

## Blog Entry: Class Certification Upheld in Ohio “Noxious Odors” Lawsuit

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Plaintiffs, seven in all, resided in Garfield Heights, Ohio. They sued various defendants, including the City of Garfield Heights, alleging “that noxious odors in their neighborhood affected the use and enjoyment of their properties.” The odors, they claimed, resulted from the redevelopment of land that had decades earlier been used as a landfill. Plaintiffs contended that in 2002, waste materials that had previously been deposited at the landfill “were disturbed as developers explored ideas for using the property.” The property eventually became a shopping center.

By the time class certification proceedings rolled around, the City of Garfield Heights was the only remaining defendant, and plaintiffs sought to have certified against it a class consisting of “all persons and entities ... that own or reside in a home within the class area which home was purchased by the class member prior to December 31, 2002.” They alleged that 220 such homes were affected.

A battle of expert reports ensued, as did an evidentiary hearing on plaintiffs’ class certification motion. The court ruled for plaintiffs, certified the class, and the City appealed. As grounds, it asserted that “[t]he trial court committed reversible error in certifying a class where the plaintiffs failed to satisfy both the explicit and implicit requirements of Civ.R. 23.”

On February 16, 2017, the court of appeals affirmed. Its opinion combines a thorough and compact recitation of Ohio class certification law with a dissection of the lower court’s ruling. The court started by noting that an “identifiable, unambiguous class” exists because plaintiffs’ proposed class “was specific as to the people, time frame, and location, and was buttressed by the map of the area and the list of people in the area.”

It then found that “questions of law or fact common to the class” exist, explaining that courts generally give Rule 23’s commonality requirement “a permissive application.” Rejecting the City’s argument “that individual differences in certain issues among the proposed class defeats the commonality requirement,” the court stated that “the balancing test of common and individual issues is qualitative” and that “there need be only a single issue common to all members of the class.” “The fact that questions peculiar to each individual member of the class remain after the common questions of the defendant’s liability have been resolved does not dictate the conclusion that a class action is impermissible.”

The court further found that questions common to the class predominate over those affecting individual members, and that a class action is “superior to other available methods to fairly and efficiently adjudicate this controversy.” In arriving at that decision, it rejected the City’s argument

that this was a “mass toxic tort case” in which individualized questions predominated, noting, instead, that this is a “relatively small and ... well defined” nuisance - not mass tort - case.

The court also rejected the City’s argument that “plaintiffs failed to demonstrate typicality because their claims require proof of individualized causation.” It reasoned that “plaintiffs here claim that the city created and failed to mitigate or abate the nuisance of the emission of noxious odors over the class area, thereby causing the plaintiffs’ damages. The answer to this issue will resolve all of the plaintiffs’ claims.”

And so the lawsuit proceeds against the City as a certified class action, unless the court of appeals, sitting *en banc*, vacates the panel’s decision or the Ohio Supreme Court accepts jurisdiction and reverses.

The case is *Berdysz v. Boyas Excavating, Inc.*, Eighth District, Ohio, Court of Appeals, case no. 104001, 2017-Ohio-530, and the decision can be found at <https://goo.gl/huFtDn>.