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1. DIKE—PREVENTION OF SHORE EROSION ALONG SOUTH SHORE OF LAKE ERIE — PROTECTION — PRIVATELY OWNED PROPERTY FRONTING ON LAKE ERIE —DEPARTMENT OF PUBLIC WORKS WITHOUT AUTHORITY TO PAY FOR ENTIRE COST AND EXPENSE OF SUCH CONSTRUCTION—SECTION 412-28 G. C.—APPROPRIATION—H. B. 496, 97 GENERAL ASSEMBLY.
2. LAKE ERIE CONSERVANCY DISTRICT NO. 1 — AGREEMENT TO ERECT OR REPAIR DIKE TO PREVENT SHORE EROSION ALONG SOUTH SHORE OF LAKE ERIE—PROPERTY UNDER JURISDICTION OF CONSERVANCY DISTRICT—STATE MAY BEAR TWO-THIRDS COST—PAYMENT TO BE MADE FROM APPROPRIATION — REMAINDER TO BE PAID BY CONSERVANCY DISTRICT.
3. STRUCTURE MAY NOT LAWFULLY BE ERECTED WITH FUNDS OF STATE DERIVED FROM SUCH APPROPRIATION—EXCEPTION, UPON LANDS WHERE STATE OR CONSERVANCY DISTRICT HOLDS TITLE OR PERPETUAL, IRREVOCABLE EASEMENT.

SYLLABUS:

1. Under the terms of the appropriation made by the 97th General Assembly in House Bill No. 496, and in view of the provisions of Section 412-28, General Code, the department of public works is without authority to pay for the entire cost and expense of constructing a dike for the prevention of shore erosion along the south shore of Lake Erie designed for the sole purpose of protecting privately owned property fronting on Lake Erie.

2. Under the provisions of Section 412-28, General Code, the department of public works is authorized to enter into an agreement with Lake Erie Conservancy District No. 1, for erecting or repairing a dike to prevent shore erosion along the south shore of Lake Erie, of property under the jurisdiction of said conservancy district, the cost thereof to be borne two-thirds by the state and the balance by such conservancy district, and for the purpose of paying the state's share may use so much as is necessary of the appropriation made by the 97th General Assembly in House Bill No. 496.

3. Such structure may not lawfully be erected with funds of the state derived from such appropriation except upon lands as to which either the state of Ohio or the conservancy district holds title or a perpetual, irrevocable easement.

Columbus, Ohio, March 8, 1948

Hon. George B. Sowers, Director, Department of Public Works
Columbus, Ohio

Dear Sir:

I have before me your communication in which you request my opinion. Your letter reads in part, as follows:

"The 97th General Assembly of Ohio, through H. B. No. 496 appropriated to the Department of Public Works under item G-32, \$1,075,000 'To devise and perfect economical and effective methods and works for preventing and correcting shore erosion of publicly owned property along the south shore of Lake Erie, and to enter into and carry out agreements to construct projects for preventing and correcting shore erosion of property under the jurisdiction of conservancy districts in accordance with the provisions of section 412-28 of the General Code'.

The Lake Erie Conservancy District Number One desires to enter into an agreement with the State to construct a project for preventing and correcting the erosion of a dike built by the District to prevent the waters of Lake Erie from re-entering the former swamp and marsh land behind the dike.

Will an opinion be rendered to this Department stating whether or not the moneys provided by the General Assembly through the above appropriation can be used by the Department of Public Works to pay any part or all of the cost for con-

structing the works as requested by Lake Erie Conservancy District No. 1.

The records show that all of the property along the shore of Lake Erie within the above Conservancy District No. 1 is privately owned and privately developed. On many of the lots fronting upon the lake shore houses have been built. There is no public interest in the arresting of the erosion of the dike other than such general public interest as there may be in the loss of private, tax paying property."

You further state that Lake Erie Conservancy District No. 1, was created in 1944 by the Court of Common Pleas of Lucas County, and a copy of the journal entry of that court is attached to your communication.

It further appears that all of the property fronting on Lake Erie within the conservancy district, is privately owned, that the portion of it along the lake is either swamp or covered with water, depending upon the stage of the water in the lake, and that except when protected by the structures hereinafter mentioned, such area is entirely useless for human habitation and not fit for cultivation.

It further appears that during the period 1903 to 1910, the owners of this land built a dike and drainage ditch adjacent thereto which had the effect of keeping the lake out, and thereby reclaiming for the purpose of the real estate venture an area of something over two square miles. It appears that in the course of time a rise in the general level of the lake together with storms beating against this structure have caused its deterioration to a considerable extent so that the lands in question again reverted to their original condition as marsh lands. The dike was partly rebuilt by the Conservancy District after its organization.

The plan now proposed, is for this dike and drainage ditch to be further repaired so as again to reclaim these lands from the action of the waters of the lake.

Section 412-28, General Code, is a part of an act found in 116 O. L., page 244, passed by the General Assembly in 1935. Said Section 412-28, which is quite lengthy, starts with the following statement:

"The superintendent of public works may expend upon erosion and harbor projects and for construction, maintenance, operation and repair of refuge harbors along the shores of Lake Erie and bays connected with Lake Erie, such funds as may be appropriated by the general assembly from time to time for such purposes, * * *."

This section then proceeds to set forth various plans of procedure, one of which contemplates an agreement with various political subdivisions of the state and with conservancy districts. I quote the following provision of this section :

“The state of Ohio, acting by and through the superintendent of public works, subject to the provisions of section 412-29 of the General Code, may enter into agreements with counties, municipalities, townships and conservancy districts for the purpose of constructing projects to prevent, correct and arrest erosion along the south shore of Lake Erie, in any rivers which are connected with Lake Erie, bays connected with said lake, and any other water courses which flow into said lake ; and these projects may also be constructed on any Lake Erie islands which are situated within the boundaries of the state of Ohio.

“The cost of such surveys and shore erosion projects shall be prorated on the basis of two-thirds of the total cost to the state of Ohio through appropriations granted to the department of public works and one-third of the cost to the county authorities or municipalities or conservancy districts or other political subdivisions, as the case may be.” (Emphasis added.)

There follow paragraphs authorizing the county commissioners and municipal or township authorities to enter into and carry out agreements with the superintendent of public works for the purpose of preventing and arresting shore erosion. As to conservancy districts, the following provision appears :

“Conservancy districts may enter into and carry out an agreement with the superintendent of public works, in accordance with the provisions and intent of section 412-28 of the General Code, under and by virtue of the powers conferred upon the conservancy districts as set forth in sections 6828-1 to 6828-79, both inclusive, of the General Code.”

The statute proceeds to make it clear that these works are to be supervised by the superintendent of public works and where done pursuant to agreements with other subdivisions or authorities the following procedure is required :

“The superintendent of public works shall approve and supervise all projects that are to be constructed in accordance with the provisions set forth in section 412-28 of the General Code. The superintendent of public works is prohibited from proceeding with the construction of any project until all funds which are to be paid by the county, municipality, township or conservancy

district, in accordance with the terms of the agreement entered into by and between the superintendent of public works and the county, municipality, township or conservancy district, are in the possession of the superintendent of public works and deposited into the shore erosion rotary fund.”

There follows a provision covering a case where the superintendent may construct such projects at the *sole expense of the state* without financial contributions of political subdivisions or conservancy districts. But it is to be noted that projects so constructed must be financed by appropriations by the General Assembly, and naturally that purpose must appear from the language of the appropriation act. The provision in question reads as follows:

“However, if the superintendent of public works finds it to be to the best interests of the state to construct projects as set forth in section 412-28 of the General Code, by the state of Ohio itself, without the financial contribution of counties, municipalities, townships or conservancy districts, he may construct the projects; the projects so constructed by the state may be financed by appropriations granted by the general assembly.”

Recurring now to the appropriation contained in House Bill No. 496 of the 97th General Assembly which is quoted in your letter, it will be noted that the authority there given by the General Assembly is two-fold: (1) “to devise and perfect economic methods and works for preventing and correcting shore erosion of *publicly owned property* along the south shore of Lake Erie” and (2) “to enter into and carry out agreements to construct projects for preventing and correcting shore erosion of property under the jurisdiction of conservancy districts in accordance with the provisions of Section 412-28 of the General Code.”

Plainly, neither of the above purposes contemplated the expenditure of the funds appropriated, for constructing projects at the sole expense of the state. The first object of the appropriation is entirely out of consideration because as you state there is no public property involved for which protection is contemplated. Accordingly, we are confined to the second purpose stated in the appropriation to wit, projects the cost of which is to be prorated on the basis of “two-thirds of the total cost to the state of Ohio through appropriations granted to the department of public works,” and “one-third to the * * * conservancy district.”

It would follow, therefore, that that portion of your question which asks whether the department of public works would be authorized to use the appropriation in question to pay *all* of the cost for constructing the works as requested by Lake Erie Conservancy District No. 1, must be answered in the negative.

We come then to the matter of agreement with the conservancy district. Conservancy districts are organized pursuant to an act of the General Assembly originally passed in 1914, found in 104 O. L., page 13, and codified as Sections 6828-1 to 6828-70, General Code. In this act, as originally passed, the purposes to be accomplished by the organization of such district were devoted primarily to the prevention of floods and control of streams. Section 6828-2, General Code, which outlined these purposes, was, however, amended by the 97th General Assembly, by adding the following additional purpose:

“(i) of arresting erosion along the Ohio shore line of Lake Erie.”

I note in your statement of facts that the order of the court, organizing this district, was made in 1944, and that the journal entry of the court had not since been amended to include “shore erosion.” I assume that the question you intend to raise is whether the conservancy district, having been organized before that new purpose had been added, is now qualified to deal with the subject of shore erosion. I do not consider that this situation limits the power of the district to contract at the present time for a project relative to shore erosion. Under the provisions of Section 6828-6 of the General Code, the order of the court is to be predicated upon the finding of the court, “that the purposes of this chapter would be subserved by the creation of a conservancy district.” Upon such finding, the court declares the district organized and gives it a corporate name, whereupon it becomes endowed with power to carry out all of the acts authorized by the conservancy law. Certainly, in the organization of this conservancy district the order of the court did nothing but establish it, and once established its powers would not be limited to those which at that time were expressed in the law, but would include such other powers as the General Assembly might from time to time see fit to add. My conclusion in this respect is strengthened by the fact that Section 412-28, General Code, and the act of which it is a part all dealt with the problems of erosion on the south shore of Lake Erie, and expressly conferred on conservancy districts the power to contract with the state relative thereto.

It is accordingly my opinion that you as superintendent of public works are authorized by law to enter into an agreement as contemplated by Section 412-28, General Code, supra, with Lake Erie Conservancy District No. 1 for such structures as will in your opinion be designed to prevent erosion on the lands embraced in such conservancy district, such contract to be upon the terms stated in the act relative to such agreements; further that two-thirds of the cost of such work may be paid out of the appropriation contained in said House Bill No. 496 of the 97th General Assembly, the balance being paid by the conservancy district; furthermore, that the portion to be paid by the conservancy district is to be paid into your hands before such construction is begun.

A further question arises as to the ownership of the land upon which the proposed improvement is to be made. The appropriation act referred to in your letter authorizes the use of the funds appropriated for the prevention or correction of shore erosion of "property under the jurisdiction of conservancy districts". I construe this as including all property, public or private, situated within the boundaries of the conservancy district. But it does not follow that the contemplated structures whether built by the conservancy district or by the department of public works, may be built on land to which neither the state nor the conservancy district has title.

A further provision of Section 412-28 supra, gives the superintendent of public works authority to acquire lands for the purpose of carrying out the provisions of that section, in the following words:

"The superintendent of public works shall have the authority to take lands and materials for the purpose of carrying out the provisions of section 412-28 of the General Code. The superintendent of public works may exercise the authority to take such lands and materials in accordance with sections 442 to 454, both inclusive, of the General Code."

Sections 442 to 454 of the General Code, relate to proceedings for appropriation of land by the superintendent of public works.

The statutes relating to the powers and procedure of the conservancy district also contain provisions whereby the district may acquire the land necessary for the construction of such works as are contemplated. Section 6828-15, General Code, in outlining the powers of the board of such district provides, among other things that it may acquire by donation, pur-

chase or condemnation, real and personal property required by the district and specific provisions are made for the condemnation of land required.

Neither in the laws relating to the powers of the department of public works nor of the conservancy district in matters such as are here under consideration is there any suggestion that these works might be built upon lands to which neither the state nor the conservancy district has any title. It would appear to me to be preposterous to assume that these or any other public works could be built on privately owned land. In the papers which you submit I find a copy of the instrument executed by the Reno Beach Amusement Company in favor of the conservancy district in question, whereby the company gives to the district "permission and license to enter upon and use the property hereinafter described for the purposes for which such Lake Erie District No. 1 was organized and subject to the scope and limits of such purposes". After setting forth the description of the property as to which such license is granted, the instrument proceeds:

"The permission and license herein given shall not be construed to be irrevocable but shall be subject to revocation in whole or in part at the election of and by the Reno Beach Amusement Company, its successors and assigns, and shall not be construed in derogation of or as limiting the rights in and uses of said property on the part of the Reno Beach Amusement Company, its successors and assigns and shall be subject to the rights in and uses of said property on the part of the Reno Beach Amusement Company, its successors and assigns as heretofore or hereafter acquired."

In my opinion, it would be an abuse of discretion on your part, to use the appropriation above referred to, or any part thereof, in building any structure whatsoever upon land to which the conservancy district holds no more title than that evidenced by the instrument above referred to. Under its terms, neither your department nor the conservancy district would have any right whatsoever in respect to said premises even to re-enter for the purpose of maintenance, repair or otherwise, that would not be subject to instant revocation by the owners of the property.

In my opinion, all laws relating to the construction of public buildings or other improvements with public funds contemplate that the public should have either an outright title to the land or a perpetual or irrevocable easement therein. The fact that the legislature accompanied the powers which your department and the conservancy district are to exer-

cise, with definite proceedings for the acquisition of necessary land strengthens my conviction that it was contemplated that an improvement such as the one in question, was only to be built upon land belonging to the state or the district.

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

1. Under the terms of the appropriation made by the 97th General Assembly in House Bill No. 496, and in view of the provisions of Section 412-28 General Code, the department of public works is without authority to pay for the entire cost and expense of constructing a dike for the prevention of shore erosion along the south shore of Lake Erie designed for the sole purpose of protecting privately owned property fronting on Lake Erie.

2. Under the provisions of Section 412-28, General Code, the department of public works is authorized to enter into an agreement with Lake Erie Conservancy District No. 1, for erecting or repairing a dike to prevent shore erosion along the south shore of Lake Erie of property under the jurisdiction of said conservancy district, the cost thereof to be borne two-thirds by the state and the balance by such conservancy district, and for the purpose of paying the state's share may use so much as is necessary of the appropriation made by the 97th General Assembly in House Bill No. 496.

3. Such structure may not lawfully be erected with funds of the state derived from such appropriation except upon lands as to which either the state of Ohio or the conservancy district holds title or a perpetual, irrevocable easement.

Respectfully,

HUGH S. JENKINS,
Attorney General.