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CANAL LANDS — LAWFUL ZONING REGULATIONS —
ADOPTED BY TRUSTEES OF TOWNSHIP—WILL GOVERN
USE BY LESSEES OF OHIO CANAL LANDS—LEASED BY
STATE OF OHIO TO PRIVATE PERSONS, ASSOCIATIONS OR
CORPORATIONS—SECTIONS 123.62 ET SEQ., 519.02 RC.

SYLLABUS:

Lawful zoning regulations adopted by the trustees of a township pursuant to Section 519.02 et seq., Revised Code, will govern the use by lessees of Ohio canal lands leased by the State of Ohio pursuant to the provisions of Section 123.62 et seq., Revised Code, to private persons, associations or corporations.

Columbus, Ohio, August 16, 1954

Hon. Marlowe Witt, Prosecuting Attorney
Henry County, Napoleon, Ohio

Dear Sir:

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

"One of our townships passed a zoning ordinance regulating the use of property and the size of housing. Through this township runs some property which belongs to the State of Ohio and was formerly part of the Miami and Erie canal.

"The State of Ohio leases this ground to individuals and cottages are then placed upon the land owned by the State of Ohio. The parties owning these cottages placed upon this leased ground refuse to comply with the terms of the zoning ordinance because they claim that they have been told by the state authorities that the zoning ordinance does not affect state owned real estate.

"I have advised the zoning inspector that it is my opinion that they must comply with the zoning ordinance particularly since under the terms of the lease from the State of Ohio the lessees have complete control and dominion over said property and further, that this land, although owned by the State of Ohio, is within the geographical boundaries of the township.

"May I therefore have your opinion as to whether this leased land and buildings thereon are subject to the terms of the zoning ordinance."

The statutes relative to township zoning are found in Sections 519.01 to 519.25 inclusive, of the Revised Code. Section 519.02 reads as follows:

"The board of township trustees may regulate by resolution the location, height, bulk, number of stories, and size of buildings and other structures, including tents, cabins, and trailer coaches, percentages of lot areas which may be occupied, set back building lines, sizes of yards, courts, and other open spaces, the density of population, the uses of buildings and other structures including tents, cabins, and trailer coaches, and the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of such township, and for such purposes may divide all or any part of the unincorporated territory of the township into districts or zones of such number, shape, and area as the board determines. All such regulations shall be uniform for each class or kind of building or other structure or use throughout any district or zone, but the regulations in one district or zone may differ from those in other districts or zones."

It will be observed that the principal items mentioned in this section which are subject to regulation, are the buildings and other structures located on the zoned land.

We may take it as very definitely settled, that regulations adopted pursuant to these sections will not in any way affect or limit the State of Ohio in the use of lands owned by it, nor the character of buildings which it may place thereon. The state is not bound by laws designed to regulate the use of property or the conduct of citizens unless it is so specifically stated in the legislation. This proposition appears in the leading case of *State of Ohio ex rel Parrott v. Board of Public Works*, 36 Ohio St., 409, where it was held, as shown by the third branch of the syllabus:

“The state is not bound by the terms of a general statute unless it be expressly so enacted.”

This proposition is founded on the doctrine of the common law which the court, in the opinion, referred to in the following words:

“The doctrine seems to be, that a sovereign state, which can make and unmake laws, in prescribing general laws intends thereby to regulate the conduct of subjects only, and not its own conduct.

“* * * Indeed, the doctrine of the common law expressed in the maxim, ‘The king is not bound by any statute, if he be not expressly named to be so bound’ (*Broom Leg. Max.* 51), applies to states in this country as well. Moreover, upon the same principle rests the well-settled doctrine that a state is not liable to be sued at the instance of a citizen. Not because a citizen may not have a just claim against the state, or may not suffer injury at the hands of the state; *but because it must be assumed that the state will ever be ready and willing to act justly toward its citizens in the absence of statutes or the intervention of courts.*”

(Emphasis added.)

The doctrine of the Parrott case has been reaffirmed and the case cited in numerous decisions of the Supreme Court, among others, *State ex rel. Attorney General v. Railway Company*, 37 Ohio St., 157; *Palumbo v. Industrial Commission*, 140 Ohio St., 54; *State ex rel. Williams v. Glander*, 148 Ohio St., 188.

The sole question, therefore, to be considered is whether or not this attribute of sovereignty that rests in the state passes in any degree to a lessee of the state. I can see no reason why it should. A very similar

question was before me in Opinion No. 2768, which I issued on the 26th of June, 1953. There, it was held as shown by paragraph 2 of the syllabus:

“The state is not bound by the terms of a general statute unless it be so expressly provided by statute. Because there is no such express provision in Section 1261-16, et seq., General Code, the health regulations adopted by a local board of health, as provided in Section 1261-42, General Code, are not binding on the state itself *but they are applicable to and may be enforced against lessees of the state.*” (Emphasis added.)

The question there under consideration, grew out of certain regulations established by the Board of Health for the Highland County General Health District, relative to soft drinks and other foods, as applying to concessionaires holding leases of state owned property adjacent to Rocky Fork Lake. In the course of the opinion it was said:

“The reason for the rule that the state is not bound by general statutes unless expressly so provided is that such exemption is inherent in the nature of a sovereignty. 49 American Jurisprudence, 301, Section 91. It cannot be supposed on any theory, however, that the execution of a lease by the sovereign thereby confers on the lessee any of the attributes of sovereignty. *Indeed, the extension of a part of the sovereignty of the government can be effected only by legislative grant in express terms, and such enactments are interpreted most strongly against the grantee and in favor of the government.* 37 Ohio Jurisprudence, 739, 740, Section 418. I conclude, therefore, that lessees of the state division of parks are bound by the health regulations relating to food establishments promulgated by the boards of health of the districts in which such lessees are located.” (Emphasis added.)

I do not wish to be understood as holding that the state would be powerless, under all circumstances, to grant a lessee of the state immunity from local zoning regulations. I can conceive of situations where, as an integral part of a state function, it would be entirely proper to grant to a lessee certain enumerated privileges which could not be interfered with except by an interference with the sovereignty of the state itself.

Such a situation is not presented here, however. Here one has a situation where lands owned by the state, acquired for and formerly used for canals but no longer needed for public use, are leased to others pursuant to the authority set out in Section 123.62, Revised Code. The rental value of such property is based on an appraised value arrived at without consideration of existing structures, and hence, without regard to existing

uses. See Section 123.63, Revised Code. There is no requirement in the statutes that the lessee use the property only in furtherance of some state function. In other words, the statutes allow the lessee to use the property *solely* for his own purposes in the same way that he would use property leased from a private individual.

In concluding, as I have, that the zoning regulations are enforceable against the property in question, I of course am assuming that the regulations are of such character as would be applicable to the same property had such property not been on state owned land. If of course, the dwellings, buildings or structures in question were in existence and used for the same purposes prior to the enactment of the zoning regulations, they would constitute a lawful "non-conforming use" within the meaning of Section 519.19, Revised Code.

Accordingly, in specific answer to your question, it is my opinion that lawful zoning regulations adopted by the trustees of a township pursuant to Section 519.02 et seq., Revised Code, will govern the use by lessees of Ohio canal lands leased by the State of Ohio pursuant to the provisions of Section 123.62 et seq., Revised Code to private persons, associations or corporations.

Respectfully,
C. WILLIAM O'NEILL
Attorney General