

4134.

APPROVAL, DEED TO LAND IN LAWRENCE COUNTY, OHIO—EVERETT ROSE—MARY ROSE—SAMUEL ROSE AND LEOTA ROSE.

COLUMBUS, OHIO, March 5, 1932.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter requesting my opinion as to the validity of a deed executed by Samuel Rose and Leota Rose, his wife, and Everett Rose and Mary Rose, his wife, purporting to convey a tract of 1.28 acres of land in Lawrence County to the state of Ohio as a site for a fire tower. Although said deed is not without some minor irregularities, I am of the opinion that they are not so substantial as to affect its validity and I therefore accord my approval to said instrument.

You have also submitted for my examination an instrument by which The Virginian Joint Stock Land Bank of Charleston, West Virginia, as mortgagee, purports to release and discharge said 1.28 acre tract of land from the operation of a mortgage which is held thereon. I am of the opinion that this instrument constitutes a valid release.

No abstract of title has been submitted to me and I have not therefore undertaken in this opinion to pass upon the status of the title of said tract of land.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4135.

CONSERVATION COMMISSIONER—UNAUTHORIZED TO CANCEL CERTAIN GAME REFUGE LEASES.

SYLLABUS:

Discussion of right of conservation commissioner to cancel certain game refuge leases.

COLUMBUS, OHIO, March 7, 1932.

HON. WILLIAM H. REINHART, *Conservation Commissioner, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is hereby made of the following inquiry:

“Game refuge leases under Section 1435 in the past have been made for a stated number of years, some of them as long as ten years.

Due to constant changes in condition of such leased lands, it becomes unsatisfactory for the purposes for which leased. Therefore, the question arises: Can such leases be terminated by the Conservation Commissioner when such lands are no longer suitable either in part or in whole?

Can part of such leased land be kept and other parcels no longer suitable be cancelled?”

For the purposes of your inquiry, there has been submitted for consideration, the blank forms of two documents, one a State Game Refuge Lease and the other a State Game Refuge Order. I take it that the leases about which you inquire were made by the use of blank forms similar to the one you have presented.

The State Game Refuge Lease states generally that this agreement of lease, made between a particular person, designated the lessor, and the state of Ohio, acting through the conservation council, designated as lessee, witnesses that the lessor, in consideration of a stipulated sum and in consideration of rents, covenants and other agreements contained in the lease, does lease unto the lessee, for the sole purpose of a State Game Refuge, for a stipulated period of years, certain described premises. Said blank form of lease contains verbatim the following provisions:

"Said lessee also agrees to establish and maintain, during the period covered by this lease, a State Game Refuge, as hereinafter described.

It is the desire and intent of the parties hereto that the State of Ohio, through the Conservation Council, establish and maintain on the premises herein leased a game and bird refuge, in accordance with the authority conferred by sections 1435, 1438-1 and other pertinent sections of the General Code of Ohio. To this end, it is understood and agreed between the lessor and lessee:

(a) That the Conservation Council, or any person by it authorized, may at any time enter upon said premises for the purpose above stated, and may erect and maintain thereon suitable fences, sign posts, buildings, structures or any device which said Conservation Council deems necessary or proper to effect the purpose of a game and bird refuge, all of which fences, sign posts, buildings, structures and devices are to remain the property of the lessee and shall be removable from said premises at the pleasure of said lessee at any time, either during or after the period of this lease.

(b) That said Conservation Council, or any person by it authorized, may at any time and for the period of this lease, prohibit or recall the taking by any and all persons, including the lessor, of all birds and wild animals upon the premises herein described.

Said lessor also agrees to cooperate with the State in preventing unauthorized persons from being on said premises.

(c) That the lessee will not cut any timber on said premises without the written consent of the lessor; that the lessee will not permit or suffer any waste thereon; that the lessee will not assign this lease or underlet the premises without the written consent of the lessor; and that the lessee will deliver up and surrender to the lessor or to his heirs, executors, administrators or assigns, the possession of the premises hereby leased at the expiration of the term aforesaid, in as good condition as the same shall be at the date of this lease, natural wear and decay and the destruction or damage by the elements, fire or electricity or by any act of God or unavoidable casualty, excepted."

The blank State Game Refuge Order document submitted states that it is an order of the conservation council of Ohio setting aside, by and with the consent of the owner thereof, certain private lands for the purpose of a State Game Refuge; that under authority of section 1435 of the General Code of Ohio, 113

O. L. 580, the conservation council of the state of Ohio sets aside certain described private lands for the purpose of a state game and bird refuge for a stipulated period of years and that the taking of all game and non-game birds and of all wild animals in or upon said lands is prohibited. In executing a State Game Refuge Order, it is the practice of the Conservation Council to identify the land upon which that order is to operate by referring to it as the land described in a particular State Game Refuge Lease.

The sections of the General Code requiring consideration are as follows:
Section 1435.

“The conservation council may for a specified period of years prohibit or recall the taking of birds, fish and wild animals, upon public lands or water set aside, with the consent and approval of the governor, or upon private lands set aside with the consent of the owner thereof for game refuges. At least thirty days before such prohibition, rule or regulation shall take effect, a copy of the same shall be filed with the auditor of each county in which any of the lands affected is situated. Such game refuges shall be surrounded by at least one wire at the boundary thereof, and notices reading ‘State Game Refuge; Hunting Is Unlawful,’ shall be posted at conspicuous places on said boundary.”
Section 1435-1.

“The conservation council shall be empowered to acquire by gift, lease or purchase suitable lands or surface rights upon suitable lands, for the purpose of establishing thereon public hunting grounds and reforestation and shall be empowered to set aside any portion of said public hunting grounds as a state game refuge. In accordance with the laws of Ohio, it may make such regulations for the taking of birds, fish or game upon either a public hunting territory or upon a state game refuge established on or within said public hunting grounds as it may deem advisable. At least ten days before such regulations shall take effect a copy of the same shall be filed with the auditor of each county in which any of the land affected by such regulations is situated. It may also acquire by gift, lease or purchase suitable land for the purpose of establishing state fish hatcheries and may erect thereon such buildings or structures as it shall deem necessary.

The title or lease to any and all such lands shall be taken by the division of conservation in the name of the state of Ohio, and when so acquired the entire supervision of such lands shall be under the division of conservation. The lease or purchase price of any and all such lands may be paid for from hunters’ and trappers’ license funds.”
Section 1438-1.

“The conservation council shall have authority and control in all matters pertaining to the protection, preservation and propagation of song and insectivorous and game birds, wild animals and fish, except authority to change laws in the General Code covering commercial fishing in the Lake Erie fishing district, and in such other waters wherein fishing with nets is licensed by law, within the state and in and upon the waters thereof. It shall enforce by proper legal action or proceeding the laws of the state for the protection, preservation and propagation of such birds, animals and havens for the propagation of fish and game, and,

so far as funds are provided therefor, shall adopt and carry into effect such measures as it deems necessary in the performance of its duties.

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It is the duty of the conservation council to plan, develop, formulate and institute programs and policies of the division of conservation and to establish such bureaus within the division as are approved by the governor.

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The conservation council may make and establish such rules and regulations not inconsistent with law governing its organization and procedure and administration of the division of conservation as it may deem necessary or expedient."

It is an established principle that public officers have only such powers as are expressly conferred upon them by law and such as are necessarily implied in order to give effect to such express powers. I find in the State Game Refuge Lease blank submitted no provision reserving the right to cancel such lease. Neither do I find in any of the provisions of the statutes any express or implied power to cancel State Game Refuge Leases when no such power was reserved in the lease. Assuming, therefore, the validity of the particular State Game Refuge Leases about which you make inquiry, I am of the opinion that there is no authority to cancel them.

Respectfully,

GILBERT BETTMAN,

Attorney General.

4136.

DIRECTOR OF HIGHWAYS—UNAUTHORIZED TO APPROPRIATE LAND
TO PROVIDE ENTRANCE TO MAINTENANCE GARAGE.

SYLLABUS:

The director of highways has no power to appropriate land for the purpose of providing an entrance to the street from a building purchased by the department of highways for a maintenance garage.

COLUMBUS, OHIO, March 7, 1932.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication which reads as follows:

"In 1929, the Department of Highways purchased a property for maintenance garage purposes in Norwalk, Ohio. Now it develops that additional land is required for entrance to the property from the streets.

The point on which we desire your opinion is:

'Does the Director of Highways have power to condemn land for this purpose?'

The land in question is in the City of Norwalk and not adjoining a State highway."