

of judge of the Common Pleas Court should be designated at the present time, before the official certification and announcement of the 1930 census, but is not sworn in until after such certification and announcement, he will be entitled to the additional compensation resulting from an increased population.

Respectfully,

GILBERT BETTMAN,
Attorney General.

-2075.

LEASE—ABANDONED CANAL LANDS—AUTHORITY OF PUBLIC WORKS SUPERINTENDENT TO EXECUTE NEW LEASE WHEN MUTUAL MISTAKE EXISTED IN ORIGINAL LEASE.

SYLLABUS:

Where the Superintendent of Public Works, acting under statutory authority, executes a lease of abandoned canal lands to a lessee therein named, and after the execution and acceptance of such lease it is ascertained that by mutual mistake of the parties to the lease, the same covers canal lands theretofore sold by the State and not owned by it at the time of the execution of such lease, such lease may be cancelled by agreement of the parties, and the Superintendent of Public Works may execute a new lease covering the abandoned canal lands intended to be conveyed by such former lease.

COLUMBUS, OHIO, July 9, 1930.

HON. A. T. CONNAR, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication which reads as follows:

“On September 13, 1928, a lease for a portion of the abandoned Hocking Canal lands at Lock No. 16 on said canal, was leased to Daisy Ferrenburg, of Logan, Ohio. It was subsequently discovered that all of the State lot that lies 50 feet north of the center line produced, of Lock No. 16, that was leased to Mrs. Ferrenburg, had been deeded by the State of Ohio to J. H. Brown, September 4, 1895.

It therefore became necessary to recall the lease in order to correct the description to fit the part still retained by the State. Accordingly, Mrs. Ferrenburg surrendered her lease for cancellation, subject to the approval of a new lease by the Governor, and a new lease was recommended by my predecessor, Mr. R. T. Wisda, on the 26th day of July, 1929, and was approved by the Governor on October 11, 1929.

Mr. W. S. Stone, of Logan, Ohio, the present owner of the tract sold by the State to Brown, contends that as an abutting property owner, he had a prior right to lease this property.

There is no law that requires the Superintendent of Public Works to grant leases exclusively to the abutting property owners, but it has been customary to give the abutting property owners the first option to lease the adjacent canal property.

Mr. Stone came to the office several times making inquiry about a lease, but was advised that it would be necessary to wait until some action had been taken under Section 14152-3a of the General Code by the State Highway Director, but in the meantime, the present Ferrenburg lease was granted.

Some things have developed that make it desirable to change lessees if it can be done legally. Kindly advise me whether or not authority existed for granting a new lease in order to correct the description in a previous lease for the same property.

I am enclosing herewith a pencil sketch showing the State Lot at Lock No. 16, of Hocking Canal Locks. The lease to Ferrenburg includes a strip of ground about 40 feet wide south of the center line of the lock produced, in addition to the 50 foot strip, making the width as included in the lease 90 feet by 360 feet in length.

I am also enclosing herewith the triplicate copy of the present Ferrenburg lease, which you will please return along with your opinion."

On May 31, 1911, the Legislature passed an act providing for the abandonment of the Hocking Canal between the Junction of said canal with the Ohio Canal in the village of Carroll, Fairfield County, Ohio, and the lower end of the lower canal lot in the City of Nelsonville, Athens County, Ohio (102 O. L. 490).

Section 3 of this act, which was carried into the appendix to the General Code as Section 14152-3, General Code, provided for the sale or lease of the canal lands abandoned by said act, subject to the approval of the Governor and the Attorney General, such sale or lease to be in strict conformity with the various provisions of the statutes of Ohio relating to the sale or lease of state canal lands, with the exception that the grant of such leases should be for a term of not less than fifteen nor more than twenty-five years and that the bed and banks of said abandoned canal property might be included in any lease of such canal lands. It was under the authority of this act of the Legislature that the lease to Daisy Ferrenburg, first referred to in your communication, was executed.

On April 5, 1929, an act was passed by the 88th General Assembly (113 O. L. 521), to provide for the lease or sale of the abandoned Hocking canal lands owned by the State of Ohio in Fairfield, Hocking and Athens counties, and to repeal Sections 3, 3a, and 3b of the act of the General Assembly passed May 31, 1911, above referred to. This act went into effect on July 24, 1929. Section 1 of said act, which by designation of the Attorney General was carried into the appendix to the General Code as Section 14152-3, General Code, provides that the Superintendent of Public Works of Ohio, as Director thereof, subject to the approval of the Governor and the Attorney General, is authorized to lease or sell, as he may deem for the best interests of the state, and in conformity with the provisions of Sections 13965, 13966, 13970 and 13971 of the General Code, those portions of the abandoned Hocking canal lands in Fairfield, Hocking and Athens counties that are still owned by the State of Ohio. This section further provides that if leases are granted they shall be for a term of not less than fifteen or more than twenty-five years and the bed and banks of such abandoned canal property may be included in any lease of such canal lands. It was under the provisions of this section of the act of the 88th General Assembly, above referred to, that the second lease to Daisy Ferrenburg, referred to in your communication, was executed.

It appears from your communication that in the execution of the first lease to said Daisy Ferrenburg there was included therein by mistake certain abandoned canal lands which the state did not then own and that it was this fact which occasioned the execution of the second lease to Mrs. Ferrenburg. In your communication to me you request my opinion as to whether or not any authority existed in the Superintendent of Public Works to execute said second lease in order to correct the description in the former of the property intended to be leased to Mrs. Ferrenburg by the first lease above mentioned. Inasmuch as it is quite obvious that the mistake made by the Superintendent of Public Works, as Director of said Department, and by Mrs. Ferrenburg in the execution and delivery of said first lease, was a mutual mistake which a

court of competent jurisdiction upon proper petition therefor would correct by a decree directing the reformation of said lease so as to describe therein the canal land which the parties intended said lease to cover, I see no reason why the parties to said lease could not effect such correction by a cancellation of the old lease by mutual agreement, and by the execution, delivery and acceptance of a new lease which correctly describes the property intended to be leased.

By way of specific answer to the question presented in your communication, I am of the opinion, therefore, that under the facts stated in said communication, the Superintendent of Public Works had authority to cancel the first lease with the consent of the lessee named therein, and to execute to her the second lease referred to in said communication.

Under the provisions of Section 2 of the act of April 5, 1929, which was designated by the Attorney General as Section 14152-3a, General Code, there is excepted and reserved from the provisions of said act any portion of abandoned Hocking canal lands that were then occupied by state highways or that might be designated by the Director of Highways as necessary in any scheme of highway improvement adjacent to said abandoned canal lands within one year from the effective date of said act. Mrs. Ferrenburg took said lease and the abandoned Hocking canal lands thereby demised subject to the provisions of Section 2 of said act, and she now holds said canal lands under her lease subject to such rights as the Director of Highways may now have to designate and use any part of said canal lands for highway purposes.

Respectfully,

GILBERT BETTMAN,
Attorney General.

2076.

APPROVAL, CONTRACT BETWEEN STATE OF OHIO AND GILCHRIST CONSTRUCTION COMPANY, OF CLEVELAND, OHIO, FOR CONSTRUCTION AND COMPLETION OF CONTRACT FOR WORK ON CLEVELAND STATE HOSPITAL AT AN EXPENDITURE OF \$105,040.00. —SURETY BOND EXECUTED BY AETNA CASUALTY AND INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

COLUMBUS, OHIO, July 9, 1930.

HON. ALBERT T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Public Works for the Department of Public Welfare, and The Gilchrist Construction Company, of Cleveland, Ohio. This contract covers the construction and completion of contract for combined bid on general work and mechanical trades in a building known as Cottage No. 4, Hawthornden Farm, Cleveland State Hospital, Cleveland, Ohio, as set forth in Item No. 6; Item No. 7, Alternate C-1; Item No. 13, Alternate C-5; Item No. 16, Alternate C-7; Item No. 17, Alternate P-1; Item No. 19, Alternate P-3; Item No. 20, Alternate H-1; and Item No. 21, Alternate E-1 of the Form of Proposal dated June 3, 1930. Said contract calls for an expenditure of one hundred and five thousand and forty dollars (\$105,040.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also furnished evidence to the effect that the consent of the Controlling Board to the expenditure has been obtained, as required by Section 11 of House Bill No. 510 of the 88th General Assembly. In addition you have