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PUBLIC WORKS, DEPARTMENT OF — SCOPE OF AUTHORITY
— RULES, REGULATIONS, IMPROVEMENT, OPERATION, MAIN-
TENANCE — LEASE — LICENSE — CANAL LANDS — FARNS-
WORTH ACT — OHIO AND ERIE CANAL, SUMMIT COUNTY.

SYLLABUS:

The matter of granting long term leases under the Act of May 13, 1921, abandoning the Ohio Canal in Summit County, discussed.

Columbus, Ohio, April 23, 1942.

Hon. Frank L. Raschig, Director, Department of Public Works,
Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

“At the present time this department is preparing leases for the purpose of railroad right-of-way crossings over the Ohio and Erie Canal property located between the northerly line of North Street in the City of Akron, and Center Street in the Village of Boston, Summit County, Ohio.

On May 13, 1921, an Act was passed by the General Assembly of Ohio, authorizing the Governor to lease for a period of ninety-nine (99) years, to the county of Summit and the city of Akron, Ohio, with the right to enter upon, improve and occupy this portion of said canal property for sewerage, drainage and highway purposes.

This department holds that inasmuch as the railroads are and have been occupying portions of said canal property under provisions of Sections 8775 and 8776, of the General Code, that we have the right of extension of such privileges by granting a long term lease, subject, however, to any improvements that may have been made by Summit County or the City of Akron.

Your opinion is therefore requested as to the proper procedure in the drafting of the above mentioned leases.”

The canals of this state since the time of their construction more than a hundred years ago, have been under the authority and control of the Ohio Canal Commission and the Board of Public Works. On September 3, 1912, the office of Superintendent of Public Works was created by the adoption of Section 12, Article VIII of the Constitution of Ohio.

Subsequently, thereto, on March 19, 1913, an Act was passed (103 O. L., 119), which vested in the Superintendent of Public Works all authority and control over the canals and public works of the state.

Although from an early date in the history of the canals, the leasing of surplus canal waters for hydraulic purposes, was authorized by law, no authority to lease canals generally, was given until the enactment of the Act of March 28, 1888 (85 O. L., 127). By the terms of this Act the Board of Public Works was authorized to lease all canal lands which were no longer necessary for the use and operation of the canals for terms of not to exceed fifteen years.

As methods of transportation changed, and the state canals became less used as a system of transportation successive legislatures abandoned various portions of the canals. On May 13, 1921, the 84th General Assembly passed House Bill No. 409 (109 O.L., 407) abandoning that portion of the Ohio Canal lying between the northerly line of North Street in Akron, Ohio, and Center Street, in the Village of Boston, Ohio. This Act provides in part, as follows:

“Section 2. All existing leases for portions of the Ohio canal within the limits above described shall remain in full force and effect until the expiration thereof with the right of renewal of any such lease at its expiration.

Section 3. The governor is hereby authorized to lease, after appraisal the same as other canal lands, to the county of Summit and the city of Akron, for the period of ninety-nine years, renewable forever, for sewerage, drainage and highway purposes only, that portion of the Ohio canal situated as above described and not under any existing lease, and that portion of said canal lands not used for the purposes herein specified shall remain and be the property of the state.

Section 4. The county of Summit and the city of Akron shall provide within the portion of the canal lands above described where necessary, a conduit of sufficient capacity to take care of the waters of the Ohio canal when such canal land is used for the purposes described in this act. It shall be a further condition of such leases that they shall be cancelled and such lands revert to the state when no longer used for the purposes herein described, or if such lands are not used within five years from and after the execution of the lease herein provided for.

Section 5. The county commissioners of Summit County and the council of Akron shall have the right to remove all existing bridges crossing such abandoned canal over which high-

ways or streets pass, and to grade such highways and streets by filling and grading across the channel and banks thereof, but must provide for all necessary drainage underneath the same in accordance with plans and specifications to be approved by the superintendent of public works."

Consonant with said act a lease was executed and delivered under date of December 29, 1922 to the City of Akron and the County of Summit. On August 1, 1940, an agreement was entered into wherein a portion of the leased premises was surrendered to the state and a reduction in the rental effected.

On April 8, 1931, the 89th General Assembly, passed what is known as the Farnsworth Act (114 O.L., 518), providing for the establishment of a system of state parks and affording any village, city, township, county or other taxing district the prior right and opportunity to take over any abandoned canal lands in the state for public park or recreational purposes. Said act provides in part, as follows:

"Tracts of such abandoned canal property not disposed of in the manner herein provided, may be leased by the superintendent of public works to responsible parties under the provisions of section 13965 of the General Code, except the length of the term of such leases may be for ninety-nine years, renewable forever, or for a term of fifteen years, and multiples thereof up to ninety years, and that railroad rights-of-way need not be limited to lengths of two miles; leases granted for a longer term than fifteen years shall contain a clause providing for a reappraisal of the canal lands described in such leases, by proper state authority, at the end of each 15 year period, embraced in such leases and the annual rental therefor shall be six per cent of the appraised value thereof for each period."

Section 13965, General Code, above referred to was part of an Act (85 O.L., 127) which required the canal commission to make a complete survey and determine therefrom which canal lands were no longer necessary for canal purposes. Said Section 13965, General Code, reads as follows:

"That each and every tract of land, and any part of the berme bank of any canal, canal basin, reservoir and outer slope of the towing path embankment, which said commission shall find to be the property of the state of Ohio, the use of which, in the opinion of said commission, the board of public works and the chief engineer of public works, if leased, would not materially injure or interfere with the maintenance and navigation of any of the canals of this state, shall be valued by said commission

at its true value in money, and if such land shall not then be under an existing lease, may be leased for any purpose or purposes other than for railroads operated by steam, but said commission, the board of public works and the chief engineer of the public works shall have power to make leases and prescribe regulations for the crossing of the canals, canal basins or canal lands by any railroad operated by steam, electricity or other motive power, or for the necessary use, for railroad purposes, of any part of the berme banks of a canal, canal basin or any portion of the canal lands for a distance not exceeding two miles, or if then under an existing lease, then at the expiration of such lease, may be leased on the terms and conditions hereinafter in this act provided for, but railroad companies unlawfully in the possession and use of state land at the date of the passage of this act shall take a lease thereon for the term of fifteen years in the same manner as when lands are leased for other purposes, or remove their tracks, buildings or other structures from said land.

Any owner of an existing lease for state canal lands may surrender the same to the state in order to have the land described therein included in a new lease, which shall not be for a greater term than fifteen years, and the application therefor shall definitely set forth the reasons why an extension of the lease is desired, but before granting a new lease for such state canal land, the superintendent of public works must be satisfied that the extension of the lease is for the purpose of making a valuable improvement thereon, which the lessee could not otherwise afford to make for the remaining portion of the unexpired lease. When a new lease, which shall not be for a less rental than the original lease, has been granted and approved by the governor and attorney general, the superintendent of public works shall cancel the original lease."

While it is to be noted that Section 13965, General Code, restricted the granting of leases of canal lands for any purpose other than railroad purposes for a period not to exceed fifteen years, however, this restriction was removed by the passage of the Farnsworth Act, supra, and specific authority therein given to lease abandoned canal property to railroads for a period of ninety-nine years, renewable forever.

Section 154-40, General Code, provides inter-alia, that the Department of Public Works shall have all the powers and perform all the duties vested by law in the superintendent of public works and the state building commission and be authorized to lease unproductive and unused lands of the state government, or any department, office or institution thereof, excepting school or ministerial lands.

By Section 464, General Code, the power and authority with re-

spect to the lease and sale of canal lands, formerly vested in the Ohio Canal Commission and Board of Public Works, has been transferred and conferred upon the Superintendent of Public Works.

Section 13965, General Code, read in connection with, and in the light of the aforementioned statutory provisions, now confers general authority upon the Superintendent of Public Works as Director thereof, to lease the abandoned canal property transferred by agreement to the state of Ohio by the City of Akron and the County of Summit.

The occupancy of canal lands by railroad companies was authorized under the sections you mention, namely, Sections 8775 and 8776 of the General Code, passed May 1, 1852 (50 O.L., 274), as part of an act to create and regulate railroad companies. Said sections read as follows:

“Section 8775. When the line of the road crosses a canal or any navigable water, the company shall file with the board of public works, the plan of the bridge, and other fixtures therefor, which shall designate the place of crossing. If the board approves such plan, it shall notify the company, in writing, of such approval. If the board disapproves such plan, or fails to approve it within twenty days from the filing thereof, the company may apply to the court of common pleas, or a judge thereof in vacation, and upon reasonable notice being given to the members of the board, upon good cause shown, the court or judge shall appoint a competent, disinterested engineer, not a resident of a county through which the road passes, to examine such crossing, and prescribe the plan and condition thereof, so as not to impede navigation. Within twenty days from his appointment, such engineer shall make his returns to the common pleas court of the county wherein such crossing is to be made, subject to exceptions by either party. At the next term after filing the return, the court shall examine, approve, and confirm it, unless good cause be shown against such approval. Its order of confirmation shall be sufficient authority for the erection, use and occupancy of such bridge, in accordance with such plans.”

“Section 8776. No company shall construct over a canal any permanent bridge less than ten feet in the clear above the top water line of the canal, and the piers and abutments of such bridge must be placed so as not in any manner to contract the width of the canal, or interfere with free passage on the towpath. This section shall not prevent the construction or continuance of draw bridges which do not interrupt navigation.”

In this connection, and as a matter of general law, it may be ob-

served that aside from the right which a company may have to erect and maintain bridges or similar structures on lands of another pursuant to a lawful lease executed by the owner for this purpose, the legal right of such person to erect and maintain structures of this kind on the lands of another is an easement which can be granted by the owner only by a deed executed by the owner in the manner provided by law. And without such a deed a permit by the owner to another for the use of lands for a purpose of this kind is but a license for the use of the lands which is revocable at the pleasure of the owner of the lands, and this is true whether the permit so given is in writing or by parol agreement. In the case of *Wilkins v. Irvine*, 33 O. S., 138, it was held that:

“A written license, without seal and unacknowledged, to enter upon and imbed water pipes in the lands of another, with privilege to enter and repair them, creates no interest in nor incumbrance upon the land such as will disable the owners from making a good and sufficient deed conveying a good title thereto.”

In Volume 13, *American and English Encyclopaedia of Law* the following statement appears at page 539:

“A license, as a term of real estate law, is an authority to do a particular act or series of acts, upon another’s land without passing any estate therein.”

A license is revocable at the option of the licensor or his grantor. *Rodefer v. P. O. V. & Ry. Co.*, 72 O.S., 273, and the case of *Yoeger v. Tuning*, 79 O. S., 12, is authority for the rule that a license is revocable even where absolute improvements have been made.

In view of the foregoing it would appear that the railroad companies are occupying canal property as licensees.

In the Act of May 13, 1921, *supra*, it is expressly provided that canal lands leased to Summit County and the City of Akron under the authority thereof shall revert to the State when no longer used for sewerage, drainage and highway purposes, and that that portion of such canal lands not used for such purposes “shall remain and be the property of the state.”

Therefore such canal property which has never been used for sewer-

age, drainage or highway purposes, or which has ceased to be used for said purposes, is now under the jurisdiction of the Department of Public Works.

In the event railroad companies are occupying any of said canal lands, and these privileges are to be extended for a definite time then it is necessary that some instrument be executed in connection therewith, and it is my opinion that you may execute and deliver to said railroad companies a long term lease under the provisions of the Farnsworth Act (114 O.L., 518).

Under Section 415, General Code, the Superintendent may prescribe such rules and regulations for the improvement, operation and maintenance of the public works as shall be necessary to the proper conduct of the department. By force of this statute the Superintendent may include in a lease to a railroad company any provision, condition or restriction which in his opinion shall be necessary in safeguarding improvements, if any, made by the City of Akron and the County of Summit.

Respectfully,

THOMAS J. HERBERT
Attorney General.