

ment under the last preceding census thereto, and did not make similar provisions for the election of representatives under the fifteenth census, I am of the opinion that the several states are now free to provide for the election of Representatives in the national House of Representatives in such manner as the legislature of the state may determine, until such time as federal regulations of the matter may become effective.

The manner of electing Representatives in Congress is peculiarly within the domain of legislative power. It is purely a matter for legislation. At present, in Ohio, provision is made by Section 4828-1, General Code, for the election of twenty-two Representatives in Congress by districts. Before any more or less number than twenty-two may be elected by districts, the state must be redistricted.

In my opinion the Legislature of Ohio may, in its discretion, redistrict the State so as to provide for the election of twenty-four members of the national House of Representatives by districts and if that is not done and no further legislation enacted on the subject, the State of Ohio will be represented in the Seventy-third Congress and in the next succeeding five Congresses, by twenty-two Representatives elected by districts, in compliance with Section 4828-1, General Code, and two Representatives at large.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

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3070.

DISAPPROVAL, LEASE FOR RIGHT TO USE FOR RAILWAY AND POLE  
LINE RIGHT OF WAY PURPOSES, MIAMI AND ERIE CANAL LAND  
IN MONTGOMERY AND WARREN COUNTIES—CINCINNATI AND  
LAKE ERIE RAILROAD COMPANY.

COLUMBUS, OHIO, March 20, 1931.

HON. ALBERT T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval a certain canal land lease, in triplicate, by which the State of Ohio, through you as Superintendent of Public Works, and as Director of said Department, has leased and demised to the Cincinnati and Lake Erie Railroad Company, an electric traction company, the right to occupy and use for electric railway and pole line right of way purposes a certain abandoned portion of Miami and Erie Canal Lands abandoned by an act of the 86th General Assembly, passed March 25, 1925, and which went into effect on the fourteenth day of July, 1925 (111 O. L. 208). That portion of abandoned Miami and Erie Canal Lands covered by said lease and thereby leased and demised to the Cincinnati and Lake Erie Railroad Company is particularly described in said lease as follows:

“That portion of the abandoned Miami and Erie Canal property, in Montgomery and Warren Counties, Ohio, commencing at the southerly corporation line of the Village of Miamisburg, Montgomery County, Ohio, being at or near Station 10036 plus 92 of H. C. Baldwin’s survey of said canal South of Dayton, Ohio, and extending thence southerly over

and along said canal a distance of twenty-two thousand, two hundred and eight (22,208) feet, to Station 10259 of said survey;

Also the right to lay, maintain and operate a single or double track railway upon the towing path embankment of said Miami and Erie Canal between Station 10259 of said canal survey and the North line of lands leased to the Village of Franklin, Warren County, Ohio, being a distance of twenty-three hundred and sixty (2,360) lineal feet, terminating at or near Station 10282 plus 64 of said Baldwin's survey which marks the intersection of the canal property with the North corporation line of said Village of Franklin, with the right to widen the top of said towing path embankment to a minimum width of eighteen (18) feet, with necessary slopes of one and three-fourths ( $1\frac{3}{4}$ ) feet horizontal measurements to one (1) foot perpendicular, sufficient to maintain the safety of said embankment;

Also the right to maintain the high tension pole line, as now located, on the berme embankment of said canal property, between points opposite Stations 10259 and 10282 plus 64, as above designated."

The lease here in question is one for a stated term of ninety years, and the lease contains the following provision with respect to the rental to be paid by the above named lessee for said lease:

"The party of the second part shall pay to the party of the first part during the term of this lease, an annual rental of fourteen hundred and seventy-four and  $\frac{8}{100}$  dollars (\$1474.08), in semi-annual installments of seven hundred thirty-seven and  $\frac{4}{100}$  dollars (\$737.04) each, in advance on the first days of May and November in each and every year, \* \* \*

1. This lease is granted subject to reappraisalment by proper State authority at the end of each fifteen-year period of this lease, and the annual rental upon said lease, after each reappraisalment for the succeeding fifteen-year period, shall be six per cent of the appraised value thereof."

From the above quoted provisions of the lease relating to the rental to be paid by the lessee during the term thereof, the intention of the parties is reasonably clear to the point that the lessee is to pay an annual rental of \$1474.08 in semi-annual installments during the first fifteen year period of the term of the lease, and that thereafter during the term of the lease, said lessee is to pay an annual rental of six per cent upon the appraisalment of the property leased, made at the end of each fifteen year period of the lease. In order to put at rest any question as to the intention of the parties with respect to this matter, it is suggested that the words "the first fifteen-year period of" be inserted between the word "during" and the words "the term of this lease," appearing in the rental provision of said lease first above quoted.

In the consideration of this lease, and of its terms and provisions, the only authority that I have assumed is that pertaining to the legal validity of the lease and of the terms and provisions therein contained. And directing my attention to the duty thus imposed upon me, it is observed that the first question presented is one with respect to your authority to execute this lease to the above named lessee in view of the fact, of which I have been advised by your department, that prior to the time the application for this lease was made by the Cincinnati and Lake Erie Railroad Company, but after the lapse of considerably more than one

year from the effective date of the act of the General Assembly above referred to, providing for the abandonment of said canal lands, the village of Franklin made and filed with your department an application for the lease of a comparatively short section of said abandoned canal lands to the north of and contiguous to said village, which section of said abandoned canal lands is included within said lease to the Cincinnati and Lake Erie Railroad Company.

This question suggests a consideration of the provisions of sections 5 and 15 of said act, which, as above noted, went into effect on the fourteenth day of July, 1925. These sections provide as follows:

"Section 5. Any city, village or other political subdivision of the state desiring to lease any portion of said abandoned canal and feeder lands, basins, wide waters and state lots heretofore used in connection with canal property lying within or adjacent to the boundaries of such political subdivision, shall, within one year from the date at which this act becomes effective, file an application for a lease of the same with the superintendent of public works."

"Section 15. The abandoned canal lands covered by this act of abandonment lying outside of municipalities and not included in an application for lease by an adjacent municipality, or other legal subdivision of the state, may be leased in strict conformity with existing statutes relating to the leasing of canal lands, except that the entire width of the canal and its embankments may be included in such leases and that the terms thereof may be for fifteen years and multiplies thereof, but subject to reappraisal at the end of each fifteen year period by proper state authority."

I am advised that the uniform administrative construction which your department has given to the above quoted sections of this act and to like provisions in other acts of the legislature providing for the abandonment of canal lands in this state is, that a city, village or other political subdivision of the state which makes application for a lease of abandoned canal lands within its boundaries or adjacent thereto, within the period of one year from the effective date of the particular act of the legislature providing for the abandonment of said canal lands is entitled as a matter of law to the lease thus applied for without reference to other applications for the lease of such canal lands; but what when the application for such lease is made by a city, village or other political subdivision after the lapse of one year from the time the particular act in question went into effect, the application so made has the same standing as any other application made by an individual or by a private corporation for the lease of such canal lands, and that in such situation it is within the authority of the Superintendent of Public Works to grant the application of the municipality or other political subdivision or not, as he sees fit.

Upon consideration of the provisions of the act here in question, and particularly those of sections 5 and 15 thereof, above quoted, I am inclined to the view that the construction which your department has given to the above quoted provisions of the act here in question, and to like provisions in other recent acts of the legislature, is correct. In this view, I am of the opinion that the words "and not included in an application for lease by an adjacent municipality, or other legal subdivision of the state", set out in section 15 of the act here in question as a description or limitation of abandoned canal lands that may be leased to individuals or to corporations other than municipalities or other political subdivisions, has reference to applications which municipalities or other political subdivisions of the

State are authorized to make as a matter of preferred right within a period of one year from the time said act went into effect. To give any other effect to the above quoted provision in section 15 would be to wholly nullify the provision of section 5 of said act that the application of a municipality or other political subdivision desiring to lease abandoned canal lands within its boundaries or adjacent thereto shall file its application therefor within one year from the effective date of said act. Without assuming to call in question, or otherwise consider the reasons which may have induced you to include within the present lease to the Cincinnati and Lake Erie Railroad Company the section of said abandoned canal lands applied for by the village of Franklin and to thereby deny its application for the lease of said section of canal lands, I do not believe that your action in any wise affects the validity of the lease here in question.

Upon examination of the provisions of the lease here in question, a further question is presented arising out of the fact that the portion of the abandoned Miami and Erie Canal Lands covered by said lease is more than four miles in length extending, as above noted, from the corporate limits of the village of Miamisburg to the corporate limits of the village of Franklin, a distance of 24,568 feet. Touching the question thus presented, it is noted that section 15 of the act above referred to providing for the abandonment of said canal lands, under the specific authority of which section this lease is executed, provides that except in the particulars therein specifically mentioned, such canal lands "may be leased in strict conformity with existing statutes relating to the leasing of canal lands." Assuming that the provision of section 15 of said act, here quoted, refers to matters other than those pertaining to the formal execution of canal land leases authorized by said section, said provision, which is likewise found in practically all of the acts of the legislature in recent years providing for the abandonment of canal lands, suggests a consideration of the provisions of section 13965, which is a general section relating to the execution of canal land leases, and which in varying form has been in effect since its original enactment March 28, 1888 (85 O. L. 127). This section of the General Code provides that each and every tract of land, and any part of the berme bank of any canal, canal basin, and outer slope of the towing path embankment which the canal commission shall find to be the property of the State of Ohio, and the use of which, in the opinion of said commission, and the board of public works would not, if leased, injure or interfere with the maintenance and navigation of the canals of the State, shall be valued by said commission at its true value in money and "may be leased for any purpose or purposes other than for railroads operated by steam, but said commission, the board of public works and the chief engineer of the public works shall have power to make leases and prescribe regulations for the crossing of the canals, canal basins or canal lands by any railroad operated by steam, electricity or other motive power, or for the necessary use, for railroad purposes, of any part of the berme banks of a canal, canal basin, or any portion of the canal lands for a distance not exceeding two miles."

It is obvious that the precise question here presented is whether the two mile limitation provided for in the above quoted terms of section 13965, General Code, applies to electric railroads or traction companies, such as the lessee herein named, or whether said limitation applies only to ordinary steam railroads. I am of the opinion that the latter view above indicated in the statement of the question is the correct construction of the above quoted provisions of the statute. The first clause in the provisions of said section here quoted in terms quite unmistakable and without any limitation as to the extent of the canal lands affected, provides generally that said canal lands may be leased for any purpose

or purposes other than for railroads operated by steam. The two mile limitation mentioned in the last clause of the provisions above quoted cannot be applied to an electric railroad or traction company without cutting down and rendering nugatory the first clause of said quoted provisions of the section above referred to. The general purpose and intent indicated by said section of the General Code was and is to exclude steam railroads generally from the privilege of taking leases of berme banks and towing paths of canals for railroad purposes. But, apparently for the purpose of meeting particular conditions, provision is made in the section that railroads, that is, steam railroads, may, under lease therefor, occupy such canal berme bank and towing paths for a distance of not to exceed two miles.

The above quoted provisions of section 13965, General Code, have been a part of said section and of section 218-225, Revised Statutes, for a period of nearly thirty-one years since the incorporation of said provisions into section 218-225, Revised Statutes, by the act of April 16, 1900 (95 O. L. 345). Since said time the department of the public works of the State and the officers and boards from time to time having authority over the affairs of said public work, have uniformly construed the above quoted statutory provisions now found in section 13965, General Code, so as to make said two mile limitation applicable only to steam railroads. And from time to time said department, with the approval of the Governor and the Attorney General, has executed a number of leases to electric or traction companies by which such companies were given the right to occupy and use abandoned canal lands extending for considerably more than two miles along such canals. As a matter of fact there are now in full force and effect at least two leases to electric railroad or traction companies in which that portion or portions of canal lands therein respectively leased is approximately five miles in length. One of the leases here referred to is that executed to the Scioto Valley Traction Company in the year 1916 by which there was granted to said electric traction company the right to use and occupy the banks of the canal between Canal Winchester and Carroll. The other lease, which was executed and approved in January, 1923, is a lease granted to the Columbus, Newark and Zanesville Railway Company by which there was leased and demised to said company the right to use and occupy the banks of the abandoned Ohio canal between Newark and Hebron. Although both of said traction companies have discontinued service, the respective leases executed to said companies are still in full force and effect.

The uniform administrative construction given by your department to the provisions of section 13965, General Code, above quoted, are persuasive with respect to the correctness of the interpretation thus given to said statute.

In the case of *Industrial Commission v. Brown*, 92 O. S. 309, 311, the court, in its opinion, said:

“Administrative interpretation of a given law, while not conclusive is, if long continued, to be reckoned with most seriously. It is not to be disregarded and set aside unless judicial construction makes it imperative so to do.”

See also *State ex rel. v. Brown*, 121 O. S. 73, 76.

I am of the opinion, therefore, that the two mile limitation found in the provisions of section 13965, General Code, above referred to, does not apply

to the lease here in question, and said lease is not invalid for the reason that the canal lands leased are in extent something more than four miles.

Assuming, as above noted, to pass only upon the legal questions involved in this lease, and, aside from the omission from said lease of appropriate words making definite and certain the annual rental to be paid by the lessee for said lease during the term thereof, and finding said lease to be in accordance with the requirements of the law, I am herewith returning the same to you with the suggestion that the provisions of the rental clause in said lease be corrected in the manner above indicated. When this is done, the lease should be returned to me for my formal approval.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

3071.

APPROVAL, LEASE TO SECOND FLOOR AND PORTION OF BASEMENT OF BUILDING ON EAST LONG STREET, COLUMBUS, OHIO, FOR USE OF OHIO COMMISSION FOR THE BLIND.

COLUMBUS, OHIO, March 20, 1931.

HON. ALBERT T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and opinion a lease between George L. Gugle, as lessor, and State of Ohio, acting by yourself as Director of Public Works for the Department of Public Welfare (Ohio Commission for the Blind), as lessee, covering the entire second floor and a portion of the basement of the building at No. 180 East Long Street in the city of Columbus, Ohio. The lease is for a term of one year, beginning on the first day of January, 1931, and ending on the thirty-first day of December, 1931, and calls for an expenditure of eighteen hundred dollars (\$1800.00).

You have submitted an encumbrance estimate, No. 2, bearing the certificate of the Director of Finance, to the effect that there are unencumbered balances legally appropriated sufficient to pay the first six months' rental.

Upon examination of said lease and the other papers submitted therewith, I am of the opinion that the same are in proper legal form and therefore approve the same.

I am returning herewith the lease and encumbrance estimate submitted in this connection.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*