

Ohio Navigability Report

Summary

Ohio is kind to recreational boaters. Ohio allows the public to use streams capable of floating recreational boats (e.g., kayaking and canoeing). Factors for determining whether the public has a right to use a stream include physical characteristics of the stream, the stream's history of public use, capacity for boating after reasonable improvements, and the existence of public access. There is some evidence that Ohio boaters may have the right to portage, although no definitive law on the subject exists.

State Test of Navigability

In Ohio, “[p]ursuant to federal law, the navigability of a body of water is determined by whether it is or ever was used in commerce,” that is, “when they are used or are susceptible of being 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.”¹ As the Supreme Court of Ohio reaffirmed in 2006, “[i]n determining the navigability of a watercourse for use either for recreation or for commerce, *consideration may be given* to the following factors: (1) Its capacity for boating in its natural condition, (2) its capacity for boating after the making of reasonable improvements, and (3) its accessibility by public termini.”² Another factor that a court may consider when determining the navigability of a stream is the history of use by the public.³

As a factorial analysis, any single factor could be, but is not necessarily, dispositive. As the Supreme Court of Ohio further explained, not all waters with a capacity for boating are public; for example, the Court cited approvingly a prior decision holding Lake Evans as not legally navigable, “probably because there is not only no public terminus which can be reached by boating on or from those waters but also because they are not even reachable by boating from admittedly navigable waters.”⁴ Further, the “capacity of a body of water for recreational boating is to be considered but, standing alone, is not determinative” of navigability.⁵

If reasonable improvements to a body of water would render the body navigable, the body of water might be navigable.⁶ Navigability may exist despite the obstruction of falls, rapids, sand

¹ *Portage Cty. Bd. of Comm'rs v. Akron*, 846 N.E.2d 478, 498 (Ohio 2006).

² *Id.* (italics in the original) (quoting *Mentor Harbor Yachting Club v. Mentor Lagoons, Inc.*, 163 N.E.2d 373, 376 (Ohio 1959) (italics added) and citing *Coleman v. Schaeffer*, 126 N.E.2d 444 (1955)).

³ *See, e.g., Portage Cty.*, 846 N.E.2d at 498 (find Lake Rockwell non-navigable because, in part, the lake “has never been shown to have been used for commerce”); *Mentor Harbor Yachting Club*, 163 N.E.2d at 377 (discussing “abundant and continued public use” in holding that Mentor Harbor was navigable); *State v. Pierce*, 132 N.E.2d 102, 104-05 (Ohio 1956) (finding that a trespass did not occur because “many people through the years had come upon this property for the purposes of hunting, fishing and boating, and that the . . . owners of the property, made no effort to keep them off.”).

⁴ *Portage Cty.*, 846 N.E.2d at 498.

⁵ *Id.* at 498-99; *Mentor Harbor Yachting Club*, 163 N.E.2d at 378 (discussing recreational boating as one factor for consideration).

⁶ *Mentor Harbor Yachting Club*, 163 N.E.2d at 377.

bars carries or shifting currents.⁷ The court is more likely to find that a stream with no public termini (points of access) is private.⁸ A long history of public use may also be a factor that supports a finding of navigability.⁹ Finally, a stream need not flow continuously to be considered navigable.¹⁰

Because Ohio considers a naturally navigable watercourse to public,¹¹ “public waters” and “navigable waters” appears to be synonymous terms.

Extent of Public Rights in Navigable and Non-Navigable Rivers

A naturally navigable watercourse is public.¹² Non-navigable waters are non-public and may be privately held, and owners of non-navigable waters may exclude others.¹³

A riparian owner has title to the stream bed to the center of the stream, but “if such stream is determined to be a ‘navigable’ stream, such title and ownership is subject to the use the public may make of such waters for the purpose of navigation.”¹⁴ The state holds title to the land beneath Lake Erie in trust for the public.¹⁵ The Supreme Court of Ohio held that at least for Lake Erie, “the public trust . . . extends to the natural shoreline, which is the line at which the water usually stands when free from disturbing causes.”¹⁶ For other navigable waters, state courts have not identified where the public trust ends.

State court have not identified clearly the scope of public use regarding incidental use in navigation (e.g., whether the public may fish, hunt, or contact the bed). But one court held that under the public trust theory, the public may make any reasonable, legitimate use.¹⁷ And another court, in determining a waterway was navigable, noted that the public had used the waterway for “hunting, fishing and boating.”¹⁸ And the Ohio Attorney General, in an opinion about whether the public trust doctrine permits the state to convey title to land to land held in trust, cited a passage that the public trust doctrine allows “the public to fully use and enjoy trust lands and waters for commerce, navigation, fishing, bathing and other related public purposes,” though while also recognizing that there are multiple variations of the doctrine.¹⁹

⁷ *Id.* at 376 (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 409 (1940)).

⁸ See *Portage Cty.*, 846 N.E.2d at 498; *Mentor Harbor Yachting Club*, 163 N.E.2d at 377.

⁹ See *Portage Cty.*, 846 N.E.2d at 498; *Mentor Harbor Yachting Club*, 163 N.E.2d at 377; *Pierce*, 132 N.E.2d at 104-105.

¹⁰ *Mentor Harbor Yachting Club*, 163 N.E.2d at 376; *East Bay Sporting Club v. Miller*, 161 N.E. 12, 14 (Ohio 1928).

¹¹ *Portage Cty.*, 846 N.E.2d at 498; *Mentor Harbor Yachting Club*, 163 N.E.2d at 377.

¹² *Portage Cty.*, 846 N.E.2d at 498; *Mentor Harbor Yachting Club*, 163 N.E.2d at 377.

¹³ *Portage Cty.*, 846 N.E.2d at 499; *Mentor Harbor Yachting Club*, 163 N.E.2d at 375.

¹⁴ *State ex rel. Brown v. Newport Concrete Co.*, 336 N.E.2d 453, 455 (Ohio Ct. App. 1975).

¹⁵ Ohio Rev. Code. Ann. § 1506.10 (West 2021).

¹⁶ *State ex rel. Merrill v. Ohio Dep’t of Nat. Res.*, 955 N.E.2d 935, 950 (Ohio 2011).

¹⁷ *Newport Concrete Co.*, 336 N.E.2d at 457-58.

¹⁸ *Mentor Harbor Yachting Club*, 163 N.E.2d at 376-377.

¹⁹ 2000 Ohio Op. Att’y Gen. 00-047 (December 29, 2000) (citing *Coastal States Org., Inc., Putting the Public Trust Doctrine to Work* 3 (2d ed. 1997)).

Though the question of portaging has not been definitively addressed, a good case can be made that boaters have a right to portage around obstacles. The Supreme Court of Ohio, in discussing navigability as affected by occasional obstructions, cited with approval a legal treatise that opined that “[n]avigability in the sense of the law is not destroyed because the watercourse is interrupted by occasional natural obstructions and portages.”²⁰ The Ohio Attorney General reached a similar conclusion by analyzing portaging as a right styled as a privilege that overcomes liability for trespass.²¹ Of course, boaters must avoid causing injury to the private land while portaging and should take the most direct route around obstacles.²²

Miscellaneous

For additional information on boating and fishing in Ohio, visit the Ohio Department of Natural Resources, State Parks and Watercraft Division, at <https://ohiodnr.gov/wps/portal/gov/odnr/discover-and-learn/safety-conservation/about-odnr/division-parks-watercraft>.

²⁰ *Mentor Harbor Yachting Club*, 163 N.E.2d at 376 (citing 56 Am. Juris., 649, § 182).

²¹ 1980 Ohio Op. Att’y Gen. 80-093 (December 23, 1980). The attorney general cites the Restatement (Second) of Torts § 195 (1965) and *Fulton v. Monahan*, 4 Ohio 427 (1831) in support of the conclusion that portaging is permissible to avoid dangerous conditions.

²² *Id.*