2768

1. HEALTH REGULATIONS—OPERATION OF FOOD ESTABLISHMENTS—LAWS FULLY EFFECTIVE AND OPERATIVE—PORTION OF HEALTH DISTRICT WITHIN SPECIAL SANITARY DISTRICT—SECTIONS 483-2, 1261-42 GC.

2. STATE NOT BOUND BY TERMS OF GENERAL STATUTE UNLESS IT BE SO EXPRESSLY PROVIDED—HEALTH REGULATIONS — ADOPTED BY LOCAL BOARD OF HEALTH—NOT BINDING ON STATE ITSELF—APPLICABLE TO AND MAY BE ENFORCED AGAINST LESSEES OF STATE—SECTIONS 1261-16 ET SEQ., 1261-42 GC.

SYLLABUS:

1. Health regulations relative to the operation of food establishments, adopted under the provisions of Section 1261-42, General Code, are fully effective and operative within such portion of the health district concerned as lies within a special sanitary district created by the enactment of Section 483-2, General Code.

2. The state is not bound by the terms of a general statute unless it be so expressly provided by statute. Because there is no such express provision in Section 1261-16, et seq., General Code, the health regulations adopted by a local board of health, as provided in Section 1261-42, General Code, are not binding on the state itself but they are applicable to and may be enforced against lessees of the state.

Columbus, Ohio, June 26, 1953

Hon. Richard L. Davis, Prosecuting Attorney
Highland County, Hillsboro, Ohio
Dear Sir:

Your request for my opinion reads as follows:

"There is located in Highland County Ohio Rocky Fork Lake which is surrounded by an area of land owned by the State of Ohio which is approximately 300 feet wide. Said premises are within the area governed by the Board of Health of the Highland County General Health District.

"The Division of Parks is operating certain concessions and also contemplating leasing same to private individuals on said premises whereby soft drinks and other foods are and will be sold to the public. Under the authority of General Code Section 1261-42 the Highland County Board of Health has established regulations governing food establishments which provide for inspection and approval by the Highland County Board of Health before any such food establishment may operate.

"General Code Sections 472 and 483-1 grant certain authority to the Division of Parks with respect to such land but make no specific reference to the governing of food establishments.

"General Code Section 483-2 creates a special sanitary district under the control and management of the State Department of Health for the territory extending back one mile from said area. The subdivisions a, b and c under this section likewise makes no mention of the control of food establishments.

"Query: Is the Division of Parks and its lessees subject to being governed by the regulations governing food establishments of the Highland County, Ohio Board of Health? If the answer to this question is yes, by what procedure and against whom would the Highland County Board of Health enforce their regulations?"

The statutes to which you refer in your inquiry are as follows:

Section 472:

"All lands and waters now or hereafter dedicated and set apart for public park or pleasure resort purposes, or which may hereafter be acquired for such purposes, shall be under the control and management of the division of parks, which shall protect, maintain and keep them in repair. The division of parks shall have the following powers over all such lands and waters, to-wit: To make alterations and improvements thereof, to construct and maintain dikes, wharves, landings, docks, dams and

other works, and to construct and maintain such roads and drives in, around, upon and to such lands and waters as shall make them conveniently accessible and useful to the public."

Section 483-1:

"No person or lessee of the state shall injure, alter, destroy, remove or change any tree, building, dock or land or part thereof within such reservoir park or other body of water under supervision and control of division of parks or construct any building or dock within such reservoir park, without written permission of the chief of the division of parks. All lessees of state lands or lots shall keep the premises in good condition and free of weeds, inflammable substances, garbage and all other unsightly or dangerous things. Proof that any state premises under lease is used for illegal or immoral purposes shall be just cause for the chief of the division of parks to cancel the leasehold for such state property."

Section 483-2:

"The territory included within any state park or pleasure resort and surrounding lands extending back one mile therefrom, is hereby designated a special sanitary district, to be under the control and management of the state department of health for sanitary purposes, and any failure to comply with the notices of said department relating to sanitary conditions, shall be deemed a violation of the terms of this act.

a. The state department of health shall have powers to make and enforce rules and regulations relating to the location, construction and repair of stockyards, hog pens, stables, privies, cesspools, sinks, plumbing, drains and all other places where offensive substances or liquids may accumulate within such sanitary district and said department of health shall have power to abate all such nuisances, and may remove or correct all unsanitary conditions detrimental to the health and well-being of the community included in such sanitary district, and may, when necessary, certify the costs and expenses thereof to the county auditor, to be assessed against the property of the offending party and thereby made a lien upon it and collected as other taxes.

"b. When any specific order of the state department of health is neglected or disregarded by parties, after due notice, the director of health may cause the arrest and prosecution of all persons so offending in accordance with the terms of this act. Notice by the state department of health to abate or correct a nuisance shall be served upon parties offending in accordance with the terms of section 4422 of the General Code.

"c. No sewer, drain or other connection with closets, cesspools, sinks, privies or other places where offensive or unsanitary

matter accumulates, shall be drained or discharged into any state reservoir, and no garbage, offal or filth of any kind shall be thrown or discharged, in any manner, into any such reservoir or immediate tributary thereto, and this rule shall apply to all houseboats and buildings erected over the waters of any state reservoir."

The authority of a board of health of a general health district in the promulgation of health regulations is found in Section 1261-42, General Code, which reads as follows:

"The board of health of a general health district may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances, and shall have the power to require that no human waste, animal waste, or household wastes from sanitary installations within the district be discharged into a storm sewer, open ditch or watercourse without a permit therefor having been first secured from the board of health of the health district under such terms and conditions as the board may from time to time require. All orders and regulations not for the government of the board, but intended for the general public, shall be adopted, recorded and certified as are ordinances of municipalities and record thereof shall be given in all courts of the state the same force and effect as is given such ordinances, but the advertisements of such orders and regulations shall be by publication in one newspaper published and of general circulation within the general health district. Publication shall be made once a week for two consecutive weeks and such orders and regulations shall take effect and be in force ten days from date of first publication. Provided, however, that in cases of emergency caused by epidemics of contagious or infectious diseases, or conditions or events endangering the public health, such boards may declare such orders and regulations to be emergency measures, and such orders and regulations shall become immediately effective without such advertising, recording and certifying."

From a reading of these statutes it is readily apparent that both sections 1261-42 and 483-2 relate in general to the protection of the public health, and are to some extent inconsistent with each other. In this situation the question arises whether the special provisions of Section 483-2, supra, are to be considered as effecting a repeal by implication of the general provisions of Section 1261-42, supra, to the extent that any of the provisions therein are in conflict. It is well established that repeals by implication are not favored and are recognized only in cases of clear and irreconcilable conflict.

A further refinement on this rule is that where the two statutes may be enforced together and effect given to each there is no such irreconcilable conflict as would effect a repeal by implication.

In considering the extent of inconsistency in these statutes, we may first observe that Section 483-2, General Code, creates a special *sanitary district,* whereas in the statute which defines the powers of a board of health provision is made for the constitution of a *health district.* While it cannot be doubted that both sanitary districts and health districts have been provided for by statute for the same fundamental purpose, i.e., for the protection of the public health, the organization, powers and functions of the governing body of each are quite different. Provision was made by statute for the erection of sanitary districts as long ago as 1919, by the enactment of Section 6602-34, et seq., General Code, in what is known as the "sanitary district act of Ohio." The purposes for which such districts may be organized is set out in Section 6602-35, General Code, as follows:

> "(a) To prevent and correct the pollution of streams;
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> "(b) To clean and improve stream channels for sanitary purposes;
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> "(c) To regulate the flow of streams for sanitary purposes;
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> "(d) To provide for the collection and disposal of sewage and other liquid wastes produced within the district;
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> "(e) To provide a water supply for domestic, municipal and public use within the district, and incident to such purposes and to enable their accomplishment, to construct reservoirs, trunk sewers, intercepting sewers, siphons, pumping stations, wells, intakes, pipe lines, purification works, treatment and disposal works; to maintain, operate and repair the same, to acquire additional water supplies by purchase, and do all other things necessary for the fulfillment of the purposes of this act.
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> "(f) To exterminate or prevent mosquitoes, flies, and other insects and abate their breeding places; and incident to such purposes to purchase supplies, materials and equipment, employ technicians and laborers, and build, construct, maintain and repair such structures, devices and improvements, and to do such other things, as may be necessary or proper to accomplish said purpose.
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> "(g) To collect and dispose of garbage.
>
> "(h) To collect and dispose of any other refuse that may become a menace to health."

It is evident from a reading of the foregoing that provision has been made for the erection of sanitary districts primarily for the purpose of dealing with hazards to the public health which arise in connection with lakes, streams and water drainage generally. The powers and functions of a board of health of a general health district on the other hand are by no means so restricted, but are sufficiently broad to encompass the full field of health regulation.

In considering the legislative purpose in the creation in Section 483-2 General Code, of special sanitary districts, it is to be observed that under the provisions of Section 6602-34 et seq., General Code, the decision to erect a sanitary district rests with the common pleas court in which the district concerned is to be erected, such court acting on a petition of the interested freeholders. Because in numerous instances state parks and lakes lie within the limits of more than one county, it can be presumed that the Legislature recognized the necessity for the erection of a special sanitary district which could operate in more than one county with greater effectiveness than two locally created sanitary districts and that the enactment of Section 483-2, General Code, was designed to provide a substitute for such locally created sanitary district rather than to provide a substitute for the local general health district.

It is true that Section 483-2, General Code, provides that the "department of health shall have power to abate all such nuisances, and may remove or correct all unsanitary conditions detrimental to the health and well-being of the community included in such sanitary district." By considering this language, however, in association with the language immediately preceding it, providing for the powers of the department to make rules relating to "stock yards, hog pens, stables, privies, cess pools, sinks, plumbing, drains," we may consider such general language limited to the same field in which such specially designated powers operate. In this view of the matter, therefore, it would appear that the state department of health, under the provisions of Section 483-2, General Code, is authorized to deal with all health matters which may be affected by lakes, streams, sewage, and water drainage problems generally; and that local boards of health are left with authority to deal with all other phases of health problems in the counties concerned. I do not, therefore, regard any of the provisions of Section 483-2, General Code, as limiting the power of the board of health of a general health dis-

trict to establish and enforce within such district health regulations pertaining to the operation of restaurants and other food establishments.

We may next consider the status of the division of parks and its lessees with respect to such local health regulations. In State ex rel Parrott v. Board of Public Works, 36 Ohio St., 409, the third paragraph of the syllabus is as follows:

> "3. The state is not bound by the terms of a general statute, unless it be so expressly enacted."

This language has been referred to with approval in State ex rel Ogelvee v. Cappeller, 39 Ohio St., 207, in State ex rel. Janes v. Brown, 112 Ohio St., 590, and in State ex rel Nixon v. Merrell, 126 Ohio St., 239, 246. It may therefore be regarded as settled law in Ohio.

Under this rule, since the statutes relating to the powers and functions of local boards of health do not expressly provide that the state is to be bound thereby, it must be concluded that if the state were to engage in some business, activity or practice which was thought to cause a hazard to the public health, the health regulations of local boards of health could not be enforced against it.

While such a conclusion may appear to operate to bad effect in certain circumstances, it should be borne in mind that the reason for the rule that the state is exempt from the terms of the general statute, unless such statute expressly provides to the contrary, is, as stated in the Parrott case, supra (p. 415), "because it must be assumed that the state will be ever ready and willing to act justly toward its citizens in the absence of statutes or the intervention of courts." In the instant case, therefore, I should think it could be assumed that the division of parks will take prompt steps to correct any unsanitary conditions with respect to its own activities which the local board of health may bring to its attention.

The status of the division's lessees, however, is a distinctly different matter.

The reason for the rule that the state is not bound by general statutes unless expressly so provided is that such exemption is inherent in the nature of a sovereignty. 49 American Jurisprudence, 301, Section 91. It cannot be supposed on any theory, however, that the execution of a lease by the sovereign thereby confers on the lessee any of the at-

tributes of sovereignty. Indeed, the extension of a part of the sovereignty of the government can be effected only by legislative grant in express terms, and such enactments are interpreted most strongly against the grantee and in favor of the government. 37 Ohio Jurisprudence, 739, 740, Section 418. I conclude, therefore, that lessees of the state division of parks are bound by the health regulations relating to food establishments promulgated by the boards of health of the districts in which such lessees are located.

In the matter of enforcement of the local boards' regulations it will be necessary, of course, to proceed against the lessees themselves rather than against the division of parks or its officers and employees. As provided in Section 1261-30, General Code, all provisions relative to "powers, duties, procedure and penalties" which were formerly applicable in the case of a municipal board of health are now applicable as to boards of city and general health districts. Such powers, duties, procedure and penalties are set out in Section 4404, et seq., General Code. Penalties, for example, are provided for in Section 4414, General Code, and in Section 4420, General Code, provision is made for the abatement of nuisances. For a further discussion of the provision noted above in Section 1261-30, General Code, your attention is invited to Opinion No. 7185, Opinions of the Attorney General for 1944, p. 583.

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

1. Health regulations relative to the operation of food establishments, adopted under the provisions of Section 1261-42, General Code, are fully effective and operative within such portion of the health district concerned as lies within a special sanitary district created by the enactment of Section 483-2, General Code.

2. The state is not bound by the terms of a general statute unless it be so expressly provided by statute. Because there is no such express provision in Section 1261-16, et seq., General Code, the health regulations adopted by a local board of health, as provided in Section 1261-42, General Code are not binding on the state itself but they are applicable to and may be enforced against lessees of the state.

Respectfully,
C. WILLIAM O'NEILL
Attorney General