

1086.

NURSERY STOCK—DIRECTOR OF AGRICULTURE—AUTHORITY TO INSPECT AND CERTIFY ONLY SUCH PLANTS NAMED IN SECTION 1122(4), G. C.—EXCEPTION, PLANTS WITHIN PROVISION SECTION 1127, G. C.—HOUSE BILL 444, 93RD GENERAL ASSEMBLY—NO AUTHORITY TO PROMULGATE REGULATION OF PLANTS NOT INCLUDED IN STATUTE.

SYLLABUS:

1. *Under the provisions of House Bill No. 444, passed by the 93rd General Assembly, the Director of Agriculture has no authority to inspect and certify plants other than those included within the definition of "nursery stock" as contained in Section (1122(4), General Code, unless said plants come within the provisions of Section 1127, General Code.*

2. *The Director of Agriculture has no authority to promulgate a regulation providing for the inspection and certification of plants other than those included within the definition of "nursery stock" as contained in Section 1122(4), General Code.*

COLUMBUS, OHIO, August 23, 1939.

HON. JOHN T. BROWN, *Director of Agriculture, Columbus, Ohio.*

DEAR SIR: Your recent request for my opinion reads as follows:

"Many applications are on file in the Ohio Department of Agriculture from producers of tender greenhouse plants, as well as from growers of gladioli bulbs and dahlia tubers which are produced out of doors, requesting official inspection and certification of such plants. These aforementioned plants are not considered hardy under normal Ohio weather conditions. Some states regard such plants as nursery stock even though they are not so considered in Ohio, and require that consignments of same from Ohio shippers bear a copy of a valid inspection certificate issued by the Ohio Department of Agriculture as a prerequisite to admission of such material to said states. Thus, some Ohio producers of above mentioned plants, who engage in an interstate shipping business request the inspection and certification thus indicated.

In view of the definition of the term 'nursery stock' in Section 1122, paragraph (4) General Code of Ohio, and in consideration of the statement of fees to be paid as indicated in Section 1137 and the fee exemption noted in Section 1138-1, paragraph (a) and Section 1138-2 General Code of Ohio, effective

August 29, 1939, is the Ohio Department of Agriculture obliged or empowered to inspect and certify the type of plants mentioned above? If such plants are so inspected by the Ohio Department of Agriculture and certified, what is the amount of the fee to be paid by the producer for such services, if any?

Providing the existing statute is insufficient to legalize the official inspection, certification and collection of fees for services rendered in this respect, are the powers which are delegated to the Director of Agriculture in Section 1125, General Code of Ohio, sufficiently broad to permit the said Director of Agriculture to promulgate pertinent regulations to fully cover the necessary procedure in the cases under consideration, including the establishment of the amount of fees to be collected?"

In substance, your inquiry concerns the power and authority of the Department of Agriculture to inspect and certify plants which do not come within the definition of "nursery stock" as contained in Section 1122 (4), General Code, which definition is as follows:

"The term 'nursery stock' shall include all hardy deciduous evergreen and herbaceous trees, shrubs and plants, whether wild or cultivated, and the cuttings, grafts, scions and buds thereof; the term 'hardy' as it applies to such deciduous evergreen and herbaceous trees, shrubs and plants, whether wild or cultivated, shall include all such that can withstand cold to the extent of surviving normal winter temperatures of the State of Ohio."

You point out that certain plants are considered nursery stock in other states but are not so considered in Ohio because of the above definition. Since such states require inspection certificates on this type of plants, you ask whether the Department of Agriculture is obliged or has the authority to inspect and certify such plants for the benefit of such Ohio producers who ship plants into other states.

It is not necessary to quote all of House Bill No. 444, passed by the 93rd General Assembly (Sections 1122 to 1140-6a, inclusive, General Code). However, a thorough examination of this act reveals that it provides for the inspection and certification of nursery stock as defined in Section 1122(4), *supra*.

The only situation in which the Director of Agriculture has the authority to inspect any plants other than nursery stock is set forth in Section 1127, General Code, which reads in part as follows:

"The secretary of agriculture through the inspector or deputies shall have the authority to inspect any field or farm crop, orchard, fruit or garden plantation, park, cemetery, private

premises, public place, and any place which might become infested or infected with dangerous or harmful insects or plant diseases.”

It can readily be seen from an examination of its provisions, that the purpose of House Bill No. 444, as well as former acts, was to protect agriculture and horticulture in this state. The Legislature in providing that only hardy plants should be subject to annual inspection and certification, apparently felt that such inspection would be sufficient to accomplish the purpose of the act.

That the Director of Agriculture has the authority to establish rules and regulations is provided in Section 1125, General Code, which reads in part as follows :

“The secretary of agriculture shall have the power to prescribe, modify, and enforce such rules, regulations, and orders as may be needed to carry out the provisions of this act, * * *.”

However, it will be noted that such regulations must “be needed to carry out the provisions of this act”. The inspection of plants not included within the definition of “nursery stock” as contained in Section 1122(4), supra, would not be in furtherance of “the provisions of this act”.

It is a well settled rule that public officers have only such powers as are expressly delegated them by statute, and such as are necessarily implied from those so delegated. It appears that the establishment of such a rule by the Director of Agriculture and the inspection of plants other than nursery stock would not come within the rule as to the powers of public officials.

There is another reason why the instant question must be answered in the negative. The Director of Agriculture is not authorized to charge fees other than as provided by statute. Consequently, if plants other than nursery stock, as defined in Section 1122(4), supra, were inspected, no fees could be charged therefor. Section 1137, General Code, provides that “For the purpose of defraying the cost of inspection and the administration of this act” certain fees shall be charged for licenses and inspections as provided in the act. When the Legislature, in this section, referred to “costs of inspection”, it meant costs of inspection of nursery stock.

Section 1140-6a, General Code, provides :

“All moneys from license fees, certificate fees, fines and costs imposed and recovered under the provisions of this act shall be paid to the director of agriculture, or his agents, and by him paid to the state treasury to the credit of the ‘plant pest fund’, which is hereby established. All moneys received into the ‘plant pest fund’ shall be for the use of the department of

agriculture in administering and enforcing the provisions of this act; excepting, however, any surplus over and above the amount necessary to administer and enforce the provisions of this act shall be transferred to the general revenue fund.”

Thus, it appears that no part of the revenue derived under this act can be used for an inspection not authorized under the act.

It appears from the above discussion that your question must be answered in the negative, since the Legislature has neither expressly nor impliedly granted to the Director of Agriculture such power or authority.

In specific answer to your inquiry, I am of the opinion that: (1) Under the provisions of House Bill No. 444, passed by the 93rd General Assembly, the Director of Agriculture has no authority to inspect and certify plants other than those included within the definition of “nursery stock” as contained in Section 1122(4), General Code, unless said plants come within the provisions of Section 1127, General Code; (2) The Director of Agriculture has no authority to promulgate the regulation providing for the inspection and certification of plants other than those included within the definition of “nursery stock” as contained in Section 1122(4), General Code.

Respectfully,

THOMAS J. HERBERT,

Attorney General.

1087.

GAS TAX FUNDS—MOTOR VEHICLE LICENSE MONEYS—
APPROPRIATED AND DISTRIBUTED TO COUNTY—
TOWNSHIP—MAY BE LAWFULLY DISTRIBUTED BY
COUNTY COMMISSIONERS OR TOWNSHIP TRUSTEES—
TO RETIRE NOTES, SECTION 7201, G. C.—DEFERRED IN-
STALLMENTS OF PURCHASE PRICE OF ROAD MA-
CHINERY OR EQUIPMENT—SECTIONS 5527, 5537, 5541,
5541-8, 6309-2, G. C.

SYLLABUS:

*“Gas tax funds” appropriated and distributed to a township (Sec-
tions 5541 and 5541-8, General Code) and “gas tax funds” appropriated
and distributed to a county (Sections 5527, 5537, 5541 and 5541-8, Gen-
eral Code), as well as “motor vehicle license moneys” appropriated to a
county (Section 6309-2, General Code), may lawfully be expended by
township trustees or county commissioners, as the case may be, for the
purpose of retiring notes lawfully issued under authority of Section 7201,*