

OHIO WATER LAW 101

Ohio Stormwater Conference

May 9, 2019

Louis L. McMahon | McMahon DeGulis LLP

lmcmahon@mdllp.net | 216.367.1407

13. Presbyterian Church 10. Col. Israel Ludlow 14. Fort Washington 4. James Smith 15. Dr. Allison
12. Samuel Best 11. Green Tree Hotel 9. Joel Williams 8. Col. Gibson 7. Martin Baum
6. Griffin Yeatman 5. David Ziegler 3. Charles Vuttier 2. Artificer's Yard

OHIO VALLEY EXPOSITION, AUGUST 29 TO SEPTEMBER 24, 1910



CIVICS 101

- What is this “Common Law”?
- *Black’s Law Dictionary*:
 - “In general, it is a body of law that develops and derives through judicial decisions, as distinguished from statutory enactments.”
 - Also, all the statutory law and case law background of England and American colonies before the American Revolution
 - Ancient, unwritten law of England derived and applied by judges in property, dispute resolution, remedies . . .
- Statutes can shape, extend or obliterate the common law.
 - See, e.g., Sovereign Immunity; reasonable use of water
 - Judges interpret and apply statutory and regulatory law

WATER AND THE COMMON LAW

- Riparian Property rights
- Water rights disputes and resolution
- “Navigability” and the “public trust”
- Premises liability

TYPES OF WATER: TRADITIONAL

- Riparian and littoral rights (water in defined channel or body)
- Groundwater
- Surface water (a.k.a. “runoff”)
- Compare: Ohio EPA and federal definitions of “surface water”

RIPARIAN RIGHTS

- “A real property right attendant to land that allows the landowner to make use of a body of water” *City of Mansfield v. Balliet* (1902) 65 Ohio St. 451
- Examples: domestic use, irrigation, watering livestock, right of ingress and egress, power generation
- “Littoral rights” are rights to use a lake, including the right to wharf out to navigable waters. *State, ex rel. Squire, v. City of Cleveland* (1943) 150 Ohio St. 303

RIPARIAN RIGHTS AND TORT LAW

- Boundaries of common law property rights defined by statute and tort law:
 - R.C. 1521.17(A) Statutorily adopts “reasonable use” as the standard
 - R.C. 1521.17(B) adopts the principle of the Restatement (Second) of Torts Section 858 (850), Chapter 41
 - R.C. 1521.17(C) recognizes common law actions and establishes primacy of recorded uses

GROUNDWATER

- Traditionally no property right in groundwater
- *Frazier v. Brown* (1861) (“Occult Waters”)
- *Cline v. American Aggregates* (1984) (reasonable use)
- R.C. 1521.17 adoption of Rest. (2d) Torts “Reasonable Use” regime
- *McNamara v. Rittman* (2005) (property rights)
- Ohio Constitutional Amendment 2008, Article I, Section 19b

RUNOFF/DRAINAGE

- Archaic system of dominant and subservient estates
- *McGlashan v. Spade Rockledge* (1980) (“reasonable use” applies)
- *Munn v. Horvitz* (1964) (laches, prescriptive rights and other legal concepts apply in the context of reasonable use regime)

OTHER RIPARIAN PROPERTY RIGHTS

- Navigable v. non-navigable means “public or private”
McElroy v. City of Akron (1964)
- Right to non-navigable waters includes a right to dam water and exclude the public

“NAVIGABLE”

- Traditional “waters...Used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel upon water.” *East Bay Sporting Club v. Miller* (1928)
- Fleming Act 1917 (R.C. 1506.10-.11) declared the waters and submerged lands of Lake Erie forever owned by the State in trust for the people
- *Coleman v. Schaefer* (1954) and *Mentor Lagoons* (1959) change Ohio judicial definition to allow permissive (“may”) inclusion of recreation uses in determining “navigability”
- Federal definition expands along different track from traditional to extend jurisdiction under Clean Water Act. But see *SWANCC* (2001) and *Rapanos* (2006) and WOTUS

COMMON LAW OF WATER SUMMARY

- Interplay of property law, tort law and other legal concepts is ill-understood by the courts
- “Reasonable use” is the key phrase

- | | | | | |
|-------------------------|------------------------|---------------------|---------------------|-----------------|
| 13. Presbyterian Church | 10. Col. Israel Ludlow | 14. Fort Washington | 4. James Smith | 15. Dr. Allison |
| 12. Samuel Best | 11. Green Tree Hotel | 9. Joel Williams | 8. Col. Gibson | 7. Martin Baum |
| 6. Griffin Yeatman | 5. David Ziegler | 3. Charles Vattier | 2. Artificer's Yard | |

OHIO VALLEY EXPOSITION, AUGUST 29 TO SEPTEMBER 24, 1910





Coal Yards and West End Gas Works during Greatest Flood in Worlds History,
Cincinnati, O., April 1st., 1913.



THE
PUBLIC
LIBRARY

of Cincinnati
and
Hamilton County



Second St. East from Walnut, Cincinnati, O., during Great Flood April 1913.
Showing ruins of January Flood 1913.

PROGRESSIVE ERA

- 1908 Board of Health Law (RC 6109 and 6111)(“waters of the state”)
- 1912 Home Rule Amendments
- 1913 Flood and 1914 Conservancy Districts authorized
- 1919 State of Ohio Division of Water created

STATUTORY AND REGULATORY WATER AUTHORITIES IN OHIO - LOCAL

- Cities and Townships
 - Home Rule, Ohio Constitution Article XVIII
 - Zoning, Planning and Stormwater Permitting
- County Water & Sewer Districts
 - RC 6117
- Regional Water & Sewer Districts
 - RC 6119
- Conservancy Districts
 - RC 6101

STATUTORY AND REGULATORY WATER AUTHORITIES IN OHIO - STATE

- Ohio law and federal law
 - Ohio EPA – established to implement CWA
 - RC 3745 (General)
 - RC 6111 (Surface Water)
 - RC 6109 (Drinking Water)
 - Ohio Department of Natural Resources
 - Division of Water
 - Division of Watercraft
 - Coastal Management (Implements CZMA)

NOTABLE OHIO STATUTES

- R.C. 6111
- R.C. 1521.17
- R.C. 2744.02

OHIO'S POLITICAL SUBDIVISION TORT LIABILITY ACT

R.C. 2744.02(A)(1):

“Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.”

OHIO'S POLITICAL SUBDIVISION TORT LIABILITY ACT

Break
It
Down:

a political subdivision is not liable in damages

in a civil action for injury, death, or loss to person or property

allegedly caused by an act or omission of the political subdivision or an employee of the political subdivision

in connection with a governmental or proprietary function

except as provided in division (B) of this section:

Negligent performance of acts by employees with respect to proprietary functions

PROPRIETARY FUNCTIONS LISTED

R.C. 2744.01(G)(2):

- The establishment, maintenance, and operation of a utility, including a municipal corporation water supply system
- **Maintenance, destruction, operation and upkeep of a sewer system**

PREMISES LIABILITY FOR SNOW

- “Snow and ice are part of the wintertime life in Ohio”
Lopatkovich v. Tiffin (1986)
- Exceptions create potential liability
 - An “unnatural accumulation” of ice caused by active negligence of the defendant
 - The natural accumulation creates a condition substantially more dangerous than a business invitee should have anticipated by reason of knowledge of the existence of this condition

LIABILITY FOR SNOW

- Fact-intensive cases, but general rules emerge:
 - “unnatural” accumulation refers to factors other than weather
 - Intervening act = human act to make matters worse
 - Ice formed after plowing is natural
 - Ice formed from run off from a pile of snow plowed is natural

CIVICS 102

- U.S. Constitution of limited, enumerated powers for federal government (Art. I, Section 8):
 - Commerce Clause: “The Congress shall have Power . . . [to] regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes”
 - Includes power to regulate Navigation (*Gibbons v. Ogden*)
 - Supremacy Clause (Art. 6)
- **States primacy in “health, safety and welfare”**
 - See, e.g., 10th Amendment; but see, 14th Amendment
- Expansion of federal regulatory and judicial jurisdiction during and after WWII

EVOLUTION OF FEDERAL WATER LAW

- Rivers and Harbors/Refuse Act of 1899
- Federal Water Pollution Control Act of 1948
 - No prevention or abatement provisions
- Post WWII– expansions of federal jurisdiction to prosecute water pollution matters in federal courts
- Federal Water Pollution Control Act of 1972, better known as the “Clean Water Act.”
- Safe Drinking Water Act of 1974

CLEAN WATER ACT PURPOSE & GOALS

- Purpose:
 - Restore and maintain the chemical, physical and biological integrity of the nation's waters
- Goals
 - Protect fish and wildlife
 - Eliminate discharge of pollutants into navigable waters by 1985

CLEAN WATER ACT JURISDICTION

- Interstate waters and tributaries
- Waters which have an effect on interstate commerce
- Supreme Court cases unsettle the analysis with addition of “significant nexus” concept
- *But see* - Waters of the U.S. rule, litigation and executive orders

MULTI-LAYERED AUTHORITIES

- Federal Baseline Statute
 - Federal agency (US EPA) to oversee and implement
 - Delegated authority to pass regulation based on statutory directives
 - Inherent authority to issue policy, guidance, etc.
- **Delegated authority to states, many with pre-existing state statutes**
 - State agencies (Ohio EPA) with regulatory authority and inherent power to issue policy, guidance, etc.

STATUTORY AND REGULATORY WATER AUTHORITIES IN OHIO - FEDERAL

- US EPA
- US Army Corps of Engineers
- Coast Guard
- ORSANCO

Questions?

Comments?

Thank you!

Louis L. McMahon | lmcmahon@mdlip.net | 216.367.1407