

OPINION NO. 69-142

Syllabus:

The Ohio Department of Public Works may lease submerged land of Lake Erie to a port authority within the latter's territorial jurisdiction for all purposes not inconsistent with the powers granted to it in Section 4582.06, Revised Code, but limited by the provisions of Section 123.03, Revised Code.

To: Alfred C. Gienow, Director, Dept. of Public Works, Columbus, Ohio
By: Paul W. Brown, Attorney General, October 23, 1969

Your request for my opinion reads in pertinent part as follows:

"Attached hereto are reproduced copies of letters dated July 16 and August 1, 1969 to me from the Cleveland-Cuyahoga County Port Authority, requesting I advise the authority whether the State will lease to it submerged Lake Erie land within the boundaries of Cuyahoga County.

"I respectfully request your opinion as to whether this may be done pursuant to Section 123.01 (A) (9), Revised Code, * * *."

To answer your question, it is necessary to analyze the respective powers of the Ohio Department of Public Works and those of the Cleveland-Cuyahoga County Port Authority.

Section 123.01 (A) (9), Revised Code, was specifically directed to me for my consideration and to the extent it is pertinent, reads:

"To lease or grant easements or licenses for unproductive and unused lands or other property under the control of the state, or any department, office, or institution thereof, excepting school and ministerial lands, such leases, easements, or licenses to be granted for a period not to exceed fifteen years and shall be exe-

cuted for the state by the director of public works and the governor and shall be approved as to form by the attorney general; * * *." (Emphasis added.)

An amendment to this section which became effective September 25, 1969, provides for a term not to exceed 40 years, if the lease is granted to a political subdivision or taxing district including a port authority and shall be for the lessee's exclusive use without any right of sublease or assignment. The recent amendment immediately follows the above quotation and it is as follows:

"* * * (P)rovided, that leases, easements, or licenses may be granted to any county, township, municipal corporation, port authority, water or sewer district, school district, library district, health district, park district, soil and water conservation district, conservancy district, or other political subdivision or taxing district, or agency of the United States government, for the exclusive use of such agency or political subdivision or taxing district, without any right of sublease or assignment, for a period not to exceed forty years; * * *."

Complementary to this are parts of Section 123.03, Revised Code, which reads:

"It is hereby declared that the waters of Lake Erie consisting of the territory within the boundaries of the state, extending from the southerly shore of Lake Erie to the international boundary line between the United States and Canada, 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, for the public uses to which it may be adapted, subject to the powers of the United States government, to the public rights of navigation, water commerce and fishery, and further subject to the property rights of littoral owners, including the right to make reasonable use of the waters in front of or flowing past their lands. * * *

"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." (Emphasis added.)

I concede that the submerged land of Lake Erie and the "public uses to which it may be adapted" may well include aids to navigation, public utilities in the form of cables, conduits, aqueducts and possibly others, within the jurisdiction and territorial limits of a port authority. The Department of Public Works is also empowered "to exercise general custodial care of all real property of the state" (Section 123.01 (A) (12), Revised Code). It would appear, however, that this power is limited by a pertinent part of Section 123.03, Revised Code, which distinguishes the use of any areas of the lake recognized as navigable channels. It reads as follows:

" * * * Any artificial encroachments by public or private littoral owners, which interfere with the free flow of commerce in navigable channels, 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, or pursuant to section 123.031 (123.03.1) of the Revised Code, 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."

I wish to emphasize that the General Assembly has reserved to itself all power to permit interference by obstructions of any kind, to the free flow of commerce in navigable channels, excepting that power of the Department of Public Works found in Section 123.031, Revised Code.

The powers of a port authority are found in Section 4582.06, Revised Code, and those of importance for our immediate purpose are quoted:

"(c) Acquire, own, hold, sell, lease, or operate real or personal property for the authorized purposes of the port authority:

" * * * * * * * * *"

" * * * Pursuant to Section 13 of Article VIII, Ohio Constitution, and in order to create jobs and employment opportunities and improve the economic welfare, the port

authority may acquire, construct, enlarge, improve, equip, sell, exchange, lease, and lease with a contract or option to purchase at such amount as the board of directors in its sole discretion may determine, real property, * * *

* * * * * * * *

"(H) Enjoy and possess the same rights, privileges, and powers granted municipal corporations under sections 721.04 to 721.11, inclusive, of the Revised Code;

* * * * * * * *

"(K) Sell or lease real and personal property not needed for the operation of the port authority and grant easement or rights-of-way over property of the port authority;

* * * * * * * *"

Notwithstanding that the Attorney General has held in a specific instance that the power to acquire real property means to purchase and excludes leasing of the same, the second quote from this section containing the words "lease, and lease with a contract or option to purchase" definitely empowers a port authority to acquire property by lease.

A port authority has all power granted to municipal corporations by Sections 721.04 to 721.11, inclusive, Revised Code. This power operates within the municipal corporation and extends into Lake Erie to a distance of two miles from the natural shore line. This power is not coextensive with the boundaries of the county. This section, however, does not permit a city or port authority to make "any artificial encroachments * * * which interfere with the free flow of commerce in navigable channels." (Section 123.03, Revised Code). For all other purposes, special authorization of the General Assembly would not be necessary. For the reason that federal power supersedes state authority with respect to commerce in navigable channels of the lake, concurrence by the United States Army Engineers is necessary to categorize the uses for which the submerged soils of the lake may be leased. Whether any structure in the lake is an obstruction or an aid to navigation is a question of fact to be determined in its final analysis by the United States Army Engineers.

From the foregoing, it is my opinion and you are advised that pursuant to the provisions of Section 123.01 (A) (9), Revised Code, the Ohio Department of Public Works may lease submerged land of Lake Erie to a port authority within the latter's territorial jurisdiction, which in this instance is coextensive with the boundaries of Cuyahoga County, for all purposes not inconsistent with the powers granted to it in Section 4582.06, Revised Code, but limited by the provisions of Section 123.03, Revised Code.