

2337.

APPROVAL, BONDS OF SPRINGFIELD CITY SCHOOL DISTRICT, CLARK COUNTY, OHIO—\$12,000.00.

COLUMBUS, OHIO, September 13, 1930.

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

2338.

OHIO REVOLUTIONARY MEMORIAL STATE PARK—WITHIN CUSTODY AND MANAGEMENT OF COMMISSION—CONTINUING CUSTODY AND MANAGEMENT UNTIL COMPLETION OF WORK AUTHORIZED BY ACT—COMMISSION MAY EMPLOY CARETAKER.

*SYLLABUS:*

1. *Custody and management of the Ohio Revolutionary Memorial State Park is in the Ohio Revolutionary Memorial Commission. This custody and management may continue until completion of all the work authorized by the act entitled "An act to provide for the creation of an Ohio revolutionary memorial" (113 O. L. 547), at which time the commission must deliver the property to the Ohio State Archaeological and Historical Society which thereafter shall have the care, custody, supervision and management of said property for the state; however, before the completion of its work, the commission may, if it deems it advisable, turn over to said society, the custody and management of this property.*

2. *During the period of the jurisdiction of the commission, it may employ a caretaker.*

3. *The commission may proceed at once to actualize the constructive and developmental program authorized by Section 5 of said act.*

COLUMBUS, OHIO, September 15, 1930.

MR. A. D. HOSTERMAN, *Chairman, Ohio Revolutionary Memorial Commission, Springfield, Ohio.*

DEAR SIR:—I wish to acknowledge receipt of the following letter from you relating to the land recently appropriated in Clark County by the State of Ohio for the Ohio Revolutionary Memorial State Park:

"As of course Mr. Godown will advise you, he came over yesterday and with the state warrant out of our commission funds for the amount of the jury award, we paid over the funds, had the two mortgages against the property cancelled, the deed to the State of Ohio placed on record along with the proper entry in the records of the Probate Court.

The farm now belongs to the State of Ohio and our Commission, as I understand having acquired the property for the State as a permanent Ohio Revolutionary Memorial State Park, is empowered under the law to go ahead with the improvement and development as Section 5 of the act amended Senate Bill No. 91 sets forth.

Our Commission will not be able to use any of its remaining funds for development of the park but we are now making up our estimates for funds needed during the next biennium as the financial officials at the State House have requested.

Will you please advise me whether I am correct in understanding that the property acquired is now in the control of the Ohio Revolutionary Memorial Commission and we should arrange for a caretaker and proper handling of the farm and when plans for development are arranged by our Commission and money available, we should go right ahead carrying out the plans laid down by Section 5 of the bill.

Unless you advise to the contrary, I am planning for the Commission arranging to have the caretaker now on the farm continue to look after it and plan for the future, as I am outlining and the bill clearly sets forth.

An opinion in the matter at your earliest convenience will be greatly appreciated together with any suggestions you may care to make."

The act entitled "An act to provide for the creation of an Ohio revolutionary memorial," 113 O. L. 547, more fully discussed in a recent opinion directed to you (1930 O. A. G., Opinion No. 1969) created the Ohio revolutionary memorial commission entrusting to it the duty "to carry into execution the provisions of this act." (Section 1.)

Section 2 of the act provides :

"There shall be an 'Ohio revolutionary memorial' to consist of (1) the Ohio part of a proposed tri-state (Michigan, Kentucky and Ohio) 'Revolutionary memorial trail' and (2) an 'Ohio revolutionary memorial state park'."

Section 5, pertaining to the park mentioned in Section 2, reads :

"The commission is authorized to acquire by purchase, part of the site of the battle of Piqua as a permanent Ohio revolutionary memorial state park; and is empowered to construct thereon a stockade or pioneer type of fort, of the kind which stood there, and to prepare therein, or in another structure adjacent thereto, facilities and space for a museum concerning Indian, frontier and pioneer days. The commission may improve the grounds and buildings thereon, as to drives, paths, fences, drainage, landscaping, and the like for their use as a public park and educational memorial. The commission may rebuild or reconstruct the foundation, and base and steps of the statue of George Rogers Clark now on the site."

In Section 6 the commission is empowered to instigate the appropriation, by condemnation proceedings, of real estate authorized to be purchased in Section 5.

Section 8, which is entitled "Powers of the Commission," provides in part :

"The commission shall meet as soon as possible after the effective date of this act, and execute the provisions hereof as expeditiously as practicable. \* \* \* . It is empowered to employ such employes as are absolutely necessary for the carrying out of the provisions hereof.

\* \* \* \* \*

Upon completion of the work authorized by this act the functions of the commission shall cease, it shall make full report of its doings to the governor, and it *shall deliver* all property, both real and personal, however acquired, into custody of the Ohio State Archaeological and Historical Society,

and *thereafter* all such property shall be in the care and custody and under the supervision and management of said society for and on behalf of the state. The commission may from time to time before the completion of its work turn over property to said society, if it deem such *transfer of custody and management* then advisable." (Italics the writer's.)

The fee simple title to this farm now being in the state of Ohio, your commission may proceed at once to actualize the constructive and developmental program authorized in Section 5 of the act.

This property is now in the custody and control of the commission. No express words in the act directly so state. But its implication emanates readily from the provisions of Section 5 which authorize the commission "to acquire" and improve the property, and from that part of Section 8 which provides that upon the expiry of the functions of the commission, occurrent upon the consummation of the work authorized by the act, "it shall deliver all property, both real and personal, however acquired, into the custody of the Ohio State Archaeological and Historical Society." If, before said delivery, the commission did not have the custody of said property, it could not deliver the custody. One cannot deliver the custody of that of which he does not have the custody. Hence the direction to deliver custody implies the presence of custody. Likewise, from the phrase "*thereafter* all such property shall be in the care and custody and under the supervision and management of said society," it may be implied, not unreasonably, that *theretofore* these same mentioned duties and privileges are lodged in the commission. However, all doubt evanesces before the provision that "The commission may from time to time before the completion of its work turn over property to said society, if it deem such transfer of custody and management then advisable."

In order to perform these functions the commission may employ a care taker if it is "absolutely necessary." In view of the facts that the farm in question comprises over two hundred acres of land and the usual farm buildings, that it represents an investment of twenty-one thousand dollars, and that the members of the commission receive no remuneration for their services, it would seem that, not only is it absolutely necessary that this property be placed under the protection of a caretaker who is physically present on the premises, but the act does not contemplate that the commissioners shall themselves be such caretakers. Hence, a caretaker may be employed by the commission.

According to Section 8 of the act, the custody and control of the commission over this property ceases when all of the work authorized by the whole act is completed. At such time the functions of the commission cease, and it must deliver all of the property to the Ohio State Archaeological and Historical Society which thereafter shall exercise the custodial, supervisory and managerial duties for the state. Before the time of full completion of all of its work outlined in the act, the commission may, but need not, turn over to the society the custody of this property if it deems it advisable. This is made volitional with the commission, subject only to the mandate that the commission shall execute the provisions of the act as expeditiously as practicable. One of the elements of the practicability with which your commission must expedite the execution of the act is, of course, the availability or non-availability of funds necessary to finance the program specified by the act.

In arriving at these conclusions I am cognitive of Section 154-40, General Code, 112 O. L. 479, which reads partially :

" \* \* \* the department of public works shall have the following powers:

\* \* \* \* \*

(7) To erect, supervise and maintain all public monuments and memorials

erected by the state, except where the supervision and maintenance thereof is otherwise provided for by law."

However, the proviso terminating paragraph number 7 is explicit, and it cannot be questioned but that, by the act entitled "An act to provide for the creation of an Ohio revolutionary memorial," the supervision and maintenance of the Ohio Revolutionary Memorial State Park is provided for by law otherwise than through the instrumentality of the department of public works.

Specifically answering your question, I am of the opinion that:

1. Custody and management of the Ohio Revolutionary Memorial State Park is in the Ohio Revolutionary Memorial Commission. This custody and management may continue until completion of all the work authorized by the act entitled "An act to provide for the creation of an Ohio revolutionary memorial," (113 O. L. 547), at which time the commission must deliver the property to the Ohio State Archaeological and Historical Society which thereafter shall have the care, custody, supervision and management of said property for the state; however, before the completion of its work, the commission may, if it deems it advisable, turn over to said society, the custody and management of this property.

2. During the period of the jurisdiction of the commission, it may employ a caretaker.

3. The commission may proceed at once to actualize the constructive and developmental program authorized by Section 5 of said act.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*

2339.

APPROVAL, FOUR RESERVOIR LAND LEASES TO LAND AT BUCKEYE LAKE, LAKE ST. MARYS, EAST RESERVOIR AND LAKE LORAMIE.

COLUMBUS, OHIO, September 15, 1930.

HON. PERRY L. GREEN, *Director of Agriculture, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your recent communication over the signature of Frank G. Adams, Chief of the Bureau of Inland Lakes and Parks, submitting for my examination and approval, certain reservoir land leases in triplicate, executed by the State of Ohio through the Conservation Commissioner, as follows:

<i>Buckeye Lake</i>	<i>Valuation</i>
C. L. Cusic, cottage site, boat house and dock landing purposes.....	\$ 800 00
Harvey R. Walker, residence and agricultural purposes.....	1,000 00
<i>Lake St. Marys</i>	
Wilbur Mallory, commercial dock landing purposes, etc. ....	1,000 00
<i>East Reservoir</i>	
A. H. Wagner, boat house dock landing and walkway purposes....	100 00
<i>Lake Loramie</i>	
Edward C. Luthman, pasturage purposes.....	1,000 00