

6031.

APPROVAL—BONDS OF SCIO VILLAGE SCHOOL DISTRICT,
HARRISON COUNTY, OHIO, \$21,000.00.

COLUMBUS, OHIO, September 2, 1936.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

6032.

APPROVAL—BONDS OF VILLAGE OF BROOK PARK, CUYA-
HOGA COUNTY, OHIO \$40,847.92.

COLUMBUS, OHIO, September 2, 1936.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

6033.

DISCUSSION ON QUESTION OF AUTHORITY OF SUPERIN-
TENDENT OF PUBLIC WORKS TO REDUCE RENTAL ON
THE COMBINED WATER AND LAND LEASE EXECUTED
UNDER THE ACT OF MARCH 23, 1840.

COLUMBUS, OHIO, September 3, 1936.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus,
Ohio.*

DEAR SIR: At a conference held in your office a few days ago between yourself as Superintendent of Public Works and as Director of said department, and representatives of The Toledo Grain and Milling Company of Toledo, Ohio, which conference was participated in by a representative of this office, there was presented for consideration the question whether a certain lease now owned and held by The Toledo Grain and Milling Company could by agreement by and between yourself as Superintendent of Public Works and said company be modified by reducing the amount of the annual rental provided for in said lease, for the remaining period of the term of the lease.

By the lease here in question, which was executed under date of December 30, 1912, by the then Board of Public Works of the state of Ohio and which was for a term of thirty years and which provided for an annual rental of \$1500.00, there was leased and demised to The Toledo Grain and Milling Company, the lessee therein named, the right to the occupation and use of all the surplus water passing locks Numbers 46 and 47 of the Miami and Erie Canal in the city of Toledo, Ohio, not necessary for navigation, which water was to be taken out of the level of the Miami and Erie Canal above Lock 48 in said city, and also a state lot containing 2.35 acres of land contiguous to the canal at this point and which was included in said lease to enable the above named lessee to make use of the water power covered by the lease.

This lease was one executed by the Board of Public Works of the state under the authority of sections 20 to 23, inclusive, of an Act of the legislature of this state under date of March 23, 1840, 38 O. L., 87, 92, which sections of the Act here referred to were carried into the Revised Statutes of 1880 as sections 7775 to 7778, inclusive, and which were later carried into the General Code as sections 13953 to 13956, inclusive. It is provided by section 20 of said act, which is now section 13953, General Code, that whenever, in the opinion of the Board of Public Works, there shall be surplus water in either of the canals, or in the feeders, or at the dams erected for the purpose of supplying either of the said canals with water, or for the purpose of improving the navigation of any river, and constructed at the expense of the state, over and above the quantity of water which may be required for the purpose of navigation, such surplus water and any lands granted to, or purchased by the state for the purpose of using the same may be leased for hydraulic purposes, subject to such conditions and reservations as may be considered necessary and proper, either in perpetuity or for a limited number of years, for a certain annual rental, or otherwise, as may be deemed most beneficial for the interests of the state. By section 23 of the Act above referred to, which is now section 13956, General Code, it is provided that every lease, grant or conveyance of water power, shall contain a reservation and condition, that the state, or its authorized agents, may at any time resume the privilege or right to the use of water, or any portion thereof, whenever it may be deemed necessary for the purposes of navigation, or whenever its use for hydraulic purposes shall be found in any manner to interfere with, and injuriously affect the navigation of either of the canals, feeders or streams from which the water shall be taken for such hydraulic purposes. This section further provides that "whenever such privilege shall be resumed, in whole or in part, the sum paid therefor, or the rent reserved, or such reasonable portion thereof as shall be determined upon, agreeably to

the conditions and stipulations of the lease or deed of conveyance aforesaid, shall be refunded, or remitted to the purchaser or lessee, his heirs or assigns."

The state lot covered by this lease and which was included therein under the authority of the provisions of section 13953, General Code, is, I assume, a parcel of land acquired by the state at an early date under the authority of the Act of February 7, 1826, 24 O. L., 58, which Act authorized the canal commissioners "to procure, by purchase or otherwise, a suitable number of acres of land, at each and every point on or adjoining the Ohio canals, heretofore authorized to be constructed, where the surplus water passing through said canals may be profitably used for hydraulic purposes." This state lot was and is contiguous to a section of the Miami and Erie Canal in the city of Toledo, Ohio, which was abandoned for canal and hydraulic purposes by an Act of the 83rd General Assembly passed January 22, 1920, 108 O. L., Pt. 2, page 1138. And under the provisions of this Act the section of Miami and Erie Canal lands thereby abandoned for canal and hydraulic purposes was later sold to the city of Toledo, Ohio, for street purposes. By reason of the abandonment of this section of the canal for hydraulic purposes, as well as by the later abandonment for canal and hydraulic purposes of an upper and contiguous section of the Miami and Erie Canal in Lucas County by an Act passed by the 87th General Assembly under date of April 4, 1927, 112 O. L., 360, The Toledo Grain and Milling Company was effectually and completely deprived of the use of any water for hydraulic purposes in the operation of its mill, or otherwise. See *Kirk, Superintendent of Public Works, v. Maumee Valley Electric Company*, 279 U. S., 797.

The questions here presented are whether the acts of the state of Ohio above referred to, which effected an abandonment of the canal for hydraulic purposes and which deprived The Toledo Grain and Milling Company of the use of the water provided for in this lease, afford a sufficient consideration for a reduction in the amount of the rental to be paid under this lease for the remaining period of its term, and whether you, as Superintendent of Public Works and as Director of said Department, are authorized to effectuate such reduction by agreement with the lessee. Under the provisions of section 464, General Code, you, as Superintendent of Public Works, are vested with all the power and authority formerly conferred by law upon the Ohio Canal Commission and upon the Board of Public Works of the state.

Although the rights which were conferred upon The Toledo Grain and Milling Company by this lease with respect to the use of the waters of the canal for hydraulic purposes were taken by it subject to the reserved right of the state to later abandon the canal for canal and

hydraulic purposes, and the deprivation of the use of such water by said company as the named lessee in this lease instrument did not confer upon this company any claim for damages which the state was required to recognize as a legal obligation (Kirk, Superintendent of Public Works, v. Maumee Valley Electric Company, *supra*), the statutory provisions under which this lease was executed fairly construed recognize the deprivation of the use of the water provided for in the contract as a sufficient consideration for the remission of an agreed part of the rental provided for in the lease and confer upon you, as Superintendent of Public Works as successor to the powers and authority of the Ohio Canal Commission and the Board of Public Works, authority to enter into an agreement with the above named lessee for the modification of the lease with respect to the rental to be paid by the lessee for the remaining period of the term of the lease. As to this, section 23 of the original Act providing for leases of this kind, which is now section 13956, General Code, provides in effect that whenever the state shall assert its privilege of taking from the lessee the use of the water provided for in the contract, in whole or in part, the rent reserved, or such reasonable portion thereof as shall be determined upon, agreeably to the conditions and stipulations of the lease shall be remitted to the lessee. See *State, ex rel., v. Board of Public Works*, 42 O. S., 607, 612.

All that The Toledo Grain and Milling Company now has under the lease instrument executed to it is a lease of the state lot therein described. And upon the considerations above noted, I am of the opinion that you are authorized to enter into an agreement with said company for a modification of this lease with respect to the amount of the annual rental to be paid thereon for the remaining period of the term of the lease and to reduce such annual rental in such reasonable amount as may be agreed upon by and between yourself and the lessee.

Respectfully,

JOHN W. BRICKER,
Attorney General.