OPINION NO. 73-033

Syllabus:

1. An upland owner, who wharfed out to navigable water over the submerged bed of Lake Erie prior to the enactment of R.C. 123.031 in 1955, is required under that statute to apply to the Director of Public Works for a lease since the submerged land belongs to the state in trust for the people of the state.

2. The terms and conditions of such a lease, including the amount of rentals, are to be determined by the Director of Public Works and approved by the Governor.

3. No upland owner may continue to use and maintain structures built out over the Lake bed prior to the effective date of R.C. 123.031 without paying rent therefor.

4. No upland owner may make repairs, replacements or additional improvements on such property without obtaining a lease and paying the stipulated rent.

To: R. Wilson Neff, Director, Dept. of Public Works, Columbus, Ohio
By: William J. Brown, Attorney General, April 18, 1973

Your request for my opinion and an interpretation of R.C. 123.031 reads in part as follows:

> The Penn Central Transportation Company, successor to the New York Central Railroad Company, is the owner of certain upland abutting Ashtabula harbor on Lake Erie. The record title of the Transportation Company and its predecessors in title goes to the natural shore line of the lake.
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> Beginning about 1900 the railroad owners of the upland filled the submerged lands in front of the upland and wharfed out to navigable waters.

The Transportation Company now maintains an ore dock inside the harbor line known as the "Minnesota Slip." All of this construction was completed prior to October 13, 1955.

Following the decision of the Ohio Supreme Court in the case of State ex rel Squire v. City of Cleveland, et al (1948) 150 O.S. 303, the Ohio General Assembly amended and repealed certain existing statutes dealing with the submerged lands under Lake Erie, and enacted new Section 123.031, R.C., (126 O.L. 187). This statute provides that upland owners shall be granted a lease provided the improvements do not constitute an unlawful encroachment on navigation and water commerce.

We respectfully request a formal opinion as to the following questions:

1. Does the statute, under the facts set out above, require the upland owner to apply for a lease?

2. If such upland owner elects to apply for a lease, does he have to enter into a lease on the terms and conditions specified by the State of Ohio, including the payment of rent?

3. If such upland owner does not apply for a lease, or if he applies but elects not to enter into a lease, does he have the right to continue to use and maintain the structures, facilities, buildings, and other improvements erected or developed prior to October 13, 1955, and the later replacements thereof, without paying rent therefor?

4. Can said upland owner make repairs, replacements, or additional improvements in, on, or to the improvements erected or developed prior to October 13, 1955, without applying for and receiving permission from the Department of Public Works, without applying for and entering into a lease, and without paying rent therefor?

These questions were supplemental to your earlier request, which reads in part as follows:

We respectfully request a formal opinion as to whether:

1. The open bays connected to Lake Erie, such as Maumee Bay and Sandusky Bay, are included in the "territory" which is the subject of Section 123.031; and

2. To what extent, if any, the estuaries such as Maumee River and Ottawa River are included in and subject to the provisions of Sec-123.031.

The Supreme Court first dealt with the question of ownership of the soil beneath the waters of Lake Erie in State v. Cleveland & Pittsburgh Railroad Co., 94 Ohio St. 61 (1916). In that case the state sought an injunction to prevent the railroad, which had title to abutting uplands, from wharfing out to navigable water in the Lake. The lower courts had ruled against the state, and the Supreme Court affirmed on the ground that the General Assembly had not, as of that time, exercised its undoubted right of regulation over the soil beneath the waters of the Lake. Because of the importance of that decision I shall quote from it at some length:

> After a careful examination we are convinced that in most of the states of the United States the conclusion has been arrived at, either by judicial reasoning or by statutory provision which has been upheld, that, subject to regulation and control by the federal and state governments, the littoral owner has the right to wharf out to navigable waters, provided he does not interfere with the public rights of navigation or fishery, and that the state holds the title to the subaqueous land of navigable waters as the trustee for the protection of the public rights therein. * * *
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> As shown, the state holds the title to the subaqueous land as trustee for the protection of public rights. The power to prescribe such regulations resides in the legislature of the state.
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> * * * Our general assembly has enacted no legislation providing such regulations.
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> Until the enactment of appropriate legislation the littoral owner, for the purposes of navigation, should be held to have the right to wharf out to the line of navigability, as fixed by the general government, provided he does not interfere with public rights. Otherwise, through the mere absence of legislation by the state, the supreme utility and value of navigable waters - navigation and commerce - would be defeated. Whatever he does in that behalf is done with knowledge on his part that the title to the subaqueous soil is held by the state as trustee for the public, and that nothing can be done by him that will destroy or weaken the rights of the beneficiaries of the trust estate. His right must yield to the paramount right of the state as such trustee to enact regulatory legislation. It must be remembered that his right, pending appropriate legislation, is one that can be exercised only in aid of navigation and commerce, and for no other purpose. What he does is, therefore, in furtherance of the object of the trust and is permitted solely on that account.

> The state as trustee for the public cannot by acquiescence abandon the trust property or enable a diversion of it to private ends different from the object for which the trust was created.
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> The defendants in error contend that the right of the littoral owner to wharf out is a property right which cannot be taken without compensation under the federal and state constitutions. A similar contention was made in Greenleaf Johnson Lumber Co. v. Garrison, 237 U.S. 251, where the wharves had been erected in keeping with federal and state lines. The claim was not sustained. * * *
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> The authorities show that the right of a riparian or littoral owner is always subject to the paramount authority of the state and federal governments for the ends set forth.
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> In this case the defendants aver in their answer that the work complained of was and is for the purpose of enabling them to reach navigation and to perform their duties as common carriers. * * *
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> It is to be presumed that the legislature, in the enactment of legislation on the subject, will appropriately provide for the performance by the state of its duty as trustee for the purposes stated; * * *. (Emphasis added.)

The Cleveland & Pittsburgh case was decided on February 29, 1916. A little over a year later the General Assembly finally exercised its regulatory power by enacting the Fleming Act. 107 Ohio Laws, 587. Section 1 of that Act became Section 3699-a of the General Code which now appears, with changes which are immaterial here, as Section 123.03 in the Revised Code. In its present form it provides in pertinent part:

> 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. Any artificial encroachments by public or private littoral owners, which interefere 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 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.
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> 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.)

After this declaration of the state's title to the bed of the Lake as trustee for the people of Ohio in Section 1 of the Fleming Act, Section 2 of the Act delegated to the municipal corporations on the shore the authority to construct and operate piers, docks and wharves over the land belonging to the state for a distance of two miles out into the Lake, or to lease the right to construct and operate such piers, docks and wharves. Section 2 appeared in the General Code as Sections 3699-1 through 3699-9 and ultimately became Sections 721.04 through 721.10 of the Revised Code. (Several of these Sections have since been repealed, and the authority to grant leases was transferred from the local authorities to the state in 1955. Compare G.C. 3699-1 with 126 Ohio Laws, 138-140, amending R.C. 721.04 and enacting R.C. 123.031.)

One portion of Section 2 of the Fleming Act (G.C. 3699-8) attempted to limit its operation in one area by transferring to the City of Cleveland the state's title to certain submerged land in the harbor of that city. This provision was held by a court of common pleas to be an unconstitutional abandonment of property held in trust by the state, and as a result the entire Fleming Act was declared unconstitutional. State, ex rel. Squire v. Cleveland, 32 Ohio Op. 111, 128 (1945). The court of appeals agreed as to the unconstitutionality of G.C. 3699-8, but found that portion of the Act to be severable and upheld the validity of the remainder. State, ex rel. Squire v. Cleveland, 80 Ohio App. 83 (1947). When the case came before the Supreme Court, several of its members agreed with the conclusion of the court of common pleas that the entire Act was unconstitutional. But, since more than one judge agreed with the conclusion of the court of appeals, that part of the decision of the court of appeals invalidating only G.C. 3699-8 was left standing. State, ex rel. Squire v. Cleveland, 150 Ohio St. 303, 334-336 (1948). The case was, however, remanded for retrial on the facts. The court's opinion strongly reaffirms its prior holding in the Cleveland & Pittsburgh case, supra, to the effect that title to the land beneath the waters of Lake Erie is held by the State of Ohio in trust for the people of the state, and that the rights of littoral owners to wharf out to navigable water in the Lake are entirely subject to regulation by the General Assembly. 150 Ohio St., at 322-326, 336-339.

There was no question of a lease in the Squire case. The real question was whether the City of Cleveland could, for the purpose of constructing works in aid of navigation, take, without compensation, land filled in over the bed of the Lake by

the littoral owner in order to wharf out to navigable water. The Supreme Court remanded the case to the court of common pleas to determine whether, as a matter of fact, the works being constructed by the City of Cleveland were in aid of navigation.

In 1955, several years after the decision in Squire, the General Assembly again exercised its authority to regulate the submerged lands under the Lake by the enactment of a new Section, R.C. 123.031, as part of the Revised Code. 131 Ohio Laws, 137-141. With some intervening amendments, that Section now reads in part as follows:

> (A) "Territory," as used in this section, means the waters and the lands presently underlying the waters of Lake Erie and lands formerly underlying the waters of Lake Erie and now artificially filled, between the natural shore line and the harbor line or the line of commercial navigation where no harbor line has been established.
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> (B) Whenever the state, * * * upon application of any owner of uplands fronting on Lake Erie, * * * determines that any part of the territory as defined in section 123.031 of the Revised Code, in front of said uplands can be developed and improved or the waters thereof used as specified in said application without impairment of the public right of navigation, water commerce and fishery, a lease of all or any part of the state's interest therein may be entered into with said owner, * * * provided the legislative authority of the municipal corporation within which any such part of the territory is located * * * or the county commissioners of the county within which such part of the territory is located, * * * or the board of directors of a port authority with respect to such part of the territory included in the jurisdiction of the port authority has enacted an ordinance or resolution finding and determining that such part of the territory, described by metes and bounds, is not necessary or required for the construction, maintenance, or operation by the municipal corporation, county, or port authority of breakwaters, piers, docks, wharves, bulkheads, connecting ways, water terminal facilities, and improvements and marginal highways, in aid of navigation and water commerce, and that the land uses specified in said application comply with regulation of permissible land use under a waterfront plan of the local authority.
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> (C) Upon the filing of the application of such upland owner in the office of the director of public works in Columbus, Ohio, such director shall hold a public hearing thereon and cause written notice of such filing to be given any municipal corporation, county, or port authority, as the case may be, in which such part of the territory is located and also public notice of such filing * * *.

> In the event the director of public works finds that a lease may properly be entered into with the applicant, he shall recommend to the governor the terms and conditions of such lease, and shall determine the consideration to be paid by the applicant, which consideration shall exclude the value of the upland owner's littoral rights and improvements made or paid for by the upland owner or his predecessors in title. Such lease may be for such periods of time, whether limited or perpetual, as the director of public works recommends. The rentals received under the terms of such a lease shall be paid into the city, county, or port authority making the finding provided for in this section.
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> (D) Upland owners who have, prior to October 13, 1955, erected, developed, or maintained structures, facilities, buildings, or improvements or made use of waters in the part of the territory in front of such uplands, shall be granted a lease by the state, * * * upon the presentation of a certification by the chief executive of a municipality, resolution of the board of county commissioners, or by a resolution of the board of directors of the port authority establishing that such structures, facilities, buildings, improvements, or uses do not constitute an unlawful encroachment on navigation and water commerce. * * *
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> (E) Upland owners having secured a lease pursuant to section 123.031 of the Revised Code are entitled to just compensation for the taking, whether for navigation, water commerce, or otherwise, by any governmental authority having the power of eminent domain, of structures, * * * or uses, * * * pursuant to the procedure provided in sections 719.01 to 719.21, inclusive, of the Revised Code. Such compensation shall not include any compensation for the site in the territory except to the extent of any interest in the site theretofore acquired by the upland owner under this section or by prior acts of the general assembly or grants from the United States. The failure of any owner of uplands to apply for or obtain a lease under this section does not prejudice any right said upland owner may have to compensation for a taking of littoral rights and improvements made in the exercise thereof.

In brief summary this Section provides for a leasing of the state's interest in submerged lands close to the shore of the Lake upon application by the owner of the adjacent uplands; there must be a public hearing before the Director of Public Works, and a finding by the municipality, county, or port authority, within which the particular territory lies, that the submerged lands are not needed by such municipality, county or port authority and that the lease will be in compliance with local waterfront plans; if the Director determines that the lease will be proper, he shall recommend, for approval by the Governor, the length and

conditions of the lease and the amount of rentals, which rentals are to be paid to the proper municipality, county, or port authority; upland owners, who had already wharfed out over the submerged lands of the Lake prior to the effective date of the Section, are entitled to a lease from the state upon certification by the municipality, county, or port authority in which the territory lies that the structures already in existence do not obstruct navigation or commerce; if any structures, erected on such territory pursuant to lease or littoral right, are taken by eminent domain for any purpose, the upland owner is entitled to just compensation, and the failure of the owner to apply for or obtain a lease will not prejudice his right to just compensation. It should be noted that both the Cleveland & Pittsburgh case and the Squire case treated wharfing out over the bed of the Lake as a "purpresture", or an enclosure of a part of the public domain by a private party, and both cases allowed a governmental taking of all property of the private party in the public domain for navigational purposes without compensation. R.C. 123.031 (E), however, now requires just compensation for any governmental taking of such property, regardless of the purpose for which it is taken.

1. Your first question asks whether R.C. 123.031 requires an upland owner, who had wharfed out over the bed of the Lake prior to the effective date of the Section, to apply for a lease from the state. Although the Section nowhere specifically states that an application for a lease must be made, I think that, when read as a whole and in the light of its history, the Section contains such a requirement by necessary implication.

As had been explained above, the Supreme Court held in the Cleveland & Pittsburgh case (and approved that holding in Squire) that title to the bed of the Lake belongs to the state in trust; that the common law right of the littoral owner to wharf out is subject to regulation by the state; and that, in the absence of the adoption of regulations by the legislature, the state may not prevent such wharfing out so long as it does not obstruct navigation. Such regulations have since been provided by the General Assembly in the 1917 Fleming Act and by the enactment of R.C. 123.031 in 1955. It is well settled that resort may be had to the title of a statute in order to determine the purpose for which it was enacted into law. Express Co. v. Wallace, 144 Ohio St. 612, 616 (1945). The title of the Act under which R.C. 123.031 was added to the Revised Code reads as follows (126 Ohio Laws, 137):

> To enact section 123.031 and to amend sections 123.03, 721.04, 721.05, and 721.11, and to repeal sections 721.06 and 721.07 of the Revised Code, for the purpose of encouraging and providing for the private development of lakefront lands and the development, utilization, and conservation of said territory for the uses to which it may be adapted, and to protect the rights of the state and to delegate certain powers to municipal corporations, port authorities, counties and the director of public works. (Emphasis added.)

The only thing in this Act, which gave the state some additional authority "to protect the rights of the state" over the submerged lands it holds in trust, was the authority to grant

leases to the littoral owners who either had built out, or desired to build out, over the bed of the Lake. As I have pointed out above, the General Assembly thus reclaimed for the state an authority which it had previously delegated in the Fleming Act to the local authorities along the Lake shore. The purpose of the Act, so far as the state was concerned, was to enable the state to control the development of the Lake shore through the medium of leases to those who occupy state-owned submerged lands.

That purpose would clearly be frustrated unless the Act be read to require that those who desire to use the submerged lands apply for a lease. Control over the development of the shore would be impossible otherwise. There can be no doubt that a statute must be so construed as to give effect to the intent of the General Assembly. Fifth Third Union Trust Co. v. Peck, 161 Ohio St. 169, 174 (1954); Opinion No. 72-089, Opinions of the Attorney General for 1972. Furthermore, in view of the Supreme Court's pronouncement in Cleveland & Pittsburgh, approved later in Squire, that the state cannot abandon that property, any other construction would raise constitutional doubts and must, of course, be avoided if possible. Wilson v. Kennedy, 151 Ohio St. 485, 491-492 (1949); Chambers v. Owens-A.-K. Co., 146 Ohio St. 559, 566 (1946). Finally, the last sentence in the quotation of R.C. 123.031, supra, provides that,

> The failure of any owner of uplands to apply for or obtain a lease under this section does not prejudice any right said upland owner may have to compensation for a taking of littoral rights and improvements made in exercise thereof.

The addition of this sentence clearly implies that there must be an application for a lease. The sentence would be pointless in the absence of such a requirement.

Subsection (D) of R.C. 123.03, supra, provides that upland owners, who like the one mentioned in your letter, had wharfed out into the Lake prior to the effective date of the Act in 1955, shall be granted a lease, "as set forth in this section", if the local authorities certify that the existing structures do not unlawfully obstruct navigation. Under subsection (B), on the other hand, new applicants may be granted a lease if the local authorities certify that the territory in question is not required for local needs and that the proposed use does not conflict with local waterfront plans. Since the upland owners who qualify for a lease under subsection (D) are to receive it "as set forth in this section", I conclude that an application must be filed with your Department.

2. Your second question inquires whether the terms and conditions of the lease, and the amount of rent, are to be determined by the state. Upon examination of subsection (C) of R.C. 123.031, the answer must be in the affirmative. The statute provides in part:

> In the event the director of public works finds that a lease may properly be entered into with the applicant, he shall recommend to the governor the terms and conditions of such lease, and shall determine the consideration to be paid by the applicant, which consideration shall

> exclude the value of the upland owner's littoral rights and improvements made or paid for by the upland owner or his predecessors in title. Such lease may be for such periods of time * * * as the director of public works recommends. * * *
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> If the governor concurs * * * he shall issue a certificate to that effect and deliver the same to the auditor of state for the drafting of the lease agreement. * * *
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> (Emphasis added.)

3. You next ask whether an upland owner, who had wharfed out over the Lake bed prior to the effective date of R.C. 123.031 in 1955 but who has not obtained a lease from the state, may continue to use and maintain such facilities without paying rent.

In both Cleveland & Pittsburgh and in Squire the Supreme Court has held that such an occupancy of the Lake bed amounts to a purpresture, a private enclosure of a part of the public domain, and that it is subject to the paramount authority of the state under appropriate legislation. 94 Ohio St., at 75-80; 150 Ohio St., at 322-326, 337-339. Furthermore, the Court's opinion in Squire contains the following language (150 Ohio St., at 346-347):

> The Attorney General urges that there should not be a narrow construction as to the meaning of navigation, for the reason that in the future scientific progress may well render entirely obsolete the types and methods of water navigation heretofore known and our great inland waterways will become largely useful for other and even more beneficial purposes, and if such progress should be made it would be ridiculous that the dead hand of the past has impressed an irrevocable and inalienable trust upon the resources of the state, limited to obsolete and antiquated public uses.
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> We are in thorough agreement with that view and firmly believe that the law should be flexible enough to be applied to a constantly progressive civilization, and by this opinion we do not mean to express any limitation with reference to situations as they may arise in the future. * * *

As we have seen above, the General Assembly, apparently influenced by the Supreme Court's language, has enacted such regulatory legislation. R.C. 123.03 provides that the waters of Lake Erie and the soil beneath belong "to the state as proprietor in trust for the people of the state, for the public uses to which it may be adapted * * *. (Emphasis added.) And R.C. 123.031 provides that the state may take all rights of an upland owner in the bed of the Lake, upon payment of just compensation, "for navigation, water commerce, or otherwise." (Emphasis added.) The emphasized passages of these two Sections first appeared in the 1955 Act, and the title of that Act, already quoted above, states its intent to be, in part, "for the purpose of * * * the development, utilization, and conservation of said territory for the uses to which it may be adapted, and to protect the rights of the state * * *."

In view of the fact that the General Assembly has exercised its control over the submerged lands of the Lake, held by the state in trust for the people of the state, for the purpose of developing and conserving such lands and protecting the state's rights, I conclude that no upland owner may continue to use and maintain structures built out over the Lake bed prior to the effective date of the 1955 Act without paying rent therefor. The upland owner must, of course, be given an opportunity to file an application for a lease, thus setting in motion the procedures provided for in R.C. 123.301.

4. The answer to your fourth question follows as a corollary to what has just been said. The upland owner may not make repairs, replacements or additional improvements on such property without obtaining a lease and paying the stipulated rent.

It should be noted that the amount of such rent will be nominal since it is to be paid only on the site of the upland owner's improvements upon adjacent submerged lands of the state. R.C. 123.031 (C) provides that the consideration for the lease

> * * * shall exclude the value of the upland owner's littoral rights and improvements made or paid for by the upland owner or his predecessors in title. * * *

See also R.C. 123.031 (E).

Your original two questions asked whether open bays connected with the Lake, and estuaries of the rivers which flow into the Lake, are subject to the provisions of R.C. 123.031. These questions are presently before the Court of Appeals for Franklin County in Rheinfranks v. Gienow, and it would, therefore, be inappropriate for me to express an opinion as to such questions. Opinion No. 72-097, Opinions of the Attorney General for 1972.

In specific answer to your supplemental questions it is my opinion, and you are so advised, that:

1. An upland owner, who wharfed out to navigable water over the submerged bed of Lake Erie prior to the enactment of R.C. 123.031 in 1955, is required under that statute to apply to the Director of Public Works for a lease since the submerged land belongs to the state in trust for the people of the state.

2. The terms and conditions of such a lease, including the amount of rentals, are to be determined by the Director of Public Works and approved by the Governor.

3. No upland owner may continue to use and maintain structures built out over the Lake bed prior to the effective date of R.C. 123.031 without paying rent therefor.

4. No upland owner may make repairs, replacements or additional improvements on such property without obtaining a lease and paying the stipulated rent.