

3437

1. NATURAL RESOURCES, DEPARTMENT OF—DIVISION OF SHORE EROSION—AUTHORIZED TO EXPEND OUT OF REAPPROPRIATION, FUNDS FOR PROJECTS “DESIGNED FOR THE SOLE BENEFIT OF PRIVATELY OWNED LITTORAL PROPERTY”—AMENDED HBS 433, 816, 100 GA.—SECTION 1507.05 RC, EFFECTIVE OCTOBER 30, 1953.
2. DIVISION OF SHORE EROSION—NOT SUBJECT TO ADMINISTRATIVE PROCEDURE ACT — FUNCTIONS DEFINED AND IMPOSED IN CHAPTER 1507, RC.
3. PERMITS—NOT LICENSES AS THAT TERM IS USED IN ACT—PERMITS ARE LICENSES IN SENSE OF AN INCORPORAL HEREDITAMENT IN AND TO PROPERTY OF STATE—ARE TO BE NEGOTIATED ON CONTRACTUAL BASIS—BODIES OR OFFICERS EMPOWERED TO CONTRACT ON BEHALF OF STATE.
4. REVOCATION OF PERMIT—GOVERNED BY AND DEPENDENT UPON TERMS AND PROVISIONS OF PERMIT. IN ESSENCE A CONTRACT.
5. DIVISION OF SHORE EROSION—NECESSARY INCIDENT TO ITS POWERS—CONTRACTING BODY ON BEHALF OF STATE—MAY PRESCRIBE METHODS WHEREBY IT WILL NEGOTIATE PERMITS IT IS EMPOWERED TO GRANT.
6. FACTORS TO CONSIDER IN NEGOTIATION OF PERMITS —MANIFEST PURPOSES OF CHAPTER 1507 RC—PROTECTION OF PUBLIC RIGHTS—USE OF WATERS OF LAKE ERIE.

SYLLABUS:

1. Under the terms of the reappropriation made by the 100th General Assembly in Amended House Bill No. 816 and in accordance with the provisions of Section 1507.05 R. C., as amended by Amended House Bill No. 433, effective October 30, 1953, the Department of Natural Resources, Division of Shore Erosion, is authorized to expend out of such reappropriation, funds for projects “designed for the sole benefit of privately owned littoral property.”

2. The Division of Shore Erosion in its functions as defined and imposed in Chapter 1507, Revised Code, is not subject to the Administrative Procedure Act.

3. The permits which the Division of Shore Erosion is empowered to grant under the provisions of Chapter 1507, Revised Code, are not licenses as that term is used in the Administrative Procedure Act. Such permits are only licenses in the sense of an incorporeal hereditament in and to property of the State and are to be negotiated on a contractual basis, in the same manner as employed by other bodies or officers generally empowered to contract on behalf of the State.

4. The revocation of a permit granted under the provisions of Chapter 1507, Revised Code, is governed by and dependent upon, the terms and provisions of the permit which is, in essence, a contract.

5. The Division of Shore Erosion as a necessary incident to its powers as a contracting body on behalf of the State may prescribe methods whereby it will negotiate permits which it is empowered to grant under the provisions of Chapter 1507, Revised Code.

6. The factors to be considered by the Division of Shore Erosion in the negotiation of such permits are the manifest purposes of Chapter 1507, Revised Code, and the protection of the public rights of use of the waters of Lake Erie.

Columbus, Ohio, January 28, 1954.

Hon. A. W. Marion, Director, Department of Natural Resources
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

"The 97th Ohio General Assembly appropriated \$1,750,000.00 (sic) 'to devise and perfect economical and effective methods and works for preventing and correcting shore erosion of publicly owned property along the south shore of Lake Erie and to enter into and carry out agreements to construct projects for preventing and correcting shore erosion of property under the jurisdiction of conservancy districts, in accordance with the provisions of Section 412-28 of the General Code.' Thereafter, the 98th, 99th, and 100th General Assembly reappropriated for the use of the Department of Natural Resources, Division of Shore Erosion, the unexpended balance of this fund. Query: On and after October 30, 1953, (the effective date of Amended House Bill No. 433) is the Department of Natural Resources, Division of Shore Erosion, authorized to expend any of the re-appropriated balance of this fund for projects 'designed for the sole benefit of privately owned littoral property?'

"Section 1507.03, as effective October 30, 1953, provides, inter alia, 'No person shall build or construct a beach or erect groins or other structures necessary to arrest erosion along the Ohio shore line of Lake Erie from the shore into Lake Erie or

remove minerals from and under the bed of Lake Erie without first submitting plans therefor to the division of shore erosion. If such plans are approved by the division, it shall issue a permit to the applicant authorizing such project.' Since the General Assembly did not prescribe any standards to guide the Chief of the Division of Shore Erosion in issuing 'licenses,' what factors and considerations are to be considered by the Chief of the Division of Shore Erosion in issuing such licenses?

"Where the Chief of the Division of Shore Erosion has issued a license authorizing a person to 'build or construct a beach or erect groins or other structures necessary to arrest erosion along the Ohio shore line of Lake Erie from the shore into Lake Erie' and such person thereafter materially deviates from the plans and specifications previously approved by the Chief of the Division of Shore Erosion, does the Chief of the Division of Shore Erosion have the power and authority to cancel or revoke this license?

"Can the Chief of the Division of Shore Erosion prescribe how, when, and in what form applications for licenses to 'build or construct a beach or erect groins or other structures necessary to arrest erosion along the Ohio shore line of Lake Erie from the shore into Lake Erie' are to be submitted? If so, would the applicant's failure to adhere to such procedure be sufficient basis to deny the applicant a license? Assuming that the Chief of the Division of Shore Erosion has authority to promulgate rules and regulations relative to how, when, and in what form applications for licenses are to be submitted, should such rules and regulations be adopted, pursuant to the Administrative Procedure Act?"

Your first question, restated in general terms, appears to resolve itself into a consideration of whether or not an appropriation made for the specific purpose of accomplishing some or all of the objects of general law, may be devoted to other or differently stated objects appended to the general law by an amendment enacted subsequent in point of time to the original appropriation.

Specifically considering the question with relation to the pertinent legislation, the original appropriation made by the 97th Ohio General Assembly as provided in House Bill No. 496 was couched in the following terms:

"Section 1.

"* * * Department of Public Works

"* * * G. Additions and Betterments

"* * * G. 32. Other Capital Outlay

“* * * To devise and perfect economical and effective methods and works for preventing and correcting shore erosion of *publicly owned property* along the south shore of Lake Erie, and to enter into and carry out agreements to construct projects for preventing and correcting shore erosion of property under the jurisdiction of conservancy districts in accordance with the provisions of Section 412-28 of the General Code * * * \$1,075,000.00.” (Emphasis supplied.)

It is fundamental that even if the pertinent provisions of the General Code relating to shore erosion as the law existed at the time of the foregoing appropriation, had given the power to expend funds for purposes other than those expressed in the quoted appropriation, there would have been no authority to make such expenditure by reason of the prohibitions of the Ohio Constitution, Article II, Section 22, whereby:

“No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years.”

In short, a power to spend public funds bestowed in a general statute is not self executing and requires the implementation of an appropriation sufficiently broad in terms as to comprehend the statutory power and sufficiently specific as to satisfy the requirements of Article II, Section 22, Ohio Constitution, *supra*.

At the time of the enactment of House Bill No. 496, *supra*, Section 412-28, General Code, now Section 1507.05, Revised Code, provided in pertinent part as follows:

“* * * The State of Ohio, acting by and through the superintendent of public works, subject to the provisions of section 412-29 of the General Code, may enter into agreements with counties, municipalities, townships and conservancy districts for the purpose of constructing projects to prevent, correct and arrest erosion along the south shore of Lake Erie, in any rivers which are connected with Lake Erie, bays connected with said lake, and any other water courses which flow into said lake; and these projects may also be constructed on any Lake Erie islands which are situated within the boundaries of the state of Ohio.

“The cost of such surveys and shore erosion projects shall be prorated on the basis of two-thirds of the total cost to the state of Ohio through appropriations granted to the department of public works and one-third the cost to the county authorities or municipalities or conservancy districts or other political subdivisions, as the case may be. * * *

Amended House Bill No. 433 effective October 30, 1953, inter alia, changed the second quoted paragraph of what is now Section 1507.05, Revised Code, so as to retain the same proration formula respecting improvements benefiting public littoral property and added the following sentence to that paragraph:

“* * * If the project is designed for the sole benefit of privately owned littoral property, the cost shall be prorated on the basis of two-thirds of the total cost to such political subdivisions and one-third of the cost to the state.”

It is apparent that even if the statute, as it existed prior to the 1953 amendment, were so construed as to give the chief of the division power to conclude an agreement with one of the enumerated political subdivisions for the construction of a project designed to arrest, prevent, or correct erosion of privately owned littoral land, the restrictive language of the then effective appropriation bill, coupled with the requirements of the Ohio Constitution, cited supra, would prohibit any expenditure of appropriated funds for such purpose, unless the agreement were concluded with a conservancy district. See Opinion No. 2856, Opinions of the Attorney General for 1948, p. 116. It follows that if successive reappropriations incorporated the limitations imposed by the original appropriation, an expenditure (other than one made pursuant to agreement with a conservancy district) solely benefiting privately owned littoral lands would be similarly prohibited; and, as a consequence, a negative answer to your first question would be required. However, the legislative history of this appropriation discloses otherwise. The 98th General Assembly in Section 2 of the Amended House Bill No. 655, passed July 15, 1949, reappropriated the sum originally appropriated by the 97th General Assembly in general terms as follows:

“* * * All unencumbered balances of all appropriations made in said House Bill No. 496 against which no encumbrances have been lawfully placed, are, to the extent of such unencumbered balances, hereby reappropriated from the funds from which they were originally appropriated, * * *”

The 99th General Assembly by substantially identical language in Section 2 of Amended House Bill No. 692, passed June 1, 1951, again reappropriated the unencumbered balances of the last mentioned bill.

However, the 100th General Assembly by Section 1 of Amended House Bill No. 816, passed July 14, 1953, provided:

“* * * Department of Natural Resources
 “Division of Beach Erosion
 “G. Additions and Betterments
 “G. 32. Other Capital Outlay
 “To Perfect Economical and Effective Methods for Preven-
 tion of Shore Erosion (Reapprop.) \$550,000. * * *”

I am also informed by your office that the sum of \$550,000 so specifically reappropriated constituted the approximate unexpended balance of the original appropriation made by the 97th General Assembly. It is apparent that by the language of this last reappropriation, those provisions which had previously (1) restricted expenditures to those projects benefiting publicly owned property and (2) limited agreements to those concluded with conservancy districts, have been significantly eliminated. Of like import is the fact that the amendment providing a formula for expenditures benefiting privately owned littoral property was passed one day prior to the passage of this reappropriation. It may reasonably be assumed that the Legislature passed this bill in contemplation of the amendatory legislation which had been the subject of such recent consideration and enactment. The elimination of the restrictive provisions which had previously obtained is indicative of a legislative intent to devote the funds to the objectives of the amendment effected by Amended House Bill No. 433, supra.

The language of State, ex rel. Hoeffler, et al., vs. Griswold, 35 Ohio App. 354, 356, is pertinent at this juncture:

“* * * Without extended discussion, suffice to say that we are of opinion that the appropriation under consideration as it appears in House Bill No. 203 is not in violation of the State Constitution, that it is a specific appropriation, and that the purpose is sufficiently defined. The power of the Legislature to reappropriate is as broad as it is to appropriate originally.

“The fact that the money set apart had, by the former Legislature, been itemized as to its distribution, was not compelling upon the General Assembly in the act of reappropriation. The history incident to this legislation establishes that the General Assembly acted with knowledge when it took from House Bill No. 203 the items theretofore appearing in the former appropriation. The form of appropriation under consideration has many times during a period covering a number of years been accepted as proper procedure, and, while this is not controlling, it is to be weighed in judicial determination. * * *”

It would thus appear that the reappropriation made by the 100th General Assembly may be devoted to improvements designed for the sole benefit of privately owned littoral land, in the manner prescribed by Chapter 1507, Revised Code, as amended.

The remaining questions propounded in your letter may be substantially answered by a consideration of whether or not the Division of Shore Erosion is governed by the provisions of the Administrative Procedure Act. That Act was designed to require administrative bodies to adhere to a uniform procedure in their jurisdiction over various areas of professional, technical and business activity and to provide uniform methods and grounds for review by the courts. In accordance with this purpose, definition of "agency" and "license" are incorporated into the statute and the means whereby the agency may revoke or suspend such license are outlined. Subdivision (B) of Section 119.01, Revised Code, defines a license as follows:

"* * * (B) 'License' means any license, permit, certificate, commission or charter issued by any agency."

As a matter of first impression, it may appear that inasmuch as Chapter 1507, Revised Code, which relates to the Division of Shore Erosion, uses the term "permit" in connection with the erection of groins and structures necessary to arrest shore erosion and in connection with the right to remove minerals from the bed of Lake Erie, such designated "permit" is a license within the meaning of the Administrative Procedure Act. However, analysis of the specific provisions of the chapter employing this term dictates to the contrary. Section 1507.03, Revised Code, provides in material part as follows:

"Subject to the limitations set forth in section 1507.11 of the Revised Code, the chief of the division of shore erosion may issue permits to parties making applications, for permission to take and remove sand, gravel, stone, minerals, and other substances from the bottom of Lake Erie, either upon a royalty basis or for a fixed annual rental as he deems is for the best interests of the state. Such permits shall be issued for terms of not less than one nor more than ten years. * * *

"No person shall build or construct a beach or erect groins or other structures necessary to arrest erosion along the Ohio shore line of Lake Erie *from the shore into Lake Erie* or remove minerals from and under the bed of Lake Erie without first submitting plans therefor to the division of shore erosion. If such

plans are approved by the division, it shall issue a permit to the applicant authorizing such project." (Emphasis supplied.)

It is manifest that the provisions above quoted contemplate nothing more nor less than a license in the sense of an incorporeal hereditament in real property, that is, a right to enter upon lands owned by the state for specified purposes. This is abundantly clear in the case of the right to remove minerals from the bed of Lake Erie which is a grant of a profit a prendre to the mutual benefit of the state and its "licensee." The situation is no less apparent with regard to the permit to construct groins or other structures "from the shore into Lake Erie." That is to say, there is nothing in the statute which would prevent a littoral owner from erecting a groin or structure on his own littoral property. It is only when the structure encroaches upon property, title to which is in the State in trust for the people, 34 Ohio Jurisprudence, 87, Section 114, that a permit or "license" is required.

Thus the function of the Division of Shore Erosion in connection with its authority to issue permits is an authority to enter into a license in and to State property on a *contractual* basis in order to effectuate the purposes of Chapter 1507, *supra*.

Attention is also invited to the following provisions of the Administrative Procedure Act, Section 119.02, Revised Code, which provides in part as follows:

"Every agency authorized by law to adopt, amend, or rescind rules shall comply with the procedure prescribed in Sections 119.01 to 119.13, inclusive, of the Revised Code, for the adoption, amendment, or rescission of rules. * * *"

Chapter 1507, *supra*, is barren of any grant of authority to the Division of Shore Erosion to promulgate rules and regulations. A power "authorized" by law means, in this context, a power, the exercise of which is authorized by the Legislature. The judiciary, for example, may only declare and interpret such powers as they exist or as they have been conferred by the Legislature; but the same judiciary is constitutionally incapable of creating them. This does not necessarily negative a situation whereby an administrative body, bereft of rule making functions under the statute creating it, might not still be subject to the Administrative Procedure Act in so far as its licensing functions are concerned. In my opinion, however, such a situation does not exist in this instance; and the

lack of an express authorization in this regard is an additional element which corroborates my conclusion that the Division of Shore Erosion is not within the Administrative Procedure Act. Moreover, the prevention of shore erosion over which the Division is given jurisdiction pursuant to the provisions of Chapter 1507, and the issuance of permits based on individually approved plans and specifications for structures tending to accomplish this purpose, would not readily lend itself to uniform rules and regulations since each and every permit would seem to require separate consideration in the light of such variable factors as the nature of the shore line and the location, length and elevations of the proposed structure.

Section 119.06, Revised Code, provides in part:

“No adjudication order of an agency shall be valid unless said agency is specifically authorized by law to make such order.
* * *”

Here, again, there appears to be no language in Chapter 1507 which “specifically” authorizes the Division to make such an adjudication order, and the absence thereof leads to the same conclusion as does the absence of the authority to promulgate rules and regulations.

I am impelled to conclude, therefore, that an agency which does not statutorily possess essential functions which the Administrative Procedure Act was designed to regulate (i. e. rule making and the entry of adjudication orders) and which, in fact, would not appear to require those functions in the exercise of its statutory duties, is not within the provisions of said Act.

Applying these conclusions to the specific inquiries contained in your letter, it would appear that the Legislature intended that the Division of Shore Erosion act as a contracting agency of the State with power to negotiate for permits on a contractual basis for the building of groins and structures to arrest erosion of the shore line of Lake Erie and to dispose of profits a prendre in and to the bed of said lake. Manifestly, each and every permit, which is in fact a contract, is no more subject to the Administrative Procedure Act than the contracts of any other agency made in the exercise of such a power to contract bestowed by the Legislature. Such permits are subject to the provisions of Section 1507.08 which provides as follows:

“All leases, contracts, permits, or agreements, which the chief of the division of shore erosion may enter into for the state under

sections 1507.01 to 1507.11, inclusive, of the Revised Code, shall be approved as to form by the attorney general. The terms of such leases, contracts, permits, or agreements shall be approved by the division of shore erosion. The effective date of such instruments shall be computed from the date the division approves the said lease, contract, permit, or agreement.”

In the case of the erection of groins and other structures, the standards to be followed are the accomplishment of the expressed purpose of the statute. The approval by the Division of plans and specifications will presumably be based, *inter alia*, upon such considerations as the effectiveness of the structure in accomplishing this purpose, and whether it will constitute a menace to the public uses of the water by way of navigation or otherwise.

With respect to the power of revocation of the permit, it is presumed that the permit will incorporate by reference the plans and specifications as approved by the Division of Shore Erosion with the contractual safeguard that a deviation therefrom would result in a breach of the contract, giving rise to a consequent revocation of the permit, constituting the permit holder a trespasser and subjecting him to the penalties of Section 1507.99, Revised Code. Such permit is thereby revoked by operation of the contract and not by the operation of administrative fiat.

The Division may, of course, in order to perform its duties prescribe methods whereby it will negotiate its permits. This is an obvious and necessary incident to its statutory obligations as imposed by Chapter 1507, *supra*.

Accordingly, and in specific answer to your inquiries, it is my opinion that:

1. Under the terms of the reappropriation made by the 100th General Assembly in Amended House Bill No. 816 and in accordance with the provisions of Section 1507.05 as amended by Amended House Bill No. 433, effective October 30, 1953, the Department of Natural Resources, Division of Shore Erosion, is authorized to expend out of such reappropriation, funds for projects “designed for the sole benefit of privately owned littoral property.”

2. The Division of Shore Erosion in its functions as defined and imposed in Chapter 1507, Revised Code, is not subject to the Administrative Procedure Act.

3. The permits which the Division of Shore Erosion is empowered to grant under the provisions of Chapter 1507, Revised Code, are not licenses as that term is used in the Administrative Procedure Act. Such permits are only licenses in the sense of an incorporeal hereditament in and to property of the State and are to be negotiated on a contractual basis, in the same manner as employed by other bodies or officers generally empowered to contract on behalf of the State.

4. The revocation of a permit granted under the provisions of Chapter 1507, Revised Code, is governed by, and dependent upon, the terms and provisions of the permit which is, in essence, a contract.

5. The Division of Shore Erosion as a necessary incident to its powers as a contracting body on behalf of the State may prescribe methods whereby it will negotiate permits which it is empowered to grant under the provisions of Chapter 1507, Revised Code.

6. The factors to be considered by the Division of Shore Erosion in the negotiation of such permits are the manifest purposes of Chapter 1507, Revised Code, and the protection of the public rights of use of the waters of Lake Erie.

Respectfully,

C. WILLIAM O'NEILL

Attorney General