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1. LAKE ERIE IMPROVEMENT — PROPOSED CONSTRUCTION BY MUNICIPAL CORPORATION—AID OF NAVIGATION AND WATER COMMERCE—CORPORATION NEED NOT OBTAIN PERMIT PRESCRIBED IN SECTION 1507.03 RC — EROSION — WHERE IMPROVEMENT IS FOR EROSION CONTROL ONLY, CORPORATION MUST SUBMIT PLANS TO DIVISION OF SHORE EROSION FOR APPROVAL AND TO OBTAIN PERMIT.
2. INDIVIDUAL WHO DESIRES TO CONSTRUCT BEACH OR ERECT GROINS OR OTHER STRUCTURES—PURPOSE TO ARREST EROSION ALONG OHIO SHORE OF LAKE ERIE — MUST OBTAIN PERMIT — STATUS, STRUCTURE LOCATED WITHIN OR WITHOUT TERRITORIAL LIMITS OF MUNICIPAL CORPORATION.
3. INDIVIDUAL WHO DESIRES TO WHARF OUT TO NAVIGABLE WATER OR MAKE FILL ON PROPERTY TO BEACH NAVIGABLE WATER—NEED NOT OBTAIN PERMIT — DESCRIBED ACTION ON PART OF LITTORAL OWNER NOT WITHIN PROHIBITIONS OF CHAPTER 1507 RC.
4. PERMIT — INDIVIDUAL MAY LAWFULLY CONSTRUCT BEACH, GROIN OR OTHER STRUCTURE TO PREVENT EROSION — STRUCTURE COULD BE IN AREA WHERE MUNICIPAL CORPORATION ENACTED ORDINANCE TO PROHIBIT ENCROACHMENTS — DIVISION OF SHORE EROSION—PROTECTION OF PUBLIC RIGHTS—SECTION 721.04 RC.

## SYLLABUS:

1. Where a municipal corporation desires to construct an improvement in Lake Erie, which improvement is in aid of navigation and water commerce, the municipal corporation need not obtain the permit prescribed by Section 1507.03, Revised Code, even though the structure will also arrest erosion. Where a municipal corporation desires to construct an improvement in Lake Erie for erosion control only, the municipal corporation must submit its plans to the Division of Shore Erosion for approval and obtain the permit.

2. An individual who desires to construct a beach or erect groins or other structures for the purposes of arresting erosion along the Ohio shore of Lake Erie

must first obtain the permit prescribed by Section 1507.03, Revised Code, whether the structure when completed will be located within or without the territorial limits of a municipal corporation.

3. Where an individual desires to wharf out to navigable water or make a fill in front of his property for the purpose of reaching navigable water, such individual need not obtain the permit prescribed by Section 1507.03, Revised Code, as such action on the part of the littoral owner is not within the prohibitions of chapter 1507 of the Revised Code.

4. An individual who has obtained the permit prescribed by Section 1507.03, Revised Code, may lawfully construct a beach, groin or other structure to prevent erosion authorized by said permit even though the structure will be placed in an area where a municipal corporation under the authority of Section 721.04, Revised Code, has enacted an ordinance prohibiting encroachments. In issuing permits in such instances the Division of Shore Erosion should consider the benefits accorded by the municipal ordinance as well as the purposes of chapter 1507, Revised Code, and the protection of the public rights of use of the waters of Lake Erie.

Columbus, Ohio, November 22, 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:

“If a municipal corporation desires to construct an improvement in Lake Erie for the purpose of ‘protecting the shore line from eroding and also as a mooring dock for small boats’, which improvement will be located within the territorial limits of such municipal corporation, must such municipal corporation obtain the permit prescribed by Section 1507.03, Revised Code of Ohio?

“If an individual desires to construct a beach or erect groins or other structures for the purpose of arresting erosion along the Ohio shore of Lake Erie and such beach, groin, or other structure when completed will be located in Lake Erie within the territorial limits of a municipal corporation, must such individual obtain the permit prescribed by Section 1507.03, Revised Code of Ohio?

“Where an individual desires to wharf out to navigable water or make a fill in Lake Erie in front of his property for the purpose of reaching navigable water, must such individual obtain the permit prescribed by Section 1507.03, Revised Code of Ohio?

“If a municipal corporation in aid of navigation and water commerce enacts legislation, pursuant to Section 721.04, Revised

Code of Ohio, prohibiting a person from placing or maintaining an encroachment in Lake Erie at a designated location within the territorial limits of such municipal corporation, can an individual who has obtained the permit prescribed by Section 1507.03, Revised Code of Ohio, lawfully construct a beach, groin, or other structure designated to prevent erosion along the Ohio shore of Lake Erie within this area?"

Your first question resolves itself into a consideration of whether or not a municipal corporation is subject to the provisions of Section 1507.03, Revised Code, pertaining to a permit for the erection of structures necessary to prevent erosion. In consideration of this question it is necessary that the following sections of the Revised Code which deal with the subject of the waters of Lake Erie be examined.

Section 123.03, Revised Code, is a declaration of the state's right to the waters of Lake Erie and reads as follows:

"It is hereby declared that the waters of Lake Erie within the boundaries of the state together with the soil beneath and their contents do now and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state, subject to the United States government and the public rights of navigation and fishery, and further subject only to the right of littoral owners while said waters remain in their natural state to make reasonable use of the waters in front of or flowing past their lands, and the rights and liabilities of littoral owners while said waters remain in their natural state of accretion, erosion, and avulsion. Any artificial encroachments by public or private littoral owners, whether in the form of wharves, piers, fills, or otherwise, beyond the natural shore line of said waters not expressly authorized by the general assembly, acting within its powers, shall not be considered as having prejudiced the rights of the public in such domain. This section does not limit the right of the state to control, improve, or place aids to navigation in the other navigable waters of the state or the territory formerly covered thereby.

"The department of public works is hereby designated as the state agency in all matters pertaining to the care, protection and enforcement of the state's rights designated in this section."

By the provisions of Section 721.04, Revised Code, the state gave municipal corporations within which there is included a part of the shore of the waters of Lake Erie certain rights in the aid of navigation and water commerce. The pertinent provisions of Section 721.04 are as follows:

"Any municipal corporations within the limits of which there is included a part of the shore of the waters of Lake Erie may, in

aid of navigation and water commerce, construct, maintain, use, and operate, or lease the right to construct, maintain, use, and operate, piers, docks, wharves, and connecting ways, places, tracks, and other water terminal improvements with buildings and appurtenances necessary or incidental to such use, on any land belonging to the municipal corporation held under title permitting such use, and also over and on any submerged or artificially filled land made by accretion resulting from artificial encroachments, title to which is in the state, within the territory covered or formerly covered by the waters of Lake Erie in front of littoral land within the limits of such municipal corporation, whether such littoral land is privately owned or not.

“Any such municipal corporation may, by ordinance, subject to federal legislation, establish harbor lines and other regulations for such territory and prohibit the placing, maintaining, or causing or permitting to be placed therein any unlawful encroachments on such territory. \* \* \*”

The permits referred to in your request are provided for by Section 1507.03, Revised Code, and the pertinent portion of this section provides:

“\* \* \* 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 added.)

The language of Section 1507.03, Revised Code, prohibits the erection of such structures without a permit and there are no exceptions; therefore, unless the municipal corporation is not a “person” within the meaning of the word as used in Section 1507.03, Revised Code, or has authority to erect such structures by some grant of power elsewhere in the statutes, it would have to obtain a permit when it desires to erect a structure for shore erosion control.

A municipality is nominally a person, and is held to be included within the term “person.” 62 Corpus Juris Secundum, 73. This was so held in Ohio in the case of Village of Bay v. Gelvick, 58 Ohio App., 51. In the case of Metropolitan Railroad Company v. District of Columbia, 132 U. S., 1, the United States Supreme Court held that to exclude municipal corporations from the word “person” or “persons” as used in a statute of limitations would be to exclude private corporations and therefore municipal corporations are within the terms of the law. See also Calhoun County v.

Brandon, 187 So., 868, Hoyt v. Board of Civil Service Commissioners, 132 P. 2d, 804, to the same effect.

It appears that the purpose of Section 1507.03, Revised Code, in providing for approval of plans for shore erosion control prior to the issuance of a permit to erect a structure for erosion control, is to insure the effectiveness of the structure to be built in the accomplishment of its purpose. Therefore, the purpose would apply equally to a municipal corporation as well as to an individual and since a municipal corporation is generally held to be a person and there is no apparent intention to exclude it from the meaning of the word "person" in Section 1507.03, it is my opinion that a municipal corporation is so included.

The only grant of authority to municipal corporations concerning the use of the waters of Lake Erie is contained in Section 721.04, Revised Code, *supra*, and is limited to improvements and appurtenances necessary thereto in the aid of navigation and water commerce. Such structures may be erected by a municipal corporation without further approval of the state.

To answer your first question it is necessary to determine whether the purpose of the municipal corporation in building the structure is in aid of navigation and water commerce or whether it is necessary for shore erosion control. By the provisions of Section 721.04, Revised Code, a municipal corporation, whose territorial limits encompass a portion of the shore line of Lake Erie, has authority to erect docks or wharves and any appurtenances necessary or incidental to such use, and therefore the erection of a mooring dock would be within the authority granted to municipal corporations. As a part of the erection of a dock it might be designed to arrest erosion as erosion control could be a necessary incidental to the maintenance of a wharf or dock. If a dock then also aids in the control of erosion it still would not take it out of the authority granted a municipal corporation to erect structures in the aid of navigation and water commerce.

Therefore, it is my opinion that where a municipal corporation erects a structure which is in aid of navigation and water commerce and which structure will also control erosion, it is not necessary for the municipal corporation to secure the permit prescribed by Section 1507.03, Revised Code, as the municipal corporation has already been authorized to erect such structures by Section 721.04, Revised Code. However, if in further-

ance of shore erosion control alone the municipal corporation desires to erect a structure necessary to control shore erosion then the municipal corporation would have to submit its plans to the division of shore erosion and obtain the permit prior to the erection of such a structure.

Your second question pertains to the necessity of an individual who wishes to erect a structure for the purpose of shore erosion control of obtaining the permit when his property is within the territorial limits of a municipal corporation.

Section 1507.03 very definitely states that "no person shall build or construct \* \* \* structures necessary to arrest erosion" unless such person submits plans for the structure for approval and is issued a permit for the erection of the structure by the division of shore erosion. It therefore seems clear that whether a person is within or without the territorial limits of a municipal corporation such person must secure the permit prescribed by Section 1507.03, Revised Code, prior to the construction of a beach or erection of a structure necessary for the control of erosion.

Your third question is whether or not a person who desires to wharf out to navigable waters need obtain the permit prescribed by Section 1507.03, Revised Code.

In the case of *State, ex rel., v. City of Cleveland*, 150 Ohio St., 303, the Ohio Supreme Court had the following to say, concerning the right of a littoral proprietor to wharf out to navigable water, in paragraph 1 of the syllabus:

"Subject to the paramount control by the United States of navigable waters and its power to establish harbor lines and regulations therein and subject to the title of the state, as trustee for the people, to the land under the waters of Lake Erie within the limits of the State of Ohio, and subject also to the control by the state of harbors of Lake Erie within harbor lines, a littoral proprietor has an incorporeal property right to wharf out to navigable waters for purposes of navigation. (*State v. Cleveland & Pittsburgh Rd. Co.*, 94 Ohio St., 61, approved and followed.)"

In the *Cleveland and Pittsburgh Railroad* case followed by the court, it was held in paragraph 5 of the syllabus:

"The littoral owner is entitled to access to navigable water on the front of which his land lies, and, subject to regulation and control by the federal and state governments, has, for purposes of navigation, the right to wharf out to navigable water."

It can be seen that the littoral owner, subject to the regulation and control of the federal and state governments, has the right to wharf out to navigable waters. The state has control of the land under Lake Erie as trustee for the people and may enact legislation in furtherance of that trust. The state has enacted legislation to regulate construction and erection of beaches and structures necessary to control shore erosion; however, this legislation does not serve to regulate the right of the littoral owner to fill and wharf out to navigable water. The necessity for a permit prescribed by Section 1507.03, Revised Code, is limited to erection or construction of structures designed to control erosion and can not be extended so as to require a permit for the erection of a wharf to reach navigable water by a littoral owner. Therefore, when a littoral owner exercises his rights to wharf out to navigable water it is not necessary to secure the permit prescribed by Section 1507.03, Revised Code, as such wharfing out to reach navigable water is not such a structure as is covered by the Shore Erosion Act.

Your final question is concerned with the case where pursuant to Section 721.04, Revised Code, a municipal corporation has enacted an ordinance in aid of navigation and water commerce prohibiting a person from maintaining an encroachment in Lake Erie at a designated location within the territorial limits of said municipal corporation and an individual who has a permit issued by the division of shore erosion wishes to erect a structure within this area to prevent erosion.

As previously pointed out, the statute clearly requires an individual to secure said permit to erect structures necessary to prevent shore erosion whether located within or without the territorial limits of a municipal corporation. At first glance it might appear that where erection of the structure is prohibited by ordinance enacted pursuant to authority ceded by the state the state would be without authority to enable an individual to erect any structure prohibited by said ordinance. However, the state's control of the land under Lake Erie is only limited by the powers and duties of the federal government and the right ceded to the municipal corporations in aid of navigation and water commerce.

Section 1507.11, Revised Code, specifically provides that any action taken by the chief of the division shall not be deemed in conflict with powers and duties as provided for in Sections 721.04 to 721.11, Revised Code. Section 1507.11 in its entirety reads:

“Any action taken by the chief of the division of shore erosion under sections 1507.01 to 1507.11, inclusive, of the Revised Code, shall not be deemed in conflict with certain powers and duties conferred upon and delegated to federal agencies, and to municipal corporations and other state agencies under Section 7 of Article XVIII, Ohio Constitution, or as provided by sections 721.04 to 721.11, inclusive, and section 123.03 of the Revised Code.”

Although the above is stated in a rather confusing manner, it is apparently the intention of the legislature to permit the chief of the division of shore erosion in the exercise of his statutory authority to override the delegation of power to municipal corporations by Section 721.04, Revised Code. Therefore, even if a municipal corporation has enacted an ordinance prohibiting encroachments in a certain area, issuance of a permit by the division of shore erosion to an individual to erect a structure for erosion control within said area would not be in conflict with the ordinance.

Although the state has this power it would seem that applications for permits for erosion control in areas where the municipal corporation has enacted ordinances in aid of navigation and water commerce should, in the absence of a state master plan to control erosion, be carefully scrutinized to determine the benefits to be gained by permitting an individual to erect erosion control structures contra to ordinances of municipal corporations. The position of the municipal corporation and the benefits accorded navigation and water commerce by the ordinances should be weighed prior to issuance of the permit. As said in paragraph 6 of the syllabus of my opinion, reported in Opinions of the Attorney General for 1954, being No. 3437:

“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.”

Therefore, in specific answer to your inquiry, it is my opinion that:

1. Where a municipal corporation desires to construct an improvement in Lake Erie, which improvement is in aid of navigation and water commerce, the municipal corporation need not obtain the permit prescribed by Section 1507.03, Revised Code, even though the structure will also arrest erosion. Where a municipal corporation desires to construct an improvement in Lake Erie for erosion control only, the municipal corporation



must submit its plans to the Division of Shore Erosion for approval and obtain the permit.

2. An individual who desires to construct a beach or erect groins or other structures for the purposes of arresting erosion along the Ohio shore of Lake Erie must first obtain the permit prescribed by Section 1507.03, Revised Code, whether the structure when completed will be located within or without the territorial limits of a municipal corporation.

3. Where an individual desires to wharf out to navigable water or make a fill in front of his property for the purpose of reaching navigable water, such individual need not obtain the permit prescribed by Section 1507.03, Revised Code, as such action on the part of the littoral owner is not within the prohibitions of chapter 1507 of the Revised Code.

4. An individual who has obtained the permit prescribed by Section 1507.03, Revised Code, may lawfully construct a beach, groin or other structure to prevent erosion authorized by said permit even though the structure will be placed in an area where a municipal corporation under the authority of Section 721.04, Revised Code, has enacted an ordinance prohibiting encroachments. In issuing permits in such instances the Division of Shore Erosion should consider the benefits accorded by the municipal ordinance as well as the 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