

**OPINION NO. 2000-047****Syllabus:**

1. The public trust doctrine does not prohibit the State of Ohio from conveying to a port authority *jus privatum* title to lands within the territorial boundaries of Lake Erie if the conveyance is authorized by the General Assembly through specific legislation, advances public trust purposes, and does not substantially impair the public's use of the remaining public trust lands or waters. However, the state may not convey to a port authority the *jus publicum* title to such lands.

2. Article II of the Ohio Constitution does not prohibit the General Assembly from enacting legislation that authorizes the State of Ohio to convey to a port authority *jus privatum* title to lands within the territorial boundaries of Lake Erie.
3. In light of *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892), the General Assembly may repeal legislation that authorizes the State of Ohio to convey to a port authority *jus privatum* title to lands within the territorial boundaries of Lake Erie.

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**To: Julia R. Bates, Lucas County Prosecuting Attorney, Toledo, Ohio**  
**By: Betty D. Montgomery, Attorney General, December 29, 2000**

You have requested an opinion concerning the authority of the State of Ohio to convey title to land within the territorial boundaries of Lake Erie. By way of background, you explain that in 1967 the General Assembly authorized and directed the Governor, Auditor of State, and Secretary of State to convey, by quit-claim deed, title to approximately thirty-one hundred acres of submerged and filled lands in Maumee Bay to the Toledo-Lucas County Port Authority.<sup>1</sup> 1967-1968 Ohio Laws, Part II-III, 2248 (Am. S.B. 263, eff. Oct. 31, 1967). In accordance with Am. S.B. 263, the Governor executed a deed in the name of the State of Ohio conveying all of the state's rights, title, and interest in this parcel to the port authority, its successors and assigns forever.

Because the Lucas County Board of Commissioners is currently reviewing proposals regarding the development of this parcel, the board wishes to ascertain the validity of the deed conveying all of the state's rights, title, and interest in this parcel to the port authority. Your request presents the following questions:

1. Does the public trust doctrine prohibit the State of Ohio from conveying to a port authority title to lands within the territorial boundaries of Lake Erie?
2. Does Article II of the Ohio Constitution prohibit the General Assembly from enacting legislation that authorizes the State of Ohio to convey to a port authority title to lands within the territorial boundaries of Lake Erie?
3. In light of *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892), may the General Assembly repeal legislation that authorizes the State of

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<sup>1</sup>Because the term "Lake Erie" commonly refers to the main waters of the lake and all harbors and bays connected thereto, see *Hogg v. Beerman*, 41 Ohio St. 81, 98 (1884), Maumee Bay is part of Lake Erie. *City of Toledo v. Kilburn*, 71 Ohio Misc. 2d 40, 45, 654 N.E.2d 202, 205 (Toledo Mun. Ct. 1995); 1977 Op. Att'y Gen. No. 77-096. See generally R.C. 1.42 (words and phrases in statutes are to be construed according to their common usage unless such words and phrases have acquired a technical or particular meaning by legislative definition or otherwise); *Thomas v. Sanders*, 65 Ohio App. 2d 5, 10, 413 N.E.2d 1224, 1228-29 (Erie County 1979) ("Sandusky Bay is connected to and an inseparable part of the navigable waters of the Great Lakes and, therefore, is a part of Lake Erie").

Ohio to convey to a port authority title to lands within the territorial boundaries of Lake Erie?

In order to answer your questions we must first examine the provisions of law governing ownership of the lands within the territorial boundaries of Lake Erie. Pursuant to 43 U.S.C.S. § 1311(a) (1995), the United States relinquished any title or ownership of the lands beneath navigable waters which it held and vested such title and ownership in the states or the persons who were on June 5, 1950, entitled thereto under the law of the respective states in which the land is located, and the respective grantees, lessees or successors in interest thereof.<sup>2</sup> 1993 Op. Att'y Gen. No. 93-025 at 2-133. 43 U.S.C.S. § 1311(a) thus reaffirms the longstanding precedent that lands under navigable waters, such as Lake Erie, are within the public trust that was given to the states when they were granted statehood. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-78 (1977); see *State v. Cleveland & Pittsburgh R.R. Co.*, 94 Ohio St. 61, 113 N.E. 677 (1916). See generally 43 U.S.C.S. § 1301(a) (1995) (the term "lands beneath navigable waters" means, *inter alia*, "all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union ... up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction"). Moreover, "state law determines the proper beneficiary of the grant of land under [43 U.S.C.S. § 1311]." *California ex rel. State Lands Comm. v. United States*, 457 U.S. 273, 288 (1982), *reh'g denied*, 458 U.S. 1131 (1982); accord 1993 Op. Att'y Gen. No. 93-025 at 2-133; see *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988), *reh'g denied*, 486 U.S. 1018 (1988).

In Ohio the state holds title to land under the waters of Lake Erie within the boundaries of the state and to all land beyond the natural shoreline that was previously covered by the waters of Lake Erie and is now covered by artificial fill.<sup>3</sup> R.C. 1506.10; *State ex rel. Squire v. Cleveland*, 150 Ohio St. 303, 82 N.E.2d 709 (1948); *State v. Cleveland & Pittsburgh R.R. Co.* (syllabus, paragraph three); 1993 Op. Att'y Gen. No. 93-025 at 2-133; 1929 Op. Att'y Gen. No. 445, vol. I, p. 659 (syllabus, paragraph one). R.C. 1506.10 provides, in part, as follows:<sup>4</sup>

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<sup>2</sup>43 U.S.C.S. § 1311(a) (1995) provides in relevant part:

It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States ... be ... recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof[.]

<sup>3</sup>The Ohio Supreme Court has acknowledged that, prior to the admission of the State of Ohio to the Union, the United States conveyed to private owners title to parcels within the territorial boundaries of Lake Erie. See *Hogg v. Beerman*; see also 43 U.S.C.S. § 1311(a). In such instances, the court has recognized the private owner's proprietary title to the land, subject to the public rights of navigation and fishery. *Hogg v. Beerman*.

<sup>4</sup>R.C. 1506.10 was originally enacted as G.C. 3699-a. 1917 Ohio Laws 587 (Am. H.B. 255, approved Mar. 30, 1917). G.C. 3699-a was recodified as R.C. 123.03 in 1953-1954 Ohio Laws 7 (Am. H.B. 1, eff. Oct. 1, 1953), and subsequently renumbered as R.C. 1506.10 in 1987-1988 Ohio Laws, Part I, 135 (Am. Sub. S.B. 70, eff. Mar. 15, 1989). The provisions of R.C. 1506.10 are substantially similar to the provisions of former G.C. 3699-a.

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.

The State of Ohio thus “is the beneficiary of the grant pursuant to 43 U.S.C.S. § 1311 of ‘lands beneath navigable waters’ that lie beneath the water of Lake Erie and ‘all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters[.]’” 1993 Op. Att’y Gen. No. 93-025 at 2-133 (citations omitted). The State of Ohio, however, holds title to these lands in trust for the people of the state. R.C. 1506.10; *State v. Cleveland & Pittsburgh R.R. Co.*; 1929 Op. Att’y Gen. No. 445, vol. I, p. 659 (syllabus, paragraph one). Accordingly, pursuant to R.C. 1506.10, lands within the territorial boundaries of Lake Erie are public trust lands. See *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 435 (1892).

Let us now turn to the first question, which asks whether the public trust doctrine prohibits the State of Ohio from conveying to a port authority title to land within the territorial boundaries of Lake Erie. The public trust doctrine provides that public trust lands in a state are held by the state in trust for the benefit of all of the people, and establishes the right of the public to fully enjoy public trust lands for a wide variety of recognized public uses. *State v. Cleveland & Pittsburgh R.R. Co.* (syllabus, paragraph three); Coastal States Org., Inc., *Putting the Public Trust Doctrine to Work* 3 (2d ed. 1997); see *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. at 452-60. Insofar as the lands within the territorial boundaries of Lake Erie are public trust lands, R.C. 1506.10, the State of Ohio has the authority and responsibility for applying the public trust doctrine to these lands according to its own views of justice and sound public policy.<sup>5</sup> *Putting the Public Trust Doctrine to Work* at 3.

Under the public trust doctrine, title to public trust lands is not a singular title in the manner of most other real estate titles. As stated in *Putting the Public Trust Doctrine to Work* at 6:

[P]ublic trust land is vested with two titles, one dominant and the other subservient, a concept necessary to understand in order to apply the Public Trust Doctrine. The dominant title is the *jus publicum*, simply described as the bundle of trust rights of the public to fully use and enjoy trust lands and waters for commerce, navigation, fishing, bathing and other related public purposes. The subservient title is the *jus privatum*, or the private proprietary rights in the use and possession of trust lands. The distinction between the two titles is often cited by the courts when they define a State’s authority to

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<sup>5</sup>There is no single public trust doctrine; instead, “there are over fifty different applications of the doctrine, one for each State, Territory or Commonwealth, as well as the federal government.” Coastal States Org., Inc., *Putting the Public Trust Doctrine to Work* 3 (2d ed. 1997). There remains, however, a common core of principles that forms the foundation for how the doctrine is applied in each State, Commonwealth or Territory. *Id.*

convey public trust land to private ownership, and when describing the rights of the public remaining in public trust land that has been so conveyed.

*See Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. at 452-60.

With respect to the conveyance of title to public trust lands into private ownership, it is well settled that states have the power and authority to convey the *jus privatum* title to public trust lands into private ownership,<sup>6</sup> but may not convey or alienate the *jus publicum* title to such trust lands into private ownership. *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. at 452-60; *Putting the Public Trust Doctrine to Work* at 229-35; see *State ex rel. Squire v. Cleveland*; *State v. Cleveland & Pittsburgh R.R. Co.* See generally 1929 Op. Att'y Gen. No. 445, vol. I, p. 659, at 663 ("I doubt very much whether the State of Ohio can authorize the conveyance of even a limited parcel of land to a private person or corporation, so as to preclude the state from its power to regulate navigation or other public needs with respect to the use of the parcel of land so granted"). A state's power and authority to convey the *jus privatum* title to public trust lands into private ownership is not plenary, however. Under the public trust doctrine, any such conveyance must be authorized by the legislature through specific legislation, must advance public trust purposes, and must not substantially impair the public's use of the remaining public trust lands or waters. *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. at 452-56; *Putting the Public Trust Doctrine to Work* at 231-35, 277; see *Martin v. Waddell*, 41 U.S. 367, 410-11 (1842). See generally *Lemley v. Stevenson*, 104 Ohio App. 3d 126, 134-35, 661 N.E.2d 237, 243 (Erie County 1995) ("the state as trustee for the water and lands of Lake Erie can, through proper legislation, use the trust for the benefit of the public"), *appeal disallowed*, 74 Ohio St. 3d 1417, 655 N.E.2d 738 (1995).

When a state conveys the *jus privatum* title to public trust lands into private ownership, the state retains the *jus publicum* title to such trust lands. *Putting the Public Trust Doctrine to Work* at 237; see *Hogg v. Beerman*, 41 Ohio St. at 98. The *jus publicum* title is dominant to the *jus privatum* title. *Putting the Public Trust Doctrine to Work* at 6, 237-38. Because "the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit," *Phillips Petroleum v. Mississippi*, 484 U.S. at 475; accord *State v. Cleveland & Pittsburgh R.R. Co.* (syllabus, paragraph two), the scope of rights reserved to the public in public trust lands conveyed into private ownership varies from state to state. *Putting the Public Trust Doctrine to Work* at 238. See generally R.C. 1506.11 (authorizing the state to lease lands of Lake Erie).

In light of the foregoing, it is clear that the public trust doctrine does not prohibit the State of Ohio from conveying to a port authority *jus privatum* title to lands within the territorial boundaries of Lake Erie, provided the conveyance is authorized by the General Assembly through specific legislation, advances public trust purposes, and does not substantially impair the public's use of the remaining public trust lands or waters. However, the state may not convey to a port authority the *jus publicum* title to such lands.

The second question asks whether Article II of the Ohio Constitution prohibits the General Assembly from enacting legislation that authorizes the State of Ohio to convey to a port authority title to lands within the territorial boundaries of Lake Erie. As explained in your letter, Am. S.B. 263 authorized and directed the Governor, Auditor of State, and Secretary of State to convey, by quit-claim deed, title to approximately thirty-one hundred acres of land within the territorial boundaries of Lake Erie to the Toledo-Lucas County Port

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<sup>6</sup>"Nearly one-third of all public trust lands in the United States is privately owned." *Putting the Public Trust Doctrine to Work* at 230.

Authority. Based on the mandate in Am. S.B. 263, title to this land was conveyed from the State of Ohio to the port authority by way of a deed executed by the Governor of Ohio. It is now argued that the port authority has an infirm title to the land because the General Assembly exceeded the authority conferred upon it by Article II of the Ohio Constitution.

Article II of the Ohio Constitution vests the legislative power of the State of Ohio in the General Assembly. Ohio Const. art. II, § 1. This article, in general, sets forth provisions governing the organization and operation of the General Assembly and procedures for enacting laws and adopting amendments to the Ohio Constitution. A review of these provisions discloses that no provision therein prohibits the General Assembly from enacting legislation that permits the State of Ohio to convey to a port authority *jus privatum* title to lands within the territorial boundaries of Lake Erie. To the contrary, this article authorizes the General Assembly to enact laws for the welfare of the citizens of Ohio. See Ohio Const. art. II, § 1. Because lands within the territorial boundaries of Lake Erie are held in trust for the people of Ohio, "any act of legislation concerning their use affects the public welfare." *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. at 459. Article II of the Ohio Constitution thus permits the General Assembly to enact legislation related to the administration and management of the lands within the territorial boundaries of Lake Erie. See generally *State ex rel. Squire v. Cleveland* (syllabus, paragraph two) (the state may regulate its use of the subaqueous soil of Lake Erie); *State v. Cleveland & Pittsburgh R.R. Co.* (syllabus, paragraph four) ("[t]he state has control of a harbor within a harbor line and may enact legislation prescribing regulations in connection therewith and to secure the rights of the public, provided it does not conflict with the regulations of the federal government").

Finally, an enactment of the General Assembly is to be presumed constitutional, absent a decision by a court of law reaching a contrary holding. R.C. 1.47(A); *State ex rel. Herman v. Klopfleisch*, 72 Ohio St. 3d 581, 587, 651 N.E.2d 995, 999 (1995); *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955) (syllabus, paragraph one). We employ that presumption with respect to Am. S.B. 263, for it does not appear that any Ohio court has ever made a determination regarding the constitutionality of that legislation. Accordingly, in answer to the second question, it is our opinion that Article II of the Ohio Constitution does not prohibit the General Assembly from enacting legislation that authorizes the State of Ohio to convey to a port authority *jus privatum* title to lands within the territorial boundaries of Lake Erie.

The final question asks whether, in light of *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892), the General Assembly may repeal legislation that authorizes the State of Ohio to convey to a port authority title to lands within the territorial boundaries of Lake Erie. In order to facilitate a clear understanding of our answer to this question, let us first review the factual circumstances that were before the United States Supreme Court in that case, and the analysis the Court employed in support of its holdings.

In *Illinois Cent. R.R. Co. v. Illinois*, the Court determined that the legislature of the State of Illinois was authorized to repeal legislation that conveyed public trust lands in Lake Michigan to a railroad company. On April 16, 1869, the legislature of the State of Illinois granted to the Illinois Central Railroad Company title to certain submerged lands located beneath the waters of Lake Michigan. Four years later, on April 15, 1873, the legislature repealed the act that granted title to the submerged lands to the railroad company. The State of Illinois subsequently brought an action to establish its title to the submerged lands and the exclusive right to develop such lands.

The Court remarked initially that, upon being admitted to the Union, the State of Illinois was granted title to the lands under the waters of Lake Michigan. The Court described the character of the title held by the State of Illinois in these lands as

a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.

*Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. at 452.

The Court then determined that the conveyance of the State of Illinois' *jus privatum* title to public trust lands beneath the waters of Lake Michigan to private ownership did not extinguish any of the public's trust rights (the *jus publicum*) in such lands. *Id.* at 452-53. In this regard, the Court stated:

The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. *Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining....* The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace.... *So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.* (Emphasis added.)

*Id.* at 452-54.

Because the State of Illinois could not abdicate its responsibility for safeguarding the trust rights of the public in the land beneath the waters of Lake Michigan, the Court held further that:

Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time. Undoubtedly there may be expenses incurred in improvements made under such a grant which the State ought to pay; but, be that as it may, the power to resume the trust whenever the State judges best is, we think, incontrovertible....

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.... There can be no irrevocable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it.

*Id.* at 455, 460.

The Court in *Illinois Cent. R.R. Co. v. Illinois* thus established that, a state retains trust rights for the people of the state even when the state has conveyed the *jus privatum* title to public trust lands into private ownership. Moreover, since the public's trust rights in these lands may not be alienated, any legislation authorizing the conveyance of the state's *jus privatum* title to such lands to private owners may be repealed. Accordingly, in light of *Illinois Cent. R.R. Co. v. Illinois*, the General Assembly may repeal legislation that authorizes the State of Ohio to convey to a port authority *jus privatum* title to lands within the territorial boundaries of Lake Erie.

Application of the foregoing principles governing public trust lands to the situation set forth in your letter indicates that the General Assembly intended to convey to the Toledo-Lucas County Port Authority *jus privatum* title to the parcel described in Am. S.B. 263, while maintaining the public's trust rights (the *jus publicum*) to the parcel. The purpose of the conveyance, as expressed by the General Assembly, is as follows:

It is hereby determined that any filling of lands, formerly submerged by the waters of Lake Erie, within the boundaries of the parcels hereinafter described which has occurred to date, has not impaired the public right of navigation, water commerce, and fishery; that said parcels hereinafter described and authorized and directed to be conveyed can be filled, developed, and improved without impairment of the public right of navigation, water commerce, and fishery; and that they can be so filled and can be developed and improved with plants, factories, offices, and other structures and facilities for industry, commerce, distribution, and research which will utilize facilities of, or cause additional water borne cargo to move through, a port within the jurisdiction of the Toledo-Lucas County Port Authority and thereby conserve and further navigation and commerce upon the waters of Lake Erie and create jobs and employment opportunities and improve the economic welfare.

1967-1968 Ohio Laws, Part II-III, 2248 (Am. S.B. 263, eff. Oct. 31, 1967).

No language in Am. S.B. 263 expressly or by necessary implication evidences a clear legislative intent to terminate the public's trust rights in the parcel. Absent such evidence, we



are constrained to conclude that the General Assembly did not intend to terminate the public's trust rights in this parcel. *See generally Putting the Public Trust Doctrine to Work* at 241 (if a court can interpret a statute so as to retain the public's trust rights in navigable waters, "the statute should be so construed"). Because the public's trust rights in the parcel have not been terminated, the General Assembly may enact legislation that repeals the conveyance to the port authority of the state's *jus privatum* title to the parcel. *See Illinois Cent. R.R. Co. v. Illinois*. *See generally* 1929 Op. Att'y Gen. No. 445, vol. I, p. 659 (syllabus, paragraph three) ("[t]he State's title to lands now or formerly submerged cannot be effectively surrendered or alienated so as to preclude subsequent use by the state when necessary to carry out the continuing trust for the purpose of navigation and water commerce").

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. The public trust doctrine does not prohibit the State of Ohio from conveying to a port authority *jus privatum* title to lands within the territorial boundaries of Lake Erie if the conveyance is authorized by the General Assembly through specific legislation, advances public trust purposes, and does not substantially impair the public's use of the remaining public trust lands or waters. However, the state may not convey to a port authority the *jus publicum* title to such lands.
2. Article II of the Ohio Constitution does not prohibit the General Assembly from enacting legislation that authorizes the State of Ohio to convey to a port authority *jus privatum* title to lands within the territorial boundaries of Lake Erie.
3. In light of *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892), the General Assembly may repeal legislation that authorizes the State of Ohio to convey to a port authority *jus privatum* title to lands within the territorial boundaries of Lake Erie.