609.

APPROVAL—FORM OF AGREEMENT BY AND BETWEEN THE STATE OF OHIO AND THE B. & O. R. R. CO. FOR THE ELIMINATION OF GRADE CROSSING IN BUTLER COUNTY, OHIO.

COLUMBUS, OHIO, May 18, 1937.

HON. JOHN J. JASTER, JR., *Director of Highways, Columbus, Ohio.*

DEAR SIR: You have submitted for my consideration a proposed agreement by and between the State of Ohio acting by the Director of Highways and the Baltimore and Ohio Railroad Company providing for the elimination of the grade crossing over the tracks of said company, located on State Highway No. 182 and State Highway No. 183 at McGonigle in Butler County, Ohio, known as USWPGC Project No. W. P. G. H. 577-B (1936) and USWPGC Project No. W. P. G. S. 1017-A (1936).

After examination, it is my opinion that said proposed agreement is in proper legal form and when the same is properly executed it will constitute a valid and binding contract.

Said proposed contract is being returned herewith.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

610.

APPROVAL—LEASE OF CANAL LANDS EXECUTED BY THE STATE OF OHIO TO R. S. ALTMAN OF IRWIN, PA.

COLUMBUS, OHIO, May 18, 1937.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval a lease form in triplicate of a canal land lease to be executed by you as Superintendent of Public Works and as Director of said department on behalf of and in the name of the State of Ohio to one R. S. Altman of Irwin, Pennsylvania. This lease, if and when the same is executed, will be one for a term of ninety-nine years, renewable forever, and will pro-

vide for an annual rental of $180.00 during the first fifteen-year period of the term of the lease with a provision therein contained that the property covered by the lease shall be subject to appraisal at the end of each fifteen-year period and that thereafter the annual rental shall be six per centum of such appraised value of the property leased.

By the terms and provisions of this proposed lease, there are leased and demised to the lessee above named certain parcels of land herein described which are to be occupied and used by said lessee for building, manufacturing, general business, water storage and agricultural purposes as therein specified with respect to each of said parcels of land. These parcels of land, together with the specifications with respect to the use of the same, are described and stated in the lease as follows:

> TRACT No. 1—Being known as the State Lot and beginning at the Northwest corner of Canal Lock No. 11, South of the Loramie Summit, and running thence South 76° West, 264 feet to an iron pin; thence South 11° 30′ East, 732.6 feet; thence South 85° 30′ East, 285.7 feet to the said canal; thence North 13° West, 774.8 feet, more or less, to the place of beginning, and containing 4.5 acres, more or less.
>
> Excepting therefrom so much of the above described property as is occupied by the switch tracks now used by the Baltimore & Ohio Railroad Co., and the Dixie Highway, known as U. S. Route No. 25.
>
> The above described property to be used for Building, Manufacturing and General Business purposes.
>
> TRACT No. 2—Being all of the abandoned canal property lying immediately east of the above described property and extending from the Northerly end of said Lock No. 11, Southerly to the Northerly line of the public road crossing said canal, and containing 1.6 acres, more or less.
>
> The above described property to be used as Basin for Water Storage, and Agricultural purposes.
>
> TRACT No. 3—Being all of the said abandoned canal property extending from the Northerly end of said Lock No. 11, at Station 8116÷41 of H. E. Whitlock's survey of said canal property, Northerly to Station 8109, and containing three (3) acres, more or less.
>
> Reserving therefrom the right to maintain by the Baltimore & Ohio Railroad Co. a switch track as now located at the Southwest corner of said Tract No. 3.
>
> The above described property to be used for Agricultural, Building and Manufacturing purposes.

Although there are no recitals in the body of this lease form as to the statutory provisions under the authority of which this lease is to be executed, I assume that this lease form has been drafted under the provisions of Amended Substitute Senate Bill No. 194, 114 O. L., 546, which has been carried into the General Code as Sections 14178-27 to 14178-52, inclusive. Section 19 of this act (Sec. 14178-45, G. C.), which is applicable to the lease of such parts of the Miami and Erie Canal lands, abandoned by said act, as have not been designated by the Director of Highways for highway purposes and have not been leased for public park purposes in the manner provided by Section 14 of said act (Sec. 14178-39, G. C.), provides as follows:

> "At the end of two years from the date at which this act becomes effective, any portion of said abandoned Miami and Erie canal that has not been designated by the director of highways as necessary for state highway improvements under the terms of this act, or has not been leased for public park purposes, to any of the parties herein authorized to make application to lease portions of said abandoned canal for public park purposes, may be appraised by the superintendent of public works at its true value in money, and leased to responsible parties for a term of fifteen years and multiples thereof up to ninety years, or for a term of ninety-nine years renewable forever, subject to the approval of the governor and attorney general, and the annual rental therefor shall be six per cent of the appraised value thereof, as determined by said superintendent of public works."

It will be noted that although this section authorizes the execution of leases for terms of ninety-nine years, renewable forever, there is no provision therein for reappraisal at the end of each fifteen-year period of the terms of the leases executed under the authority of this section of said act. Nor do I find such provision for reappraisal in any other section of the act other than that found in Section 22 of the act (Sec. 14178-48, G. C.) which, apparently, relates only to leases executed to railroad companies. However, aside from any implied authority which the Superintendent of Public Works may, perhaps, be said to have with respect to the insertion of a provision of this kind in a lease where such term is a period of years which is a multiple of fifteen years, or is for a term of ninety-nine years, renewable forever, it is noted that the Farnsworth Act, 114 O.L., 518 (Secs. 464-1 and 464-2, G. C.), which went into effect the same day with the act above referred to and which relates to the lease of all abandoned canal property in the State other than that

taken over for park purposes in the manner provided by said act, specifically provides that leases granted for a longer term than fifteen years shall contain a clause providing for a reappraisement of the canal lands described in such leases, by proper state authority, at the end of each fifteen-year period, embraced in such leases and the annual rental therefor shall be six per centum of the appraised value thereof for each period. I am inclined to the view, therefore, that there is ample authority for the insertion in this lease form of this provision with respect to reappraisal at the end of each fifteen-year period of the proposed lease. And inasmuch as the terms and provisions of this proposed lease, as the same are set out in the lease form submitted to me, are in all respects in compliance with law, I am of the opinion that this lease form may be approved unless the execution of the proposed lease in accordance with this lease form is made illegal by reason of the fact that the proposed lessee above named now owns and holds a lease upon this property as is hereinafter noted and considered.

The present lease on this property, above referred to, is one executed under date of November 16, 1926, by the then Superintendent of Public Works and Director of said department to The Allen and Wheeler Company, a corporation, which lease was later, under date of July 6, 1936, assigned by said company to R. S. Altman by and with your approval as Superintendent of Public Works. This lease which covered each and all of the above described parcels of abandoned Miami and Erie Canal land was executed for a stated term of ninety-nine years, renewable forever. The only statutory authority which at that time provided for the lease of abandoned Miami and Erie Canal lands, other than leases not to exceed the term of fifteen years under the provisions of Section 13965, General Code, was that found in the then recently enacted provisions of House Bill No. 162 enacted under date of April 11, 1925, 111 O. L., 208. Separate provisions were made in said act for the lease of abandoned Miami and Erie Canal lands lying outside of municipalities, no application for which had been made by any adjacent municipality or by any other political subdivision, and for the lease of abandoned Miami and Erie Canal lands situated within a municipality as to which no application for the lease of the same had been made by such municipality. I am advised that the property covered by the present lease held by R. S. Altman and that described in the proposed lease to him is not situated within any municipality but is situated entirely outside of any municipality. In this situation, the provisions of said act of April 11, 1925, applicable in the execution of The Allen and Wheeler Company lease now held by R. S. Altman were those contained in Section 15 of said Act which reads as follows:

> "The abandoned canal lands covered by this act of abandonment lying outside of municipalities and not included in an application for lease by an adjacent municipality, or other legal subdivision of the state, may be leased in strict conformity with existing statutes relating to the leasing of canal lands, except that the entire width of the canal and its embankments may be included in such leases and that the terms thereof may be for fifteen years and multiples thereof, but subject to reappraisal at the end of each fifteen year period by proper state authority."

It will be noted from the provisions of this section that although the same authorized the execution of leases for terms of fifteen years or multiples thereof, there was no provision in this section for the execution of a lease for a term of ninety-nine years, renewable forever, as is provided for in the lease which Mr. Altman now owns and holds. And inasmuch as there was no provision elsewhere in this act or otherwise in the law of this State which authorized a lease of the particular canal lands here in question for a term of ninety-nine years, renewable forever, said lease was and is invalid. As to this, it is to be observed that with respect to canal land leases the Superintendent of Public Works possesses no powers except such as are expressly conferred by law, or as are nececsarily implied. *State, ex rel.,* vs. *Railway Company,* 37 O. S., 157, 174. And inasmuch as the law under the assumed authority of which this lease was executed specifically provided that the term of the lease should be fifteen years or some multiple of fifteen years, there was no authority for the execution of a lease that did not comply with this requirement of the statute as to the term of the lease. And since neither this office nor the courts can at this time by construction correct this lease by changing the provision thereof in this respect, it follows that such lease is invalid. *City of Wellston* vs. *Morgan,* 59 O. S., 147.

In this situation, it is not necessary for me to consider the question whether the Superintendent of Public Works may with the consent of the lessee cancel a valid existing lease for the purpose of executing to such lessee a new and in some respects a different lease for the same property. In this case, as I am advised, the lessee desired a new lease of this property for the reason that under the terms of the old lease he was not authorized to use for manufacturing purposes some of the above described property which he now desires to use for this purpose and as indicated by the provision therefor in the new lease, he is willing to pay an annual rental for the property in excess of that provided for in the lease which he now holds. This new lease will doubtless be advantageous to both the State and the lessee. Since, as I have held, the lease now held by Mr. Altman is invalid for the reason above stated, no

objection whatever is seen to the execution of the new lease on the terms and conditions therein provided for. I am accordingly approving this lease form and am herewith returning the same to you for execution in the manner provided by law.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

611.

POOR RELIEF BONDS—ALLOCATION OF FUNDS—PROVISION FOR RETIREMENT OF PRINCIPAL AND INTEREST —ENCUMBRANCE AND TRANSFER OF RELIEF FUNDS, WHEN.

SYLLABUS:

1. *Allocations received or to be received which have been pledged by the subdivision and upon which the Tax Commission of Ohio estimated and approved the issuance of bonds under authority of Amended Senate Bill No.* 4 (114 *O. L., Pt.* 2, 17), *or other Amending acts authorizing poor relief bonds, shall not be used for any other purpose until the poor relief bonds so authorized have been retired or a sum sufficient has been set aside for the retirement of both principal and interest of poor relief bonds.*

2. *The balances now existing in the "emergency poor relief fund" or the "county poor relief excise fund" which are the proceeds of the pledged allocations may not be transferred to the newly created "county relief fund" under Amended Substitute House Bill No.* 65, *for the reason that these moneys or funds are encumbered, and also all balances in the "county poor relief excise fund" and the "emergency poor relief fund" which are a part of the proceeds of the sale of the poor relief bonds not needed for poor relief may not be transferred to the newly created "county relief fund" for the reason that these proceeds were specifically required to be used for the retirement of poor relief bonds.*

3. *All allocations received after the effective date of Amended Substitute House Bill No.* 65 *shall be placed in the "county relief fund," subject, however, first to the retirement of the poor relief bonds, provided these allocations were the allocations pledged by the subdivision in the issuance of their poor relief bonds, and to give constitutional force and effect to this interpretation there must necessarily be set up a sep-*