for each transect shall be the center-weighted moving average of distances equal to thirty times the annual recession rate in feet per year

as determined at five consecutive transects where: (1) the distances for the two outer transects shall be weighted by a factor of one; (2) the distances for the two inner transects shall be weighted by a factor of three; and (3) the distance for the center transect shall be weighted by a factor of five (figure I). Anticipated recession distances less than thirty times the calculated accuracy limit shall be equal to zero. In no case shall the anticipated recession distance be less than zero.

#### **Ohio Adm. Code 1501-6-13**

Coastal erosion areas shall be delineated on coastal erosion area maps.

(A) Where coastal erosion areas are identified, such areas shall include land lakeward of the base recession line and all land that extends landward of the base recession line for a distance equal to the anticipated recession distance. Where anticipated recession distances are equal to zero, a coastal erosion area shall not be designated, either lakeward or landward of the base recession line.

{1) The landward boundary of a coastal erosion area shall be delineated by plotting on each transect a point landward from the base recession line equal to the anticipated recession distance as determined in rule 1501-6-12 of the Administrative Code and then drawing straight lines between these points (figure I).

(2) Where one transect has a positive anticipated recession distance and an adjacent transect has a zero anticipated recession distance, the coastal erosion area boundary shall be delineated as follows. A boundary line shall be drawn between the positive anticipated recession distance on the one transect to the base recession line position on the adjacent transect (figure 2). At the point where the distance between the boundary line and the base recession line equals the calculated accuracy limit, the boundary line shall turn lakeward. The lakeward extension of the boundary line shall extend to the shoreline and shall be spaced proportionately between the transects (figure 2).

While expert opinion differs, the facts in this matter are not chiefly in dispute. Pursuant to the authority set forth in R.C. 1506.06 and Ohio Adm. Code 1501-6-10 through 1501-6-13, ODNr's Division of Geological Survey reviews and may revise the identification of Lake Erie coastal erosion areas at least once every ten years. The erosion is measured along each of 14,175 lines or transects spaced 100 feet apart that run perpendicular to the shoreline. These lines are placed on two sets of high-resolution aerial photography taken at different times (2004 and 2015 for the 2018 CEA identification) superimposed over each other and the degree of erosion between the years represented by the photography plotted along each line. From this figure the recession rate in feet per year is calculated and multiplied by 30 to arrive at a projected recession rate for that thirty-year time frame for each transect.



The data is then smoothed through a five-point center-weighted moving averaging function set forth in the rules restated above to address irregularities in the coast and to account for potential long-term flanking effects on adjacent properties to arrive at a final thirty-year projected amount of recession (anticipated recession distance). A threshold figure of projected erosion (14 feet in the 2018 identification), is used to determine whether the area is included in a CEA. The coastal erosion areas are then delineated on coastal erosion area maps.

The parties do not dispute that ODNR correctly and accurately followed the procedure outlined in the rules. What is at issue is whether ODNR has the discretion to deviate from its methodology, and if so, should create an exception from identification of a CEA for the approximately 20-25% northern portion of the Hawkins property currently included within a CEA on the January 10, 2019 Final Identification of the Lake Erie Coastal Erosion Area.

The foundation for the dispute is that the five-point center-weighted moving average function set forth in the rules has the potential in given instances for dramatically different measured recession rates at transects on adjoining properties, whether the disparity occurs naturally or through the success or failure of erosion control structures, to influence whether portions of either property are included within or without a CEA. That is the situation in the instant proceeding, as evidenced in the 23 transects included in the excerpt of data from the Final 2018 Map Data Sheet for Lake County (Appellee's Exh. 7, Attachment 5.) Of the five transects that make up the

CEA in which the Hawkins property is included, both Transect No. 360-13/TID 2841 and Transect No. 360-17mD 2845 recorded nominal recession between 2004 and 2015, but the property at the three transects in between them measured recession of 34.9 feet (Transect No. 360-14/TID 2842), 16.1 feet (Transect No. 360-15/TID 2843) and 21.7 feet (Transect No. 360-16/TID 2844). Consequently all five transects were included in the CEA after application of averaging resulted in projections of recession over thirty years of 26.5 feet, 52 feet, 53.1 feet, 41.3 feet and 18.9 feet, respectively as one proceeds westward from the Hawkins property.<sup>5</sup>

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<sup>5</sup> The evidence shows that the projection of much higher rates of recession at transects where nominal recession was measured over the eleven-year period used for the January 10, 2019 Final CEA identification, is an inherent facet of the five-point center-weighted moving average methodology even for transects not included in a CEA, as Mr. Oxner-Jones testified. Examination of the 23 transects included in the excerpt of data from the Final 2018 Map Data Sheet for Lake County (Appellant Exh. 7, Attachment 5) reveals that the property immediately east of the Hawkins property had a measurement of zero recession along the transect that crossed that property (No. 360-12/TID 2840). Nevertheless, application of the averaging function resulted in an 8-foot projection of erosion over 30 years. Similarly property west of the Hawkins property at transects 360-18/TID 2846 and 360-19/TID 2847 where zero feet and 2 feet were measured respectively for the eleven-year period, resulted in projections of 7.3 feet and 13.5 feet over a 30 year period because they border areas where much higher recession was documented over the 2004-2015 time period.

The same is true of the data for the 2010 Final Identification and resulted in property with low recession nevertheless still

Appellants argue that their erosion control efforts are the chief reason for the lack of significant recession on their property, and they and their expert, Mr. Matricardi, argue that, as applied to them, it is unfair to include their property in the CEA because they have made the effort to protect it from erosion and their expert believes that their efforts will prevent the property from receding more than the 14 feet threshold over the next 30 years. But their expert also concedes that no such exception is recognized under the rules that govern the identification process. (Matricardi, Tr. at 96-97, 108.) ODNr's expert, Mr. Oxner-Jones, concurs. (Oxner-Jones Tr. at I 74-176, 210-211.) Indeed a plain reading of the rules supports this testimony. Throughout Ohio Adm. Code 1501-6-11 through 13, the operative mandatory term "shall" appears. In specific, Ohio Adm. Code 1501-6-12 states in pertinent part that, [t]he anticipated recession distance in feet for each transect *shall be the center-weighted moving average of distances equal to thirty*

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included within a CEA. Although transect 360-12/TID 2840 measured only 2.8 feet of recession, application of the five-point center-weighted moving averaging caused its anticipated recession over thirty years to be 18.2 feet and therefore inclusion in a CEA. The reason was that transect 360-13/TID 2841, ironically the transect at the Hawkins property, measured 31.3 feet of recession and an anticipated recession over thirty years of 29.4 feet. The Hawkins property had the same effect on property to the west where measured distances of 5.6 feet at Transect 360-14/TID 2842, and 1.7 feet at transect 360-15/TID 2843 ended up with much higher projections over a thirty-year period and inclusion within the CEA along with the Hawkins property. (Appellee Exh. 6) It is apparent that excepting out properties like the Hawkins property that measured nominal erosion before application of the averaging function would emasculate the methodology.

*times the annual recession rate in feet per year as determined at five consecutive transects.*" Nowhere in the rules is there any language providing for exceptions, let alone providing any methodology for determining when and how such exceptions are to be determined.

Mr. Oxner-Jones has pointed out that this "smoothing" affect is a necessary facet of the methodology. Particularly he has emphasized that one of the very reasons why the State adopted a five point center-weighted moving average was to address situations like that of the Hawkins and their westerly neighbor where, "potential long-term flanking effects on adjacent properties" could negatively impact the Hawkins property. (Appellee Exh. Sat 3.) Although Mr. Matricardi opined that he believes that the 29 feet of stone and concrete that was placed along the Hawkins' western border would prevent erosion from that direction in excess of 14 feet over a thirty-year period, he, nonetheless acknowledged that "any structure will fail over time," and that due to likely continuing erosion along that face, "[t]here is a possibility it [the Hawkins property] would be what they call flanked on the west side." (Matricardi Tr. at 127-128.) Mr. Oxner-Jones opined that such a flanking effect on the Hawkins property was a real concern as his observation of the neighboring property showed significant active continuing erosion. (Oxner-Jones Tr. at 201-202.)<sup>6</sup>

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<sup>6</sup> Comparison of the data supporting the 20JO and January 10, 2019 Final Identifications demonstrates how erosion patterns can dramatically change from one measured period to the next. The measured recession distance at Transects 360-13 through 360-17 for the period of 1990 through 2004 was 31.3 feet, 5.6 feet, 1.7 feet, 8.5 feet and 7.7 feet, respectively. For those same

The Hawkins also argue that the lack of any provision in Ohio Adm. Code 1501-6-10 through Ohio Adm. Code 1501-6-13 authorizing ODNR to except out given properties from the five point center-weighted moving averaging function violates the language in R.C. 1506.06(A) that the CEA identification "*shall take into account areas where substantial filling, protective measures or naturally stable land has significantly reduced recession,*" and the language in R.C. 1506.06(B) that all revisions to the initial identification shall be carried out, "*taking into account any recent natural or artificially induced changes affecting anticipated recession.* "

In response ODNR point out two factors that rebut this claim. First, ODNR points out that the efforts by the Hawkins to implement erosion control carry less weight because they were conducted without required ODNR approval which would have required the Hawkins to have their proposed erosion control structure designed with detailed plans and specifications prepared by a professional engineer registered under R.C. 4733. See former R.C. 1507.04 (effective 1994- 2000), former R.C. 1521.22 (effective

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transects during the period of 2004 through 2015 the recession was 1.1 feet, 34.9 feet, 16.1 feet, 21.7 feet and 1.8 feet. (Mr. Oxner-Jones notes that part of the 31.3 feet of measured recession at the Hawkins property could have been due to the effect of grading and that ODNR's computer takes that into consideration in calculating whether the property belongs in a CEA. But he also noted that the projection of recession of 29.4 feet was nonetheless the highest within the five transects. Oxner-Jones Tr. at 211-213.)

2000-2007), and current R.C. 1506.40 (effective 2007-present). Appellants argue that regulatory approval is irrelevant for purposes of identifying a CEA and point to Mr. Oxner-Jones' acknowledgement that ODNR doesn't factor in the effect of non-approved erosion control structures in computing recession.

But the regulatory language clearly indicates that regulatory approval is relevant. In the very sentence preceding that relied upon by the Appellants in R.C. 1506.06, "coastal erosion areas" are defined as "the land areas along Lake Erie anticipated to be lost due to Lake Erie-related erosion within a thirty-year period if no additional approved erosion control measures are completed within that time." The language is repeated in Ohio Adm. Code 1501-6-10(1). To the extent that Appellants present Mr. Matricardi's expert opinion as a de facto retroactive substitute for this approval process, it falls short. Mr. Matricardi did not produce the required plans and specifications and his sole visit to the property did not even involve a close inspection of the stone and concrete structure due to weather conditions.

Second, the Appellee points out that Mr. Oxner-Jones addressed this criticism by noting that ODNR does take "into account any recent natural or artificially induced changes affecting anticipated recession," by basing its selection of the recession feature used to monitor bluff retreat on the erosion history of the property. Mr. Oxner-Jones noted that since ODNR selected the same recession feature at the Hawkins transect for all three rounds of its CEA maps, it was taking into account the stability of the property.

(Oxner-Jones Tr. at 209.)<sup>7</sup>

Both parties cite to *Turtle Bay Limited Partnership v. Ohio Department of Natural Resources*, Franklin C.P. No. 00CVF06 5493 (April 10, 2001), the only other appeal of an identification of property within a Lake Erie CEA since the statutory framework was enacted. In that matter a property owner cited to the same language in R.C. 1506.06(A) as do the Hawkins in arguing that ODNR ignored efforts by the property owners in installing an erosion control structure in including the property in a CEA. The court, in affirming the the Director's decision to affirm the Hearing Officer's Report and Recommendation rejecting the property's owners arguments, noted that [a]t first blush, the plain language of the statute does appear to mandate consideration of Appellant's erosion control structure. *However, when read in conjunction with the rest of the statute and the administrative rules*, the Court must conclude that

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<sup>7</sup> The parties also raise additional arguments in their briefing that the Hearing Officer does not find to be germane to disposition of the core issue. First, as ODNR points out, the Appellants did not challenge the inclusion of their property in the 2010 designation. However, as Appellants point out, under statute and rules, they have an independent right to object to each and every new designation. There may have been good reason why they elected to refrain from an objection in 2010 where the base measurements showed considerable erosion but elect to object in 2018 where the base measurements were much different. Second, the Appellants inexplicably argue that ODNR is incorrect in arguing that only a portion of their property is included in the CEA. However examination of the 2018 Map clearly shows that ODNR is correct. Only the northernmost lakefront portion of the property is designated within the CEA

the purpose of this sentence is allow consideration of what historic effect structures built during the period studied have had in order to anticipate what future recession will occur." (Emphasis added.)

The court noted that the regulatory scheme provided for identifications of CEAs to be based on comparisons of aerial imagery maps and that the structure in question had been built after the last imagery and before another one had been made. The court found that the effect of the erosion control structure could only be measured after the next round of imagery was prepared, and a determination made under the regulatory methodology of whether the transect recession projection exceeded the threshold for inclusion as a CEA.

Although the court noted that ODNR "further argues that it cannot be expected to consider each of potentially 12,000 property owners' separate erosion controls," the court resolved the appeal based on the lack of comparative imagery and did not expressly address the issue of whether the regulatory scheme allows for the erosion control efforts on each property to be evaluated independently from the inclusion of the effects of such efforts in the application of the five point center-weighted moving averaging set forth in Ohio Adm. Code 1501-6-12. The decision therefore does not address the specific issue presented in the instant matter. The court's analysis however does provide pertinent guidance. One, the court clearly found that the construction of R.C. 1506.06(A) should be made with consideration of both the remaining language in the statute and the administrative rules. Second, the court concluded that it, "must give



deference to statutory interpretations by an agency that has accumulated substantial expertise and to which the Ohio General Assembly has delegated enforcement responsibility," citing *Weiss v. PUC*, 90 Ohio St.3d.15 (2000).

In addressing the arguments of the parties, the Hearing Officer notes that nowhere in the statute does it provide for exceptions to be created from ODNR methodology as the Appellant argues, only that the enumerated factors be taken into account in performing the CEA identification. ODNR points out how and where it has taken these factors into account in adopting the regulations. As the court in *Turtle Bay* concluded, the agency's interpretation and application of its own statute is entitled to deference absent indication that it is an unreasonable interpretation. See also *State ex rel. Celebrezze v. Natl. Lime & Stone Co.*, 68 Ohio St.3d 377, 382, 1994-Ohio-486, 627 N.E.2d 538, citing *State ex rel. Brown v. Dayton Malleable, Inc.*, 1 Ohio St.2d 151, 155, 438 N.E.2d 120, 123 (1982) and *Jones Metal Products Co. v. Walker* (1972), 29 Ohio St.2d 173, 181, 281 N.E.2d 1, 8 (1972); *Pons v. State Med. Bd. of Ohio*, 66 Ohio St.2d 619, 621 (1993). The Hearing Officer cannot say that ODNR's interpretation of its statute is unreasonable.

It has also been long established that, "[a]dministrative rules are designed to accomplish the ends sought by the legislation enacted by the General Assembly." "[A]n administrative rule that is issued pursuant to statutory authority has the force of law unless it is unreasonable or conflicts with a statute covering the same subject matter." *Silver Lining*

Group EiC Morrow County v. Ohio Department of Education Autism Scholarship Program, 85 N.E.3d 789, 2017- Ohio-7834, 'IJ 41(101h Dist.) citing Hoffman v. State Med. Bd., 113 Ohio St.3d 376, 2007-Ohio- 2201, 865 N.E.2d 1259, 'IJ 17, and State ex rel. Celebrezze v. v. Natl. Lime & Stone Co, supra; Youngstown Sheet & Tube Co. v. Lindley, 38 Ohio St.3d 232,234, 527 N.E.2d 828, 830 (1988). Ohio Adm. Code 1501-6-10 through 1501-6-13 were designed to accomplish the ends sought by the General Assembly in enacting R.C. 1506.06. Per the testimony of Mr. Oxner-Jones, they constitute one reasonable means of doing so, as Mr. Matricardi conceded. Nor have the Appellants presented any compelling evidence or proffered any compelling statutory construction that would establish a conflict between statute and regulation that would invalidate the latter. The regulations must therefore carry the force of law unless and until a court on appeal would find otherwise. See e.g. Vargas v. State Med. Bd. of Ohio, 2012-Ohio-2735, 972 N.E.2d 1076 (10th Dist.); Hinton Adult Care Facility v. Ohio Dept. of Men/a/ Health and Addiction Services, Fourth Dist. Ross No. 16CA3566, 2017-Ohio-4113.<sup>8, 9</sup>

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<sup>8</sup> Appellants also cite to Slate ex rel. Merrill v. Ohio Department of Natural Resources, 130 Ohio St.3d. 30, 2011-Ohio-4612, 955 N.E.2d. 935, to argue that ODNR's inclusion of a portion of their property within a CEA violates their constitutionally vested property rights. (Appellant's Closing Argument at 5-6.) The Hearing Officer notes that this decision addresses the interpretation of R.C. 1506.10 and R.C. 1506.11 and the issue of lakefront property boundaries, not the issue of the propriety of CEA designations under R.C. 1506.06. It is therefore not particularly germane to these proceedings.

The Hearing Officer therefore finds that the Appellants have not established by a preponderance of the evidence that ODNR erred in including the northern portion of their property within a CEA. To the contrary, the preponderance of evidence establishes that the property has been properly and

## **V. Findings of Fact**

Having heard the testimony of the witnesses and considered the arguments of counsel and having examined the exhibits admitted into evidence, I make the following findings of fact and conclusions of law. To the extent that any findings of fact constitute conclusions of law, they are offered as such. To the extent any conclusions of law constitute findings of fact they are offered as such.

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<sup>9</sup> The Hearing Officer further notes that although the Appellants maintain that they "are not asking this hearing officer to address any 'constitutional issues,'" (Appellant's Closing Argument at 5), to the extent they are, they raise issues not properly addressed at the agency level of an administrative proceeding. Agencies, as creatures of statute, only have jurisdiction over such issues as the General Assembly has granted them. *Herrick v. Kosydar*, 44 Ohio St. 2d 128, 130, 339 N.E.2d 626 (1975); *Penn Cent. Transp. Co. v. Pub. Util. Comm.*, 35 Ohio St.2d 97, 298 N.E.2d 587 (1973), paragraph one of the syllabus. As such, arguments that agency rules and/or actions violate constitutional rights, whether facial or as applied, are not in the purview of administrative agencies. Such determinations are reserved to the courts on appeal. *MCI Telecommunications Corp. v. Limbach*, 68 Ohio St.2d 195, 197-199, 625 N.E.2d 597 (1994); *S.S. Kresge Co. v. Bowers*, 170 Ohio St. 405, 406-407, 166 N.E.2d 139 (1960).

1. Appellants Judson and Mary Hawkins ("Appellants" or "the Hawkins") own property at 37811 Lake Shore Boulevard, Eastlake, Ohio. It was purchased in October, 1990. The property is 75 feet wide and consists of a horizontal surface on which their residence stands that becomes a sloping bluff down to the beach.

2. Property along Lake Erie is subject to the effects of ongoing erosion.

3. Starting in 1993, the Appellants commenced erosion control efforts beginning with a drainage system in 1993, the installation of anchor stone at base of the bluff in 1998, additional stone as part of three repairs between 2010 and 2012, and the installation of concrete blocks in front of the anchor stone in 2014.

4. The evidence indicates that even with erosion control measures, erosion can continue unless the erosion control structures are properly designed, constructed and maintained.

5. The erosion control structures built for the Hawkins property were done without seeking a shore structure permit from the Ohio Department of Natural Resources ("ODNR" or "Appellee") and without including detailed plans and specifications prepared by a professional engineer registered under R.C. 4733, as required by former R.C. 1507.04 (effective 1994-2000), former R.C. 1521.22 (effective

6. Data shows that the Hawkins property eroded a foot between 2004 and 2015. In contrast, the adjacent

properly immediately to the west has suffered significant recession of 34.9 feet.

7. 29 feet of the Hawkins anchor stone and concrete blocks extend along the western boundary of the property in front of the adjoining property.

8. The evidence indicates that the erosion on the adjacent property is likely to continue and has the potential to eventually flank the Hawkins anchor stone and concrete blocks and further erode the western face of the Hawkins property.

9. Pursuant to the Ohio Coastal Management Act of 1988, R.C. Chapter 1506, ODNR is responsible for identifying and designating Lake Erie coastal erosion areas and administering a permit system for construction or redevelopment of permanent structures within those areas.

10. R.C. 1506.06(A) identifies coastal erosion areas as, "the land areas anticipated to be lost by Lake Erie-related erosion within a thirty-year period if no additional approved erosion control measures are completed within that time."

11. R.C. 1506.06(8) further provides that, [t]he director of natural resources, using the best available scientific records, data, and analyses of shoreline recession, shall make a preliminary identification of Lake Erie coastal erosion areas, which are the land areas anticipated to be lost by Lake Erie-related erosion within a thirty-year period if no additional approved erosion control measures are completed within that time. The preliminary identification shall

state the bluff recession rates for the coastal erosion areas and shall take into account areas where substantial filling, protective measures, or naturally stable land has significantly reduced recession."

12. R.C. 1506.06(8) requires ODNR to review its designations at least once every ten years and make any revisions of the identification of the CEAs, taking into account any recent natural or artificially induced changes affecting anticipated recession. The review and any revisions are required to be done in the same manner as the original preliminary and final identification of the CEAs along Lake Erie.

13. These directives have been interpreted and applied by ODNR through the enactment of a regulatory scheme set forth in Ohio Adm. Code 1501-6-10 through Ohio Adm. Code 1501-6-13.

14. Under the regulatory scheme, ODNR's Division of Geological Survey measures the amount of recession along each of 14,175 lines or transects spaced 100 feet apart that run perpendicular to the shoreline. These transects were selected in the early 90s irrespective of actual property boundaries.

15. The recession is calculated through comparison of two sets of high resolution calibrated aerial photography taken years apart during ideal lighting conditions in early spring, and both orthorectified and georeferenced for accurate measurements.

16. Ohio Adm. Code. 1501-6-J0(R) allows ODNR the discretion to choose which landform to use for the recession line, e.g. the bluff line, the crest of a dune,

or other feature. Typically, a landform is picked that can be easily identified on aerial imagery and is likely to be persistent, i.e. it can be identified on two or more aerial images taken at different dates.

17. The locations where the two recession lines intersect the transects are digitized using an on-screen digitizing tool in ArcMap, a specialized computer software program. Based on the digitized locations, an historic recession line and a base recession line are created. A Visual Basic for Applications, or "VBA," program within ArcMap then automatically calculates the measured recession distances and the annual recession rates for each digital transect. Annual recession rates are then multiplied by 30 years to calculate 30-year recession distances at each transect.

18. Finally the VBA program applies a five point center-weighted moving averaging function to the 30-year recession distances to calculate the anticipated recession distance at each digital transect in accordance with Ohio Adm. Code 150L-6-12. The moving average is adopted in the regulation to address irregularities in the coast and to account for potential long-term flanking effects on adjacent properties.

19. For the 2018 CEA mapping and January 10, 2019 CEA Final Identification, aerial imagery from 2004 and 2015 were used to create the historic and base recession lines.

20. For the 2018 CEA mapping and January 10, 2019 CEA final Identification, CEAs were delineated

only where the anticipated recession distances were equal to 14 feet or greater over a 30-year time period. The figure was the result of a rigorous error analysis to arrive at a calculated accuracy limit. At each digital transect, anticipated recession distances equal to or greater than 14 feet were used to delineate the landward edge of the CEAs on the map as measured from the 2004 recession line. The coastal erosion areas were delineated on coastal erosion area maps with the beginning and end of the CEA drawn in accordance with the directives set forth in Ohio Adm. Code 1501-6-13.

21. After the Division of Geological Survey finished its mapping work, the maps and data were shared with the Office of Coastal Management which was given an opportunity to examine the maps and each transect, to comment on every transect, and share their comments with the Division. The Division of Geological Survey then went back through and looked at each and every comment and made changes as necessary.

22. As applied to the Hawkins property, ODNR recorded 2.5 (later reduced to 1.1) feet of recession distance at Transect 360-13/TID 2841 running through the center of the Hawkins property; recorded 0.0 feet of recession distance at Transect 360-12/TID 2840 immediately to the east of the Hawkins property and recorded 34.9, 16.1, 21.7 and 1.8 feet of recession distance at the four transects to the immediate west of the Hawkins property, Transects 360-14/TID 2842, 360-15/TID 2843, 360-16/TID 2844, 360-17/TID 2845, respectively.



23. After application of the five point center-weighted moving averaging function to these transects, 26.5 feet of anticipated recession distance was calculated over a thirty year period at Transect 360-13/TID 284 I running through the Hawkins property; 8 feet of anticipated recession distance over thirty years was calculated at Transect 360- 12/TID 2840 immediately to the east of the Hawkins property; 52 feet of anticipated recession distance over thirty years was calculated at Transect 360-14/TID 2842, immediately to the west of the Hawkins property and 53.1, 41.3 and 18.9 feet of anticipated recession distance over thirty years was calculated at the next three transects, Transects No 360-15/TID 2843, 360-16/TID 2844 and 360-17/TID 2845.

24. As a result of the averaging function codified in Ohio Adm. Code 1501-6-12, the properties, including the Hawkins property, at Transects 360-13, 14, 15, 16 and 17 had anticipated recession distance in excess of 14 feet and were included in a CEA even though the measurements of recession distance over the previous eleven years significantly varied between adjoining transects in the case of at least four of the five transects. As Mr. Oxner-Jones testified, this attribute was deliberately built into the methodology to account for potential long-term flanking effects on adjacent properties.

25. This identification resulted in the inclusion of the Hawkins property in a CEA for the second straight period, having been included in a CEA in 2010.

26. The process involved in designation of CEAs includes a preliminary identification of each CEA and notification to affected local governments and private landowners, R. C. I 506.06(A); opportunity for written objections by affected local governments and private landowners, and a ruling on said objections by ODNR, R.C. J 506.06(A) and (B); the discretion for ODNR to modify the preliminary identification and for the affected entities to file written objections to the modifications, R.C. 1506.06 (B) and (C); and, after ruling on the objections, the issuance by ODNR of a final identification, R.C. 1506.06(0). Any person adversely affected by the final identification may appeal it within thirty days in accordance with R.C. Chapter I 19. R. C. 1506.06 (D) and R. C. 1506.08.

27. Under this procedure, the Hawkins property was included in a CEA in the 2010 final identification without the filing of an objection or appeal by the Appellants.

28. The CEA maps delineating the preliminary identification of CEAs for the current identification were released in January 2018. As required by R.C. 1506.06, property owners whose property was included in a CEA in the preliminary identification were notified by certified mail.

29. On January 12, 2018, Appellants were advised in writing by ODNR that "all or a portion of your property lies within a 2018 preliminarily identified coastal erosion area" and advised of the location where the maps could be viewed, of various steps that they could take to further apprise themselves of the nature of the preliminary identification, and of the

ability for them to file objections. The letter advised the Appellants that, "[t]he final designation will be appealable in accordance with O.R.C. Section 1506.08."

30. On May 7, 2018, ODNR received a written objection, postmarked May 2, 2018, by the Appellants to the preliminary identification. On May 11, 2019 Geology Program Supervisor Damon Mark Oxner-Jones responded and acknowledged receipt of the objection. He called Mr. Hawkins on May 25, 2018 to request a visit to the Hawkins property.

31. Before visiting the property, Mr. Oxner-Jones re-checked the mapping to ensure that no mistakes were made and to determine if any uncertainties on the aerial imagery could reasonably be re-interpreted in a way that would affect the mapping. He found none. Mr. Oxner-Jones looked at the transects that were either crossing the Hawkins property or adjacent to the Hawkins property and verified that the recession features were correctly chosen. He confirmed that the recession rate was correctly calculated and confirmed that the anticipated recession distances were correctly calculated.

32. Mr. Oxner-Jones and Division of Geological Survey employee Josh Novello visited the Hawkins property on June 7, 2018. During the site visit, Mr. Jones listened to the Hawkins relate their history on the property and looked at the coast and confirmed that ODNR's interpretation of the bluff crest position had been correct. Mr. Oxner-Jones was also able to confirm that the erosion measured from aerial

imagery at Transects 360-14/TID 2842 and 360-15/TID 2843 had occurred.

33. After returning to his office, Mr. Oxner-Jones re-visited the aerial imagery in ArcMap and made a small adjustment to the mapping, reducing the amount of recession at Transect 360-J 3(TID 2841 from 2.5 feet to 1.1 feet. The change was an adjustment to ensure that the selection of the landform at that transect reflected the lakeward edge of the lawn that marked the crest of the bluff as accurately as possible, and resulted in a reduction of the delineated size of the CEA at the transect by only about 1.5 feet.

34. Mr. Oxner-Jones concluded that the northern portion of the Hawkins property remained within the identification of CEAs due to the significant recession to the immediate west of the Hawkins property which was confirmed by the site visit and correctly applied to the Hawkins property using the five-point center-weighted moving average per Ohio Adm. Code 1501-6-12.

35. August 8, 2018, ODNR sent a letter to the Appellants containing its ruling denying the objection. The letter further informed the Appellants that, "[t]he 2018 preliminary maps will be finalized on about December 21, 2018. Ohio Revised Code I 506.06(D) guarantees you the right to appeal the final erosion designation under Chapter 119 of the Revised Code."

36. The Final Identification of the Lake Erie Coastal Erosion Area was made on or about January 10, 2019,

and included the northern portion of the Hawkins property within a CEA.

37. On February 8, 2019, the Appellants, in accordance with R.C. 1506.06, R.C. 1506.08 and R.C. Chapter 119, filed a Notice of Appeal to ODNR from the inclusion of their property in a CEA in the January IO, 2019 Final Identification of the Lake Erie Coastal Erosion Area.

38. The hearing was initially scheduled for February 25, 2019, and then continued on motion of ODNR in accordance with R.C. 119.09.

39. The matter was assigned to the undersigned as Hearing Officer and, by agreement of the parties, the hearing was ultimately scheduled for August 12, 2019.

40. The matter came forward for hearing on August 12, 2019, at which time the parties presented their evidence and arguments.

41. At hearing both parties presented expert testimony as to whether the Hawkins property should be included in a CEA.

42. The Appellants called John Matricardi, P.E. on their behalf. Mr. Matricardi has been a civil engineer for over forty years and has been involved in over 800 erosion control projects. He has never performed work on a CEA identification.

43. In his opinion, Mr. Matricardi conceded that he was not challenging the accuracy of ODNR's

application of its regulations in including the Hawkins property in a CEA.

44. Nevertheless, Mr. Matricardi does not believe that the state's methodology gives proper consideration to the Hawkins' erosion control efforts. Using what he characterized as "the straight line method," a linear measurement of his own creation that he concedes has not been codified, is inconsistent with the existing regulations governing CEAs and is confined only to the Hawkins property, Mr. Matricardi advocated that the Hawkins property should be excepted from the methodology set forth in the regulations.

45. Based on his observation of, "the size of the stone and the fact that it extends almost 29 feet past its property line," and consideration that the property, "in the previous ten years... had basically the same coastal erosion protection system and it stayed exactly the same," Mr. Matricardi opined that the erosion control structure in place would protect the Hawkins' western property line from eroding more than 14 feet in the next 30 years," and therefore ODNR's regulations should not apply to it.

46. Mr. Matricardi's opinion is based on his review of aerial photography provided by ODNR showing the condition of the property over time, ODNR's recession measurements, a site visit to the Hawkins property and photos the witness took during the site visit.

47. Despite not having the benefit of any engineering plans or specifications for the erosion control structures on the Hawkins property, Mr.

Matricardi rendered his opinion without performing any physical examination of the structural stability of the structures.

48. In response, ODNR called as an expert its Geology Program Supervisor, geologist Dalton Mark Oxner-Jones. Mr. Oxner-Jones has extensive experience as a geologist in both the regulatory and private sector settings. Mr. Oxner-Jones is in charge of the 2018 CEA identifications, was involved as a supervisor in the 2010 CEA identifications, has been published several times on topics related to methods utilized by the Coastal Erosion Area Mapping Program, and as noted above, made a site visit to the Hawkins property.

49. Mr. Oxner-Jones agreed with Mr. Matricardi that the straight line methodology relied upon by Mr. Matricardi is not recognized in the Ohio Administrative Code.

50. Mr. Oxner-Jones further opined that the regulatory scheme for identifying CEAs is mandatory and makes no exceptions for other methodologies or for exceptions from a properly identified CEA.

51. Mr. Oxner-Jones opined that the regulatory scheme in Ohio Adm. Code 1501-6-10 through 1501-6-13 used the best scientific records, data, and analysis, as required by R.C. 1506.06(A).

52. Mr. Oxner-Jones opined that the regulatory scheme in Ohio Adm. Code 1501-6-10 through 1501-6-13, as required by R.C. 1506.06(A) and (E), does account for efforts made in erosion control through

the process used in selecting the recession feature along the transect that is used to monitor bluff retreat. If the history of erosion at the property is such that ODNR sees that the property is stable, it will pick a recession feature that reflects that observation. He pointed out that the fact that ODNR chose the same recession feature at the Hawkins transect for all three rounds of maps was indicative that ODNR was taking into account the observed stability at the property.

53. Mr. Oxner-Jones opined that since the methodology set forth in in Ohio Adm. Code 1501-6-10 through 1501-6-13 was applied correctly to the Hawkins property, the final identification of coastal erosion areas made on the 2018 maps correctly included the northern portion of the Hawkins property.

54. Mr. Oxner-Jones testified that the results of the regulatory methodology was consistent with his own visual inspection of the Hawkins property where the extensive ongoing erosion along the western boundary caused him real concerns about the prospects for continued integrity of the Hawkins property over time.

55. The Hearing Officer finds the expert opinion of Mr. Oxner-Jones more compelling than that of Mr. Matricardi.

56. The northern 20-25% portion of the Hawkins property was properly and correctly included in the January 10, 2019 Final Identification of the Lake Erie Coastal Erosion Area.



57. After the conclusion of the evidence, the parties submitted written closing arguments. Closing briefing was completed on November 1, 2019 after which the matter was then submitted for consideration.

## **VI. Conclusions of Law**

I. The Ohio Department of Natural Resources ("ODNR") has jurisdiction in this matter and has complied with all procedural requirements of R.C. Chapter 119

R.C. 1506.06 and R.C. 1506.08.

2. Pursuant to R.C. 1506.06, ODNR is charged at least once every ten years with the task of identifying and designating Lake Erie coastal erosion areas ("CEAs"), defined in R.C. 1506.06(A) as the "the land areas anticipated to be lost by Lake Erie-related erosion within a thirty-year period if no additional approved erosion control measures are completed within that time."

3. The task of identifying and designating Lake Erie coastal erosion areas charged by R.C. 1506.06 is carried out through methodology set forth in Ohio Adm. Code 1501-6-10 through 1501-6-13.

4. The methodology set forth in Ohio Adm. Code 1501-6-10 through 1501-6-13 reasonably and properly carries out the directives of R.C. 1506.06.

5. Ohio Adm. Code 1501-6-10 through 1501-6-13 does not provide for the use of an alternative methodology to determine whether property should be included within a CEA.

6. Neither R.C. 1506.06 nor Ohio Adm. Code 1501-6-10 through 1501-6-13 provides for excepting out any property correctly and accurately included

within a CEA pursuant to the methodology set forth in the rules.

7. A plain reading of R.C. 1506.06(A) is that ODNR, in identifying Lake Erie coastal erosion areas, shall take into account areas where "substantial filling, protective measures" that constitute "approved erosion control measures" "has significantly reduced recession." (Emphasis added.)

8. Erosion control measures along Lake Erie must be approved pursuant to R.C. 1507.04 (effective 1994-2000), R.C. 1521.22 (effective 2000-2007) and/or current R.C. 1506.40 (effective 2007-present).

9. The preponderance of evidence in the record establishes that the erosion control measures implemented by the Hawkins on their property were not approved in accordance with former R.C. 1507.04, former R.C. 1521.22 and/or current R.C. 1506.40.

10. In applying the methodology set forth in Adm. Code 1501-6-10 through 1501-6-13, ODNR nonetheless takes into account the effects of erosion control measures, even if not approved, on property along Lake Erie by basing its selection of the recession feature used to monitor bluff retreat on the erosion history of the property. The same is true of the measurements taken at the transect crossing the Hawkins property.

11. Appellants have failed to establish by a preponderance of evidence in this proceeding that ODNR erred in its application of R.C. 1506.06 and Ohio Adm. Code 1501-6-10 through 1501-6-13 to the Hawkins property.

I 2. Appellants have failed to establish by a preponderance of evidence in this proceeding that ODNR erred in its inclusion of the northern 20-25% of the Hawkins property within a CEA on the January

IO, 2019 Final Identification of the Lake Erie Coastal Erosion Area.

13. To the contrary, the preponderance of evidence in this proceeding establishes that ODNR properly applied both R.C. 1506.06 and Ohio Adm. Code 1501-6-10 through 1501-6-13 and correctly and accurately included the northern 20-25% of the Hawkins property within a CEA on the January IO, 2019 Final Identification of the Lake Erie Coastal Erosion Area as more accurately depicted on the 2018 Final Coastal Erosion Area Map for Lake County, Frame 360.

## **VII. Recommendation**

Based on review of the record and the arguments of the parties, the Hearing Officer hereby recommends that the Director of ODNR affirm the action of ODNR to include the identified northern portion of the Hawkins property in the January IO, 2019 Final Identification of the Lake Erie Coastal Erosion Area.

This is a recommendation only; it is not a final order. Only the Director has the authority to enter a final order in this administrative action. The Director has the authority to approve, modify, or disapprove this order, and this order shall not be effective until and unless approved by the Director in the manner provided by R.C. 1506.06(D), R.C. 1506.08 and Chapter 119 of the Revised Code and the applicable rules promulgated thereunder.

11/27/19

Date

Lawrence D. Pratt  
Hearing Officer

CERTIFICATE OF SERVICE

I certify that the original of this document was served upon the Ohio Department of Education at its offices in Columbus, Ohio, by regular mail, postage prepaid and by e-mail delivery on November 27, 2019, with instructions that the Depulment is to serve copies of the Report and Recommendation to all parties of record in accordance with R.C. Chapter 119

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Lawrence D. Pratt  
Hearing Officer

## APPENDIX E

### FIFTH AMENDMENT

No person, shall be held to answer for a capital or otherwise infamous crime unless of a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witnessed against himself, nor be deprived of life, liberty or property, without due process of law; nor shall property be taken for public use without just compensation.

### FOURTEENTH AMENDMENT, SECTION 1

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

### ARTICLE 1, SECTION 16 OF THE CONSTITUTION OF OHIO

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner as may be provided by law.

## APPENDIX F

### **Section 1506.10** Lake Erie boundary lines.

Effective: March 15, 1989  
Legislation: Senate Bill 70  
- 117th General Assembly

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

formerly covered thereby.

The department of natural resources is hereby designated as the state agency in all matters pertaining to the care, protection, and enforcement of the state's rights designated in this section.

Any order of the director of natural resources in any matter pertaining to the care, protection, and enforcement of the state's rights in that territory is a rule or adjudication within the meaning of sections 119.01 to 119.13 of the Revised Code.

**Ohio Revised Code Section 1506.06** Preliminary and final identification of Lake Erie coastal erosion areas.

Effective: May 8, 1996

Legislation: House Bill 119 - 121st General Assembly

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(A) The director of natural resources, using the best available scientific records, data, and analyses of shoreline recession, shall make a preliminary identification of Lake Erie coastal erosion areas, which are the land areas anticipated to be lost by Lake Erie related erosion within a thirty-year period if no additional approved erosion control measures are completed within that time. The preliminary identification shall state the bluff recession rates for the coastal erosion areas and shall take into account areas where substantial filling, protective measures, or naturally stable land has significantly reduced recession. Prior to making the preliminary identification, the director shall consult with the appropriate authority of each municipal corporation, county, and township having territory within an area that the director proposes to identify as a Lake Erie coastal erosion area. Upon making the preliminary identification, the director shall notify by certified mail the appropriate authority of each municipal corporation, county, and township having territory within a Lake Erie coastal erosion area of the preliminary identification. The notice shall delineate the portion of a Lake Erie coastal erosion area within the jurisdiction of, and shall be made available for public inspection by, the municipal



corporation, county, or township. The director also shall publish a notice in a newspaper of general circulation in each affected locality stating that the preliminary identification has been made and stating where information delineating the Lake Erie coastal erosion areas may be inspected by the public and shall notify each landowner of record in a coastal erosion area of the preliminary identification. The notification shall be sent by certified mail to the landowner at the address indicated in the most recent tax duplicate. Within sixty days after the notifications required by this division, the director shall hold public hearings in each of the shoreline counties on the preliminary identification of the Lake Erie coastal erosion areas. Any affected municipal corporation, county, township, or private landowner may file with the director a written objection to the preliminary identification at any of those hearings or at any other time within one hundred twenty days from the date indicated in the certified mail notice, which date shall be one week following the date of the notice. For any such objection, verifiable evidence or documentation shall be submitted indicating that some portion of a Lake Erie coastal erosion area should not have been included in the areas defined by the preliminary identification. A municipal corporation, county, or township may object only with respect to territory within its jurisdiction or other territory that it owns; a private landowner may object only with respect to the landowner's land.

(B) The director shall review all objections filed under division (A) of this section. The director may

then modify the preliminary identification of Lake Erie coastal erosion areas. Within the next ninety days, the director shall notify each objecting person of the director's decision regarding the objection. The director also shall notify, within that ninety-day period, any other owner for whom the director's decision results in a modification on that other owner's property.

(C) Whenever the preliminary identification of a Lake Erie coastal erosion area is modified as a result of an objection, the director shall so notify the affected municipal corporation, county, or township and shall publish a notice of the modification in a newspaper of general circulation in the affected locality. Objections to modifications may be filed within sixty days of the newspaper notification required by this division or within sixty days of the date of the property owner's notification required by division (B) of this section, whichever is later, and shall be filed in the same manner as objections to the original preliminary identification. The director shall rule on each objection to a modification within sixty days after receiving it.

(D) After the director has ruled on each objection filed under division (B) or (C) of this section, the director shall make a final identification of the Lake Erie coastal erosion areas and shall notify by certified mail the appropriate authority of each affected municipal corporation, county, and township of the final identification. The final identification may be appealed under section

1506.08 of the Revised Code.

(E) At least once every ten years, the director shall review and may revise the identification of Lake Erie coastal erosion areas, taking into account any recent natural or artificially induced changes affecting anticipated recession. The review and revision shall be done in the same manner as that provided for original preliminary and final identification in this section.

(F) Any person who has received written notice under this section or section 5302.30 of the Revised Code that a parcel or any portion of a parcel of real property that the person owns has been included in a Lake Erie coastal erosion area identified under this section shall not sell or transfer any interest in that real property unless the person first provides written notice to the purchaser or grantee that the real property is included in a Lake Erie coastal erosion area. The written notice shall be provided in accordance with section 5302.30 of the Revised Code.

(G) No state agency, county, township, or municipal corporation, or any other political subdivision or special district in this state established by law shall use the fact that property has been identified as a Lake Erie coastal erosion area as a basis for any of the following:

- (1) Failing to enter into or renew a lease or to issue or renew a permit under section 1506.11 of the Revised Code;
- (2) Failing to issue or renew a permit required

by law, other than a permit issued under section 1506.07 of the Revised Code;

- (3) Taking private property for public use in the exercise of the power of eminent domain;  
Determining what constitutes just compensation for a taking of the property in the exercise of the power of eminent domain.

Ohio Revised Code  
Section 1506.08 Appeals.

Effective: May 8, 1996

Legislation: House Bill 119 - 121st General Assembly

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**Ohio Revised Code, 1506.08, Appeals**

Any person who is adversely affected by the final identification of a Lake Erie coastal erosion area under division (D) of section 1506.06 of the Revised Code or any other final administrative act of the director of natural resources under this chapter or who receives denial of a permit application under rules adopted under division (A) of section 1506.07 of the Revised Code, within thirty days after the identification, act, or denial, may appeal it in accordance with Chapter 119. of the Revised Code.

**Ohio Revised Code Section 119.12** Appeal by party adversely affected - notice - record - hearing - judgment.

Effective: October 3, 2023

Legislation: Senate Bill 21 (GA 135), House Bill 33 (GA 135)

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(A) Any party adversely affected by any order of an agency issued pursuant to an adjudication may appeal from the order of the agency to the court of common pleas of the county designated in division (B) of this section.

(B) An appeal from an order described in division (A) of this section shall be filed in the county designated as follows:

(1) Except as otherwise provided in division (B)(2) of this section, an appeal from an order of an agency issued pursuant to an adjudication denying an applicant admission to an examination, denying the issuance or renewal of a license or registration of a licensee, revoking or suspending a license, or allowing the payment of a forfeiture under section 4301.252 of the Revised Code shall be filed in the county in which the place of business of the licensee is located or the county in which the licensee is a resident.

(2) An appeal from an order issued by any of the following agencies shall be made to the court of common pleas of Franklin County or the court of common pleas in the county in which the place of

business of the licensee is located or the county in which the licensee is a resident:

- (a) The liquor control commission;
  - (b) The Ohio casino control commission;
  - (c) The state medical board;
  - (d) The state chiropractic board;
  - (e) The board of nursing;
  - (f) he bureau of workers' compensation regarding participation in the health partnership program created in sections 4121.44 and 4121.441 of the Revised Code.
- (3) Appeals from orders of the fire marshal issued under Chapter 3737. of the Revised Code shall be to the court of common pleas of the county in which the building of the aggrieved person is located.
- (4) Appeals under division (B) of section 124.34 of the Revised Code from a decision of the state personnel board of review or a municipal or civil service township civil service commission shall be taken to the court of common pleas of the county in which the appointing authority is located or, in the case of an appeal by the department of

rehabilitation and correction, to the court of common pleas of Franklin County.

(5) If any party appealing from an order described in division (B)(1), (2), or (6) of this section is not a resident of and has no place of business in this state, the party shall appeal to the court of common pleas of Franklin County.

(6) Any party adversely affected by any order of an agency issued pursuant to any other adjudication may appeal to the court of common pleas of Franklin County or the court of common pleas of the county in which the business of the party is located or in which the party is a resident.

(C) This section does not apply to appeals from the department of taxation.

(D) Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and stating that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal may, but need not, set forth the specific grounds of the party's appeal beyond the statement that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal shall also be filed by the appellant with the court. In filing a notice of appeal with the agency or court, the notice that is filed may be either the original notice or a copy of the original notice. Unless otherwise provided by



law relating to a particular agency, notices of appeal shall be filed within fifteen days after the service of the notice of the agency's order as provided in section 119.05 of the Revised Code. For purposes of this paragraph, an order includes a determination appealed pursuant to division (C) of section 119.092 of the Revised Code. The amendments made to this paragraph by Sub. H.B. 215 of the 128th general assembly are procedural, and this paragraph as amended by those amendments shall be applied retrospectively to all appeals pursuant to this paragraph filed before September 13, 2010, but not earlier than May 7, 2009, which was the date the supreme court of Ohio released its opinion and judgment in *Medcorp, Inc. v. Ohio Dep't. of Job and Family Servs.* (2009), 121 Ohio St.3d 622.

(E) The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. If it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal, the court may grant a suspension and fix its terms. If an appeal is taken from the judgment of the court and the court has previously granted a suspension of the agency's order as provided in this section, the suspension of the agency's order shall not be vacated and shall be given full force and effect until the matter is finally adjudicated. No renewal of a license or permit shall be denied by reason of the suspended order during the period of the appeal from the decision of the court of common pleas. In the case of an appeal from the Ohio casino control commission, the state medical board, or the state chiropractic board, the court may grant a suspension and fix its terms if it

appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal and the health, safety, and welfare of the public will not be threatened by suspension of the order. This provision shall not be construed to limit the factors the court may consider in determining whether to suspend an order of any other agency pending determination of an appeal.

(F) The final order of adjudication may apply to any renewal of a license or permit which has been granted during the period of the appeal.

(G) Notwithstanding any other provision of this section, any order issued by a court of common pleas or a court of appeals suspending the effect of an order of the liquor control commission issued pursuant to Chapter 4301. or 4303. of the Revised Code that suspends, revokes, or cancels a permit issued under Chapter 4303. of the Revised Code or that allows the payment of a forfeiture under section 4301.252 of the Revised Code shall terminate not more than six months after the date of the filing of the record of the liquor control commission with the clerk of the court of common pleas and shall not be extended. The court of common pleas, or the court of appeals on appeal, shall render a judgment in that matter within six months after the date of the filing of the record of the liquor control commission with the clerk of the court of common pleas. A court of appeals shall not issue an order suspending the effect of an order of the liquor control commission that extends beyond

six months after the date on which the record of the liquor control commission is filed with a court of common pleas.

(H) Notwithstanding any other provision of this section, any order issued by a court of common pleas or a court of appeals suspending the effect of an order of the Ohio casino control commission issued under Chapter 3772. of the Revised Code that limits, conditions, restricts, suspends, revokes, denies, not renews, fines, or otherwise penalizes an applicant, licensee, or person excluded or ejected from a casino facility in accordance with section 3772.031 of the Revised Code shall terminate not more than six months after the date of the filing of the record of the Ohio casino control commission with the clerk of the court of common pleas and shall not be extended. The court of common pleas, or the court of appeals on appeal, shall render a judgment in that matter within six months after the date of the filing of the record of the Ohio casino control commission with the clerk of the court of common pleas. A court of appeals shall not issue an order suspending the effect of an order of the Ohio casino control commission that extends beyond six months after the date on which the record of the Ohio casino control commission is filed with the clerk of a court of common pleas.

(I) Notwithstanding any other provision of this section, any order issued by a court of common pleas suspending the effect of an order of the state medical board or state chiropractic board that limits, revokes, suspends, places on probation, or

refuses to register or reinstate a certificate issued by the board or reprimands the holder of the certificate shall terminate not more than fifteen months after the date of the filing of a notice of appeal in the court of common pleas, or upon the rendering of a final decision or order in the appeal by the court of common pleas, whichever occurs first.

(J) Within thirty days after receipt of a notice of appeal from an order in any case in which a hearing is required by sections 119.01 to 119.13 of the Revised Code, the agency shall prepare and certify to the court a complete record of the proceedings in the case. Failure of the agency to comply within the time allowed, upon motion, shall cause the court to enter a finding in favor of the party adversely affected. Additional time, however, may be granted by the court, not to exceed thirty days, when it is shown that the agency has made substantial effort to comply. The record shall be prepared and transcribed, and the expense of it shall be taxed as a part of the costs on the appeal. The appellant shall provide security for costs satisfactory to the court of common pleas. Upon demand by any interested party, the agency shall furnish at the cost of the party requesting it a copy of the stenographic report of testimony offered and evidence submitted at any hearing and a copy of the complete record.

(K) Notwithstanding any other provision of this section, any party desiring to appeal an order or decision of the state personnel board of review shall, at the time of filing a notice of appeal with the board, provide a security deposit in an amount and manner prescribed in rules that the board

shall adopt in accordance with this chapter. In addition, the board is not required to prepare or transcribe the record of any of its proceedings unless the appellant has provided the deposit described above. The failure of the board to prepare or transcribe a record for an appellant who has not provided a security deposit shall not cause a court to enter a finding adverse to the board.

(L) Unless otherwise provided by law, in the hearing of the appeal, the court is confined to the record as certified to it by the agency. Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that the additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency.

(M) The court shall conduct a hearing on the appeal and shall give preference to all proceedings under sections 119.01 to 119.13 of the Revised Code, over all other civil cases, irrespective of the position of the proceedings on the calendar of the court. An appeal from an order of the state medical board issued pursuant to division (G) of either section 4730.25 or 4731.22 of the Revised Code, the state chiropractic board issued pursuant to section 4734.37 of the Revised Code, the liquor control commission issued pursuant to Chapter 4301. or 4303. of the Revised Code, or the Ohio casino control commission issued pursuant to Chapter 3772. of the Revised Code shall be set down for hearing at the earliest possible time and takes

precedence over all other actions. The hearing in the court of common pleas shall proceed as in the trial of a civil action, and the court shall determine the rights of the parties in accordance with the laws applicable to a civil action. At the hearing, counsel may be heard on oral argument, briefs may be submitted, and evidence may be introduced if the court has granted a request for the presentation of additional evidence.

(N) The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. The court shall award compensation for fees in accordance with section 2335.39 of the Revised Code to a prevailing party, other than an agency, in an appeal filed pursuant to this section.

(O) The judgment of the court shall be final and conclusive unless reversed, vacated, or modified on appeal. These appeals may be taken either by the party or the agency, shall proceed as in the case of appeals in civil actions, and shall be pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code. An appeal by the agency shall be taken on questions of law relating to the

constitutionality, construction, or interpretation of statutes and rules of the agency, and, in the appeal, the court may also review and determine the correctness of the judgment of the court of common pleas that the order of the agency is not supported by any reliable, probative, and substantial evidence in the entire record.

The court shall certify its judgment to the agency or take any other action necessary to give its judgment effect.

**Ohio Revised Code Section 1506.09** Violations -  
injunction - civil penalty.

Effective: March 15, 1989

Legislation: Senate Bill 70 - 117th General Assembly

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(A)(1) No person shall violate or fail to comply with any provision of this chapter, any rule or order adopted or issued under it, or any condition of a permit issued in accordance with rules, resolutions, or ordinances adopted under it.

(2) The attorney general, upon written request of the director of natural resources, shall bring an action for an injunction against any person who has violated, is violating, or is threatening to violate division (A)(1) of this section.

(3) Any person who violates any provision of this chapter, any rule or order adopted or issued under it, or any condition of a permit issued in accordance with rules adopted under division (A) of section 1506.07 of the Revised Code shall, in addition to any fine that may be assessed under section 1506.99 of the Revised Code, be assessed a civil penalty of not more than five thousand dollars for each offense to be paid into the state treasury to the credit of the general revenue fund. Upon written request of the director, the attorney general shall commence an action against any such violator. Any action under this division is a civil action, governed by the Rules of Civil Procedure and other rules of practice and procedure applicable to civil actions.



(B) The prosecuting attorney of a county or the city director of law of a municipal corporation that has adopted a resolution or ordinance in accordance with division (D) of section 1506.07 of the Revised Code may, on behalf of that county or municipal corporation, respectively, bring a civil action against any person who violates that resolution or ordinance within the territory of that county or municipal corporation in the court of common pleas in the county in which the violation occurred. Any such violator may, in addition to any fine that may be assessed under section 1506.99 of the Revised Code, be assessed a civil penalty of not more than five thousand dollars for each offense together with court costs. Any moneys recovered under this division shall be paid into the treasury of the appropriate county or municipal corporation. Any action under this division shall be governed by the Rules of Civil Procedure and other rules of practice and procedure applicable to civil actions.

**Ohio Revised Code Section 1506.99** Penalty.

Effective: September 29, 2007

Legislation: House Bill 119 - 127th General Assembly

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(A) Whoever violates division (A) of section 1506.09 of the Revised Code shall be fined not less than one hundred nor more than five hundred dollars for each offense.

(B) Whoever violates division (K) of section 1506.32 of the Revised Code is guilty of a misdemeanor of the third degree.

Whoever violates sections 1506.38 to 1506.48 of the Revised Code shall be fined not less than one hundred dollars nor more than five hundred dollars for each offense. Each day of violation constitutes a separate offense.

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**Ohio Revised Code Section 1506.02** Designating department of natural resources as lead agency for development and implementation of coastal management program.

Effective: March 18, 1999

Legislation: Senate Bill 187 - 122nd General Assembly

(A) The department of natural resources is hereby designated the lead agency for the development and implementation of a coastal management program. The director of natural resources:

(1) Shall develop and adopt the coastal management program document. The director shall cooperate and coordinate with other agencies of the state and its political subdivisions in the development of the document. Before adopting the document, the director shall hold four public hearings on it in the coastal area, and may hold additional public meetings, to give the public the opportunity to make comments and recommendations concerning its terms. The director shall consider the public comments and recommendations before adopting the document. The director may amend the coastal management program document, provided that, prior to making changes in it, the director notifies by mail those persons who submitted comments and recommendations concerning the original document and appropriate agencies of the state and its political subdivisions. The director may hold at least one public hearing on the proposed changes.

(2) Shall administer the coastal management program in accordance with the coastal management program document, this chapter, and rules adopted

under it;

(3) Shall adopt and may amend or rescind rules under Chapter 119. of the Revised Code for the implementation, administration, and enforcement of the coastal management program and the other provisions of this chapter. Before the adoption, amendment, or rescission of rules under division (A)(3) of this section, the director shall do all of the following:

(a) Maintain a list of interested public and private organizations and mail notice to those organizations of any proposed rule or amendment to or rescission of a rule at least thirty days before any public hearing on the proposal;

(b) Mail a copy of each proposed rule, amendment, or rescission to any person who requests a copy within five days after receipt of the request;

(c) Consult with appropriate statewide organizations and units of local government that would be affected by the proposed rule, amendment, or rescission. Although the director is expected to discharge these duties diligently, failure to mail any notice or copy or to so consult with any person is not jurisdictional and shall not be construed to invalidate any proceeding or action of the director.

(4) Shall provide for consultation and coordination between and among state agencies, political subdivisions of the state, and interstate, regional, areawide, and federal agencies in carrying out the purposes of the coastal management program and the other provisions of this chapter;

(5) Shall, to the extent practicable and consistent with the protection of coastal area resources, coordinate the rules and policies of the department of natural resources with the rules and

policies of other state and federal agencies to simplify and consolidate the regulation of activities along the Lake Erie shoreline;

(6) May, to accomplish the purposes of the coastal management program and the other provisions of this chapter, contract with any person and may accept and expend gifts, bequests, and grants of money or property from any person.

(B) Every agency of the state, upon request of the director, shall cooperate with the department of natural resources in the implementation of the coastal management program.

(C) The director shall establish a coastal management assistance grant program. Grants may be awarded from federal funds received for that purpose and from such other funds as may be provided by law to any municipal corporation, county, township, park district created under section 511.18 or 1545.04 of the Revised Code, conservancy district established under Chapter 6101. of the Revised Code, port authority, other political subdivision, state agency, educational institution, or nonprofit corporation to help implement, administer, or enforce any aspect of the coastal management program. Grants may be used for any of the following purposes:

(1) Feasibility studies and engineering reports for projects that are consistent with the policies in the coastal management program document;

(2) The protection and preservation of wetlands, beaches, fish and wildlife habitats, minerals, natural areas, prime agricultural land, endangered plant and animal species, or other

significant natural coastal resources;

(3) The management of shoreline development to prevent loss of life and property in coastal flood hazard areas and coastal erosion areas, to set priorities for water-dependent energy, commercial, industrial, agricultural, and recreational uses, or to identify environmentally acceptable sites for dredge spoil disposal;

(4) Increasing public access to Lake Erie and other public places in the coastal area;

(5) The protection and preservation of historical, cultural, or aesthetic coastal resources;

(6) Improving the predictability and efficiency of governmental decision making related to coastal area management;

(7) Adopting, administering, and enforcing zoning ordinances or resolutions relating to coastal flood hazard areas or coastal erosion areas;

(8) The redevelopment of deteriorating and underutilized waterfronts and ports;

(9) Other purposes approved by the director.

**Ohio Revised Code Section 1.47** Presumptions in enactment of statutes.

Effective: January 3, 1972

Legislation: House

Bill 607 - 109th

General Assembly

In enacting a statute it is presumed that:

- (A) Compliance with the constitutions of the state and of the United States is intended;
- (B) The entire statute is intended to be effective;
- (C) A just and reasonable result is intended;
- (D) A result feasible of execution is intended.

## APPENDIX G

### **Ohio Administrative Code Rule 1501-6-11**

Determination of annual recession rates.

Effective: June 14, 1996

The process of determining annual recession rates shall include preparation of recession-line base maps, measurement of recession distances on the recession-line maps, and calculation of annual recession rates.

(A) Recession-line maps shall be prepared using the following procedure.

(1) Base maps shall be constructed using the most currently available imagery. Types of base-map imagery may include, but are not limited to, aerial photographs, remote sensing imagery, digital data, or some combination thereof. Criteria used to select base-map imagery shall include, but are not limited to, complete synoptic coverage of the Ohio shore where the shore is centrally located on the images, adequate geographic reference points, and resolution that is adequate to map a base recession line and identify cultural and physiographic features on the imagery.

(2) The resulting base maps shall be produced at a nominal scale of one inch equal to two hundred feet; the scale of the base maps shall be verified with field measurements not less than five hundred feet in length, and the true scale in feet shall be noted on each individual base map.

(3) A base recession line shall be mapped on the



recession-line base maps as described in paragraph (R) of rule 1501-6-10 of the Administrative Code.

(4) Historical imagery used to prepare recession-line maps shall be selected from charts, aerial photographs, or other imagery of the shore which are on file at the department of natural resources, division of geological survey. Criteria used to select this imagery for recession-line mapping shall include but are not limited to those criteria listed in paragraph (A)(1) of this rule. Imagery shall be acquired within a time period of not less than ten years nor greater than thirty years prior to the year that the base-map imagery was acquired.

(5) Recession lines from charts, aerial photographs, or other imagery shall be projected or digitally transferred onto the base maps.

(B) Recession distances shall be measured at points uniformly spaced along the base recession line. The recession distance at each point shall be measured from the base recession line along a transect oriented at a right angle to the general trend of the base recession line (figure 1). Each transect shall be uniquely identified and the measured recession distance shall be recorded and used to calculate the annual recession rate.

For each transect, the annual recession rate in feet per year shall be calculated by dividing the measured recession distance by the time period in years between the recession lines. The minimum annual recession rate shall be zero feet per year.

**Ohio Administrative Code Rule 1501-6-23** Permit application procedure.

Effective: August 1, 1997

(A) A person seeking to obtain a permit to erect, construct, or redevelop a permanent structure which lies or will lie, in whole or in part, on any land within a lake Erie coastal erosion area is required to file an application, accompanied by necessary supporting information, in accordance with rules 1501-6-21 to 1501-6-28 of the Administrative Code. The application shall be on a form as specified by the director, copies of which may be obtained from the department. In addition to the information to be supplied on the application form, the applicant shall also submit the supporting information described in paragraph (B) or (C) of this rule.

(B) For a proposed permanent structure protected or to be protected by an erosion control measure, the application shall include the following:

(1) A general description of the proposed permanent structure identifying its purpose; and

(2) A map of the project site that clearly shows the location of the proposed permanent structure with respect to the Lake Erie shoreline; property lines; county, township, and municipal corporation boundary lines; and state, county and local roads. A United States geological survey (USGS) seven and one-half minute topographic map or portion thereof will generally meet this requirement; and

(3) A proposed schedule of construction. The

schedule shall demonstrate that the erosion control measures will be constructed prior to or concurrent with the erection, construction, or redevelopment of the permanent structure; and

(4) Other pertinent information as may reasonably be determined necessary by the department to fully evaluate the application.

(C) For a proposed permanent structure when the applicant requests a permit due to exceptional hardship as described in paragraph (C)(2) of rule 1501-6-24 of the Administrative Code, the application shall include the following supporting information:

(1) The information described in paragraphs (B)(1) and (B)(2) of this rule; and

(2) Documentation that the permanent structure will be movable or will be situated as far landward as applicable zoning resolutions or ordinances permit; and

(3) Explanation of the exceptional hardship that the person seeking the authorization will suffer, if the authorization is not given.

(D) The thirty-day review period specified in paragraph (B) of rule 1501-6-24 of the Administrative Code will begin on the date the department receives a completed application and all required supporting information. Within seven working days of receipt of the application, the department shall notify the applicant, in writing, indicating the starting date for

the thirty-day review period (which date shall be, as stated above, the date of receipt of the application) if the application is complete. If the application is incomplete, the department shall identify deficiencies in the application which must be corrected before the application will be considered complete. If additional information is requested, the thirty-day review period will begin on the date it is received by the department.

If, during the thirty-day review period specified in paragraph (B) rule 1501-6-24 of the Administrative Code, the application is found to be inaccurate or additional information from the applicant is necessary to adequately evaluate the project, the applicant shall be notified, in writing, of the inaccuracy or additional information required. Review of the application will cease pending receipt of the necessary changes or additional information from the applicant. Upon receipt of the requested changes or additional information from the applicant, a new thirty-day review period will commence. If either the necessary changes or additional information is not provided within sixty days of the date the department requested it, review of the application will be terminated, the department shall return the application, and a new application shall be required for renewed consideration.

**Ohio Administrative Code Rule 1501-6-21**  
Definitions.

Effective: August 1, 1997

The following definitions shall apply to the terms used in rules 1501-6-21 to 1501-6-28 of the Administrative Code.

(A) "Applicant" means the owner of the property to be improved or an authorized agent for said property owner.

(B) "Application" means the signed and completed application form and all supporting information required to be submitted to apply for a permit to erect, construct, or redevelop a permanent structure in a Lake Erie coastal erosion area pursuant to section 1506.07 of the Revised Code.

(C) "Coastal erosion area" means those land areas along Lake Erie anticipated to be lost due to lake Erie-related erosion within a thirty-year period if no additional approved erosion control measures are completed within that time, as defined in rule 1501-6-10 of the Administrative Code.

(D) "Construct" means to build, form, or assemble a new permanent structure.

(E) "Department" means the department of natural resources.

(F) "Director" means the director of the department of natural resources, or the director's designee.

(G) "Erect" means construct.

(H) "Erosion control measure" means a structure or actions specifically designed to reduce or control Lake Erie-related erosion of the shore. Examples include, but are not limited to, groins, jetties, dikes, seawalls, revetments, bulkheads, breakwaters and artificially nourished sand and/or gravel beaches.

(I) "Existing structure" means a permanent structure which existed or upon which construction had begun prior to the effective date of enforcement of these rules as described in paragraph (C) of rule

1501-6-22 of the Administrative Code.

(J) "Movable structure" means a permanent structure designed, sited, and constructed to be readily relocated at minimum cost and with minimum disruption of its intended use. Access to and from the site shall be of sufficient width and acceptable grade to permit the structure to be relocated. Mobile homes and structures built of above-ground stud wall construction on skids or on piling, or on basement or crawl space foundations are examples of movable structures. Septic systems and structures with above-ground walls of masonry, concrete, or related materials are not movable structures.

(K) "Permanent structure" means any residential, commercial, industrial, institutional, or agricultural building, any manufactured home as defined in section 4501.01 of the Revised Code, and any septic system that receives sewage from a single-family,

two-family, or three-family dwelling, but does not include any recreational vehicle as defined in section 4501.01 of the Revised Code. An addition to any existing residential, commercial, industrial, institutional, or agricultural building, or any manufactured home, will be considered a permanent structure if the ground level area of the addition is greater than or equal to 500 square feet.

An appurtenant structure to any residential, commercial, industrial, institutional, or agricultural building, or any manufactured home, that is not integral to the building's structure, such as a patio or deck, will not be considered a permanent structure. Stand-alone, uninhabitable, structures such as gazebos, picnic shelters, garages and storage or tool sheds will not be considered permanent structures.

(L) "Permit" means a form signed by the director authorizing a person to erect, construct, or redevelop a permanent structure which lies or will lie, in whole or in part, on land within a lake Erie coastal erosion area.

(M) "Person" means any agency of this state, any political subdivision of this state or of the United States, and any legal entity defined as a person under section 1.59 of the Revised Code.

(N) "Redevelop" means to remove and replace an entire existing permanent structure, or to build a new permanent structure on an existing foundation.