JANUARY 3, 1951.

HON. CHARLES R. ERDMAN, *Commissioner,*
Dept. of Conservation and Economic Development,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 1.

DEAR COMMISSIONER:

Your letter concerning application for permit to dredge a lagoon and approach channel to deep water of Barnegat Bay, of Francis E. Fanning, is at hand.

You first inquire whether the board has the right to require this applicant or any future owner of said lagoon to make application to the State for a permit for any dredging or construction work contemplated within the lagoon and whether the State has the right to establish an exterior line for piers within the lagoon. Then you inquire whether the lagoon as described inshore of the mean high-water line is strictly private property.

Under R. S. 12:3-21 no person shall dredge or remove any deposit of sand from lands of the State lying under water without a license first obtained as provided in R. S. 12:3-22. At the end of this section there is a proviso that nothing in the section contained shall prevent the owner of any grant or lease from digging, removing or taking sand within the lines of or in front of such grant for the purpose of improving lands granted or leased to them, nor prevent such owner from digging or dredging a channel to the main channels and removing and taking the material therefrom.

My answer to this question is that if the applicant digs, dredges or removes any material from the land of the State lying under tidal water, he must have a permit from your board before commencing said work. But if he digs a lagoon on his property inshore of the mean high-water line that is strictly private property and requires no permit.

You next inquire—In a case where a small tidal stream tributary of some bay or river, for which an applicant has acquired the riparian rights, covering the bed of same, and by widening or deepening said stream so as to form a boat basin within the applicant's upland, has the State, acting through Title 12:5-3 jurisdiction over such a basin?

My answer to that question is yes.

Under R. S. 12:5-3 all plans for the development of any water front upon any navigable water or stream of this State or bounding thereon, which is contemplated by any person or municipality, in the nature of individual improvement or development or as a part of a general plan which involves the construction or alteration of a dock, wharf, pier, bulkhead, etc., shall be first submitted to your board and no such development or improvement shall be commenced or executed without the approval of your board first had and received.

The map submitted to me upon which this inquiry is established shows a river or bay in front of applicant's property and there was an original stream from the river or bay running through the property, which was widened and improved, which gives your board jurisdiction because the land on each side of the stream itself was originally riparian land. Under previous decisions, the State owns the bed of a stream where it is flowed by tide. *McCarter* vs. *Hudson Co. Water Company*, 70 N. J. L. 720.

In your third inquiry you ask—Where an applicant acquires riparian rights along a portion of water front, then dredges through the mean high-water line into applicant's property so as to form a public or private boat basin, has the State, acting through Title 12:5–3 jurisdiction over that portion of the basin located on applicant's upland as set forth in sketch "B."

Sketch "B" shows the river or bay in front of applicant's land and dredged basin is on the private property of the applicant and is not a navigable stream. So that my answer to the third inquiry is no.

The public has no right to use a stream which is not navigable in its natural condition; and, in case the riparian owner makes it navigable for his own purpose, he may exclude the public from the use of it in its improved condition. This is cited in Farnham on "Waters and Water Rights," p. 1491.

The mere fact that the applicant permitted the public to enjoy the increased facilities does not deprive him of any of his rights when he chooses to exercise them. Farnham on "Waters &c." p. 1496.

Our earliest courts from the grant of King James down have ruled that every navigable river so high as the sea flows the bed of the stream belongs to the State to high-water mark, but in every waterway not navigable the owners have an interest of common right, which is not a public right. Farnham on "Waters &c." p. 238.

The fact that a grantee has improved the waterway of the stream which was made navigable by public improvements does not disturb the rights of the adjoining owners. Farnham on "Waters &c." p. 240.

All of the courts agree that the title to streams which are not navigable is in the upland owner and public policy requires the titles of the beds of such streams to be in private owners and the fact that the stream is navigable or being made navigable does not affect the rule stated above. Farnham on "Waters &c." p. 262-3. Woolrych, Waters, p. 147 with numerous cases throughout the United States cited thereunder.

The right of using the water of a private pond is generally regarded as a property right of which a riparian owner cannot be deprived for the private use of another without receiving compensation. Farnham on "Waters &c." p. 282; citing thereunder *Keyport* vs. *Farmers Trans. Co.* 18 N. J. Eq. 12; aff. 18 N. J. Eq. 511.

Therefore the statutory provisions, in order to improve navigation, do not authorize the improvement of non-navigable streams nor do they contemplate the creation of a navigable stream out of a non-navigable stream and mere private improvements which make a non-navigable stream navigable do not increase the rights of the public therein. Farnham on "Waters &c." p. 366, citing Hale, chap. 3, and *DeCamp* vs. *Thompson,* 44 N. Y. 1014.

So that the State has no jurisdiction over that portion of the basin located on applicant's upland as it is private property.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By : ROBERT PEACOCK,
Deputy Attorney General.

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