

1853.

REALTY—CONTIGUOUS TO CANAL LANDS—ACQUIRED BY STATE CANAL COMMISSION AS RESIDENCE SITE FOR LOCK TENDER—NOW UNDER CONTROL OF SUPERINTENDENT OF PUBLIC WORKS—NOT SUBJECT TO TRANSFER TO CONSERVATION COUNCIL.

SYLLABUS:

A tract of land contiguous to canal lands which was appropriated or otherwise acquired by the state canal commission as a site for the erection of a residence for a lock tender became a part of the public works of the state, and is now under the control and supervision of the Superintendent of Public Works; and, by the provisions of Section 1438-1, General Code (113 O. L. 583), such tract of land and the buildings thereon, are excepted from the state lands of which the Conservation Council is given the general care and supervision by the terms of said section of the General Code.

The fact that this tract of land and the residence building erected thereon are occupied by a person who devotes a part of his time to the maintenance of a state reservoir park does not bring it within the class of property which the provisions of Section 1438-3, General Code (113 O. L. 585), require the Superintendent of Public Works to transfer to the Division of Conservation.

COLUMBUS, OHIO, May 12, 1930.

HON. A. T. CONNAR, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication which reads as follows:

“By the terms of Section 1438-3, of the General Code, providing for the transfer of State Reservoir lands heretofore dedicated and set apart as pleasure resorts for the free use of the public for recreation and pleasure purposes, there were transferred to the control and management of the Conservation Council, (Sections 472 and 472-1, G. C.)—(Amended Senate Bill No. 131, 88th General Assembly), ‘such records, leases, papers, supplies, rights and property, belonging to or in the custody of the Department of Public Works, for the supervision, maintenance and improvement of the State Reservoir Parks, pertaining to and necessary for the administration of the powers and duties therein transferred to the Division of Conservation, and shall be in the custody of and under the control of the Division of Conservation’.

In the Inventory of Property to be turned over by the Director of Public Works to the Conservation Council, the first item noted on Sheet No. 3, is the residence, barn and out-buildings on a certain State lot acquired by the State of Ohio from Thomas Minthorne by the payment of damages amounting to Sixty (\$60.00) Dollars, allowed by the Board of Appraisers on the 16th day of February, 1839.

This land was acquired as a site for the Locktender’s house, located on the west bank of the Ohio Canal just north of the borrow pits of the Licking Summit Reservoir now known as Buckeye Lake.

Prior to this award, however, the said Thomas Minthorne made application for damages done by the construction of a reservoir on the Licking Summit, to his farm in Range 18, Town 17, Section 22, Refugee land. The appraisers allowed Minthorne the sum of Two Hundred and Eighty (\$280.00) Dollars, and the award recites: ‘in the above estimate on the land included in said reservoir of said tract, and so much thereof as is used for embankment,

and 40 feet in the rear of the same for making a ditch, is included'. I am enclosing herewith a certified copy of the Award of Damages to Minthorne in each of the above claims.

Mr. Booton has prepared a sketch showing the location of this Lock-house lot, containing one acre, at the angle formed by the junction of the northerly embankment of what is known as the 'New Reservoir', with the westerly embankment of the Ohio Canal, where the supply of water for the navigation of boats north of Licking Summit, was furnished.

The first award included the lands within the reservoir, as well as the land occupied by the artificial embankment and a strip of ground 40 feet wide in the rear of the embankment. The sketch indicates that the borrow pits which were excavated so as to form a ditch, occupied a very small portion of this Lock-house lot.

The primary object of the State in acquiring this Lock-house lot was to provide a residence and garden for the use of the Locktender. It was his duty to open the gates so as to transfer boats from the level of the lake to the lower level of the canal going northward, and to lift the boats going southward from the level of the canal to the level of the reservoir. This was a policy adopted early in the operation and maintenance of the canals for navigation purposes.

Within recent years, the canal was abandoned to a point north of Hebron, so that the stretch of canal between the Village of Hebron in Licking County, to its junction with the Licking Summit Reservoir, now Buckeye Lake, is, so far as the statutes are concerned, a canal maintained for navigation purposes.

The lot, with the buildings thereon, including a residence, barn and out-buildings, appraised at the sum of \$4,500.00, have been occupied by the reservoir and canal foreman, the present occupant being Mr. G. A. Marquardt.

Mr. Marquardt's duties as a Canal Foreman, extended from Frazeysburg, in Muskingum County, to the junction of the Ohio Canal with the Scioto River, at Portsmouth, and while no great amount of supervision is required over this stretch of canal, it was his duty to make inspections and repairs on the canal when breaches through the canal embankments were washed out by excessive rain fall along the line of the canal. The greater portion of his duties, however, was the supervision, maintenance, etc., of Buckeye Lake, as a public park.

The question that I am submitting for solution is whether or not this lot belongs to the canal system or to the reservoir, as a part of the State's public Park System.

There is no question but what the Division of Conservation can use this residence building and barn, in connection with the public park system, to good advantage. What I want to know is whether or not we can legally surrender this state lot and buildings thereon, to the Division of Conservation, or will it be necessary to wait further action by the General Assembly in order that it may legally be transferred to the Division of Conservation.

In the meantime, the Canal and Reservoir Foreman will continue to occupy and use the property as heretofore.

As we are turning over to the Conservation Division all the property that was intended to be relinquished under the terms of Amended Senate Bill No. 131, I will greatly appreciate an early decision."

The question here presented is whether the one acre tract of land referred to in your communication which was originally acquired by the state as a location for a locktender's residence is now under the jurisdiction of the Division of Conservation created by the provisions of Amended Senate Bill No. 131 (113 O. L. 551) and whether

you are authorized to relinquish control of this property and surrender and transfer the same to said Division of Conservation.

The reservoir now known as Buckeye Lake, and the lands thereof, were appropriated and otherwise acquired by the state as the feeder for the Ohio & Erie Canal, and as such, said reservoir became a part of the canal system of the state. *The Columbus, Newark & Zanesville Electric Railway Company vs. Nelson*, 14 C. C. N. S. 129. By legislative classification this reservoir later became a part of Division No. 2 of the Public Works of the state. Section 411, General Code. By statutory provision later carried into the General Code as Section 469, Buckeye Lake and other state reservoirs acquired and constructed as a part of the canal system of the state were dedicated and set apart for the use of the public, as public parks or pleasure resorts.

Prior to the enactment and effective date of the Conservation Act above referred to these reservoirs both as public parks and as a part of the public works of the state were under the jurisdiction and control of the Superintendent of Public Works. By Section 1438-1, General Code, as enacted in said Conservation Act, it is provided among other things, that:

“* * * The conservation council shall have and take the general care, protection and supervision of the state parks known as Lake St. Marys, Portage Lakes, Lake Loramie, Indian Lake, Buckeye Lake, Guilford Lake and all other state parks and lands owned by the state or in which it is interested or may acquire or become interested, except lands, the care and supervision of which are vested in some other officer, body, board, association or organization. * * *”

Section 1438-3, General Code, as enacted by said act, provides, among other things, that upon the organization of the Conservation Council and the delivery of notice of said fact to the Governor, all records, leases, papers, supplies, rights and property belonging to or in the custody of the Department of Public Works for the supervision, maintenance and improvement of the state reservoir parks, pertaining to and necessary for the administration of the powers and duties transferred to the Division of Conservation shall be transferred to and shall be in the custody of and under the control of the Division of Conservation.

With respect to the question here presented, it is to be observed that there is nothing in the provisions of Sections 1438-1 and 1438-3, General Code, above noted, that requires the transfer to the Division of Conservation of property other than such as is a part of the reservoir in its status as a public park, or such as is in the custody of the Department of Public Works for the supervision, maintenance and improvement of the park.

In considering the question whether the tract of land here in question is a part of Buckeye Lake as a public park, the provisions of Section 469, General Code, should be noted. This section provides in part, as follows:

“The body of water and adjacent state lands in Licking, Fairfield and Perry counties, known as the Licking Reservoir or Buckeye Lake are dedicated and set apart forever for the use of the public, as a public park or pleasure resort.”

The question whether the tract of land here in question is land adjacent to the waters of Buckeye Lake within the meaning of Section 469, General Code, and as such, is a part of Buckeye Lake Park, depends, as I see it, upon whether said tract of land was appropriated or otherwise acquired as a part of said reservoir.

In the case of the *Columbus, Newark & Zanesville Electric Railway Company vs. Nelson*, supra, the court in its opinion, speaking with reference to the State Reservoir known as Buckeye Lake, said:

"We are therefore of the opinion that the state acquired not only the land actually covered by these waters but also a berme bank of sufficient width not only for the purpose of retaining the waters but for such other legitimate purposes for which it may be used, including not only the duty to protect the reservoir from invasion from adjoining proprietors from any natural cause that might affect the same, and also for the purpose of affording a right-of-way to the agent of the state over and around this property for the purpose of proper maintenance thereof.

We are of the opinion that this appropriation by the state of lands for reservoirs or feeders for the canals included berme banks, and that they would necessarily be included in ascertaining the compensation and damages that might be allowed therefor."

From the plat attached to your communication, it appears that the south line of the tract of land here in question lies about 65 feet north of the north shore or water line of Buckeye Lake, that about 25 feet of this ground is embankment and about 40 feet consists of borrow pits, which were made, I assume, in the construction of said embankment.

It further appears, from the facts stated in your communication, that this ground between the shore line of the waters of the lake and what is now the south line of the tract of land here in question was a part of the lands of Thomas Minthorne appropriated by the state for the purpose of constructing said reservoir, and for which he was awarded and paid compensation in the sum of \$280.00 under date of April 25, 1836.

It appears further, from the files referred to in your communication, that the tract of land here in question, was later appropriated by the state by a separate proceeding for the purpose of obtaining ground upon which to locate a residence for the canal lock tender at this point, it appearing that compensation in the sum of \$62.50 was allowed and paid to the owner for this tract of land in October, 1840.

In this situation, I am inclined to the view that the only land that became a part of Buckeye Lake reservoir as a park or otherwise at this point, was, and is, the 65 feet of ground above mentioned, and that although the one acre tract of land here in question appropriated by the state for the purpose above stated, became a part of the canal system of the state, it did not become a part of said reservoir, as such. Neither does it appear that this tract of land is state land adjacent to the body of water of the reservoir so as to become a part of Buckeye Lake Park, under the above quoted provisions of Section 469, General Code. In this connection, as above noted, it is not at all evident that the term "adjacent state lands" as employed in said section, is intended to cover any lands other than such as were appropriated or otherwise acquired as a part of the reservoir itself, conformable to the rule noted in the opinion of the court in the case of *Columbus, Newark and Zanesville Electric Railway Company vs. Nelson*, supra.

In the further consideration of the question here presented, it is to be observed that this tract of land was not acquired for any purpose related to the maintenance of the reservoir as a public park, but the same was acquired for a purpose directly related to the operation and maintenance of the Ohio and Erie Canal as a part of the public works of the state.

By Section 412, General Code, it is provided that the Superintendent of Public Works shall have the care and control of the public works of the state and shall protect, maintain and keep them in repair. It appears, therefore, that at the time the Conservation Act was enacted and became effective, the tract of land here in question as a part of the public works of the state, was in the care and control of the Superintendent of Public Works, and was for this reason excepted from the state lands of which the Conservation Council was given the general care, protection and supervision

under the provisions of Section 1438-1, General Code, enacted as a part of said Conservation Act.

Inasmuch as above noted, this tract of land at the time of the enactment of the Conservation Act, was state land under the care and control of the Superintendent of Public Works, and as such, expressly excepted by the provisions of Section 1438-1, General Code, from the category of state lands of which the Conservation Council took the supervision under said act, the provisions of Section 1438-3, General Code, enacted as a part of said Conservation Act cannot reasonably be construed to include this tract of land as property which under the provisions of said section is required to be transferred to the custody and control of the Division of Conservation. The "property" belonging to, or in the custody of the Department of Public Works for the supervision, maintenance and improvement of the State Reservoir Park which under the provisions of Section 1438-3, General Code, is to be transferred to the custody and control of the Division of Conservation, is, in my opinion, such personal property and equipment as has been heretofore used by the Superintendent of Public Works in improving and maintaining the State Reservoir parks. Aside from the fact that this tract of land is expressly excepted from the control and supervision of the Conservation Council by the provisions of Section 1438-1, General Code, the fact that this lot and the residence building erected thereon are occupied by a person who has devoted a part of his time to the maintenance of Buckeye Lake Park would not bring it within the class of property which the provisions of Section 1438-3, General Code, require to be turned over to the care and control of the Division of Conservation.

Since you, as Superintendent of Public Works, have only such power and authority with respect to the Public Works of the state as are conferred upon you by law (*State ex rel vs. Railway Company*, 37 O. S. 157, 174) you do not in my opinion, have any authority to transfer the care and control of this property to the Division of Conservation.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1854.

INITIATIVE PETITION—TO BE SUBMITTED TO ATTORNEY GENERAL
FOR CERTIFICATION OF FORM AND SYNOPSIS—SIGNATURES OF
AT LEAST ONE HUNDRED ELECTORS NECESSARY.

SYLLABUS:

Before the Attorney General may execute the certificates provided in Section 4785-176, General Code, to be printed upon an Initiative or Referendum petition, there should be submitted to him a petition signed by one hundred or more qualified electors of the state requesting such certifications.

COLUMBUS, OHIO, May 12, 1930.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your letter of recent date requesting my opinion upon the sufficiency of a proposed initiative petition seeking to repeal the Criminal Syndicalism Law of Ohio. Section 4785-176, General Code, provides in part as follows:

"One hundred or more qualified electors of the State may, by a written