

1907.

APPROVAL, BONDS OF CITY OF TOLEDO, LUCAS COUNTY, OHIO—
\$25,000.00.

COLUMBUS, OHIO, November 23, 1933.

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

1908.

APPROVAL, BONDS OF CITY OF TOLEDO, LUCAS COUNTY, OHIO—
\$96,000.00.

COLUMBUS, OHIO, November 23, 1933.

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

1909.

APPROVAL, BONDS OF CITY OF SPRINGFIELD, CLARK COUNTY,
OHIO—\$17,000.00.

COLUMBUS, OHIO, November 23, 1933.

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

1910.

APPROVAL, BONDS OF ELYRIA CITY SCHOOL DISTRICT, LORAIN
COUNTY, OHIO—\$21,000.00.

COLUMBUS, OHIO, November 23, 1933.

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

1911.

DISAPPROVAL, LEASES TO CANAL LAND IN HENRY COUNTY, OHIO.

COLUMBUS, OHIO, November 23, 1933.

HON. T. S. BRINDLE, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You recently submitted to me for my examination and approval two canal land leases in triplicate, executed by you as Superintendent of Public Works

and as Director of said Department, to the Henry County Park District. By the leases here in question, which are for a stated term of ninety-nine years, renewable forever, there is leased and demised to said park district the right to use and occupy for the purposes therein stated certain sections of the abandoned Miami and Erie Canal lands and the waters therein contained lying within Henry County, Ohio. One of these leases covers that part of the Miami and Erie Canal which lies within the corporate limits of the Village of Napoleon, Ohio, which section of the canal is 2.25 miles in length. The other lease here referred to covers two separate sections of Miami and Erie Canal lands, which are described in said lease as separate tracts as follows:

TRACT 1. All that portion of the Miami and Erie Canal lands lying and being between the West end of Buckland Lock No. 11 in Henry County, Ohio, and the Eastern boundary line of the village of Napoleon, Ohio, not now designated or required for highway purposes; and being about eleven (11) miles, more or less, in length; and also

TRACT 2. All that portion of the Miami and Erie Canal lands lying and being between the Western boundary of the village of Napoleon, Ohio, and the Western boundary of Henry County, Ohio, not now designated or required for highway purposes, and being about six (6) miles in length.

In both of said leases it is stated that the canal lands therein described are leased to the park district for public park, recreational and other purposes incidental thereto, "including the right to construct, maintain and operate thereon public parks, with the further right to construct and maintain thereon swimming pools, public parking grounds, athletic and other equipment for amusement purposes, and likewise to construct and maintain thereon walks, drives, comfort stations and other devices for the use and convenience of the public."

As it appears from recitals therein contained, these leases were executed by you under authority of Amended Substitute Senate Bill No. 194, known as the DeArmond Act, enacted by the 89th General Assembly, 114 O. L. 546. This act provides for the abandonment for canal and hydraulic purposes of the Miami and Erie Canal from a certain point in Providence Township, Lucas County, Ohio, to a point five hundred feet north of the state dam near the north corporation line of the City of Middletown, Ohio. Apparently, the primary purpose of the legislature in providing for the abandonment of said canal for canal and hydraulic purposes was to devote such portions thereof as might be suitable, to highway purposes. And to this end, it was provided that the Director of Highways within ninety days from the effective date of the act, which was August 6, 1931, should make a preliminary survey for the purpose, among other things, of determining what portions of said Miami and Erie Canal lands abandoned for canal and hydraulic purposes by said act, would be required as rights of way for highway improvement.

The leases here under consideration are executed under the authority of sections 13 and 14 of said act, which, by designations made by the Attorney General, have been carried into the General Code as sections 14178-39 and 14178-40. These sections read as follows:

Sec. 14178-39.

"If the division of conservation of the state of Ohio, or any city, village or other municipal corporation, or any county, township, municipal

park board, or other political subdivision or taxing district of the state, desires to lease any portion of said canal lands not required for highway purposes, such parties may make application, within two years from the date at which this act becomes effective, to the superintendent of public works of the state of Ohio for a lease thereof, stating the purpose for which such canal land, herein abandoned for canal and hydraulic purposes, is desired, such land or lands may be leased to such party or parties, by said superintendent of public works, for public park purposes only, for a period of fifteen years, or multiples thereof, up to ninety years, or for a term of ninety-nine years, renewable forever."

Sec. 14178-40.

"If the said superintendent of public works determines after investigation, that it will be to the interest of the state and of the public in general to grant such lease, he may grant such party or parties a lease therefor, subject to the approval of the governor and attorney general; in determining the annual rental to be paid to the state for a lease of canal lands for such purpose, the said superintendent of public works shall take into consideration the public use that is to be made of such canal property by such party or parties, and fix the annual rental therefor at a nominal sum, but such party or parties shall obligate themselves by the terms of such lease to make substantial improvements thereon so as to fit the same for public park and recreational purposes, and this shall be a necessary restriction in the granting of such leases, provided, however, that nothing contained in this act shall apply to canals herein abandoned for canal and hydraulic purposes, or to lands or bodies of water now used or hereafter to be used for power production, water supply and other industrial purposes, all of which shall be under the control and jurisdiction of the superintendent of public works for the purpose of maintaining and leasing the same."

The Henry County Park District is, I assume, a park district created and established under the provisions of section 2976-1, General Code, and aside from the powers expressly or by implication conferred upon it by the DeArmond Act so far as these leases are concerned, said park district has the general powers and authority conferred upon it by the sections of the park district law above referred to. It is sufficient to say in this connection that there is nothing in the park district law which in terms authorizes a park district created under said law to take a lease of the lands for the purposes indicated and stated in the leases here in question. And I am inclined to the view that the provisions of the DeArmond Act must be looked to as the sole authority for the execution of these leases.

In this view of the law governing the authority for the execution of these leases, it is pertinent to note some of the provisions therein contained. In each of these leases, it is stated that the prime object to be obtained by the granting of the lease is to enable the Board of Park Commissioners of Henry County Park District to establish and maintain public parks and pleasure resorts in connection with lands now owned or to be acquired by the park board for the use of the citizens of Henry County and of the State of Ohio in general, "and to authorize the said The Board of Park Commissioners of Henry County Park District to do anything that the State of Ohio might do in maintaining public parks and pleasure resorts upon the canal lands herein leased, but subject to the rules and regulations hereinafter stipulated". It is further provided in these leases that both the water and

lands covered by the lease shall be under the control and management of the Board of Park Commissioners of Henry County Park District, but that all plans for permanent improvements or betterments shall be subject to the approval of the Superintendent of Public Works, and likewise that any permanent rules and regulations that the Board of Park Commissioners may desire to promulgate for the control and management of the canal lands and waters therein leased, as public parks and pleasure resorts, shall be subject to the approval of the Superintendent of Public Works. It is further provided in and by each of these leases that the Superintendent of Public Works shall have full control of all water craft operating upon slack water pools of water therein leased, other than pleasure boats as to which it is provided they shall be under the control of the board of park commissioners of said park district. In each of these leases the following provision is contained :

“The party of the first part hereto hereby authorizes the Board of Park Commissioners of the Henry County Park District to grant sub-lease, special privileges and concessions for portions of the canal property herein leased where the same can be done without materially affecting the rights of the public, in strict conformity with the provisions of the General Code relating to the leasing of State reservoir lands that have heretofore been dedicated and set apart as public parks and pleasure resorts for the use of the public, and all laws now in force governing the leasing of lands at State Reservoir parks by the Conservation Council and the Conservation Commissioner of Ohio, are hereby made applicable and in full force and effect as to said the Board of Park Commissioners of the Henry County Park District, but all such sub-leases, privileges and concessions shall first be approved by the Superintendent of Public Works before the same become effective, and copies thereof shall be filed in the office of the Superintendent of Public Works of Ohio within thirty (30) days after the same have been duly executed by said Park Board.”

In connection with the provisions of these leases above quoted, it is expressly provided by the further terms of these leases that the provisions of sections 479, 480, 481, 482, 483, 484 and 486 of the General Code shall apply as rules governing the operation and use of the lands and waters covered by the leases, as public parks. These sections of the General Code, it will be recalled, apply to certain named state reservoirs which, by the provisions of sections 469 and 470, General Code, have been dedicated and set apart for the use of the public as public parks and pleasure resorts. In other words, the parties to these leases have attempted by contract to make applicable to the slack water pools and other waters constituting a part of the sections of the Miami and Erie Canal system, for the regulation of such waters in the use of the same by the public for park and recreational purposes, the rules of law prescribed and enacted by the legislature governing the public in the use for park purposes, of the state reservoirs named in section 469, General Code, and which by that section and by section 470, General Code, have been expressly dedicated and set aside for public park purposes subject to the regulatory provisions contained in sections 479, et seq., General Code, above referred to. In this connection, it is pertinent to note further that the 89th General Assembly in an act passed March 9, 1931, and which went into effect on the _____ day of June, 1931, 114 O. L. 15, provided for the abandonment for canal and hydraulic purposes of certain portions of the Miami and Erie Canal in Lucas and Henry Counties, other than those

covered by the leases here in question, and for the lease of the same for public park and recreational purposes. By this act, which specifically provided that the Superintendent of Public Works might include in any lease of such abandoned canal lands a slack water pool in the Maumee River, therein referred to, express provision was made for the application of sections 479 to 484, inclusive, and of section 486 of the General Code to the lands and waters covered by any lease executed under the provisions of said act. It is thus seen that with respect to the leases here in question the parties executing the same have sought to make applicable to the lands and waters covered by these leases rules of law which the legislature in the enactment of the DeArmond Act did not see fit to prescribe with respect to that part of the Miami and Erie Canal system which was abandoned for canal and hydraulic purposes by said act.

Aside from inherent limitations in the power of the Superintendent of Public Works and of those contracting with him in the lease of canal lands or otherwise to legislate with respect to matters covered by such contracts, another and perhaps more obvious consideration requires me to hold that the above noted provisions of these leases relating to the slack water pools and other waters covered thereby, are wholly unauthorized and are for this reason illegal. In this connection, it will be noted that section 14 of the DeArmond Act, under the authority of which these leases are executed, provides that nothing in said act, which provides generally for the lease of canal lands abandoned for canal and hydraulic purposes by the act, shall apply to lands or bodies of water that may hereafter be used for power production, water supply or other industrial purposes. As to this, the provision of this section is "provided, however, that nothing in this act shall apply * * to lands or bodies of water now used or hereafter to be used for power production, water supply and other industrial purposes, all of which shall be under the control and jurisdiction of the superintendent of public works for the purpose of maintaining and leasing the same". Under the provisions of section 14009 and other related sections of the General Code, the Superintendent of Public Works is authorized to sell or lease the right to use surplus water in any of the state canals, feeders, reservoirs or slack water pools, constituting a part of the state canal system, for hydraulic and other purposes; and if, as provided in section 14 of the DeArmond Act, such waters are required to remain under the control and jurisdiction of the Superintendent of Public Works for the purpose of maintaining and leasing the use of the same for power production, water supply and other industrial purposes, it is clear that the Superintendent of Public Works is not authorized to turn these waters over in perpetuity for park purposes and thereby disable himself or his successors in office in carrying out the power and authority which he has under the act to lease these waters for power production, water supply or other industrial purposes.

Recognizing as I do the beneficent and useful purpose for which the canal lands and waters covered by these leases are to be maintained and used by the Henry County Park District, the lessee named in the leases, I am reluctant to disapprove these leases on any ground, but inasmuch as it quite clearly appears that in the execution of these leases you have exceeded the authority conferred upon you in and by the act of the legislature above referred to, I do not feel that I can do otherwise than to disapprove these leases. For the reasons above stated, these leases are disapproved and the same are herewith returned to you.

Respectfully,

JOHN W. BRICKER,
Attorney General.