

August 10, 1951.

HON. RANSFORD J. ABBOTT,
State Highway Commissioner,
Parkway Avenue, Fernwood,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 25.

MY DEAR COMMISSIONER ABBOTT:

Your memorandum to Attorney General Parsons of May 24, 1951, requesting a formal opinion on the matter of drainage rights at locations described in Mr. Alex. W. Muir's memorandum to me of March 19, 1951, was referred by the Attorney General to me for such opinion.

Around the time of that reference, and on the evening of July 9, 1951, Mr. Muir, Mr. William A. Pfister, drainage engineer of the State Highway Department, and I met with members of the Planning Commission of Burlington Township, property owners and others involved at the Stevens School on Route 25, visited the locus in quo and held a general discussion of the matter.

This opinion is based upon information furnished me, supplemented by my observation referred to above.

I understand the history of the matter to be as follows: The section of highway involved is in Burlington Township, Burlington County, and was originally constructed as State Highway Route No. 2, Burlington-Roebing section. Subsequently this highway was renumbered Route 25. The station references given hereafter are in accordance with map entitled "New Jersey State Highway Department Plan, Profile of Route 25 (1927) Section 24, Burlington to Crystal Lake." Prior to the deed hereafter mentioned there were existing cross drains at stations 873/60 and 881/16.

On July 15th, 1936 Henry J. Bosshard, the then owner of land adjoining the highway on the north side between stations 871 and 882, executed a deed to the State of New Jersey for certain parts or parcels of his said land described therein, including land adjoining and on each side of the two cross drains referred to, by which acquisition, with others, Route 25 was widened. The deed was recorded in the Clerk's Office of Burlington County on July 17, 1936, in Book 558 of Deeds, page 53. This deed also conveyed, among other things, the following:

"And also such drainage rights, if any, as may be necessary or desirable adequately to drain and protect the aforesaid State Highway as constructed the full ultimate width thereof;"

In the year 1936, in connection with the widening of the said highway, the cross drain at station 873/60 was replaced by one at station 876/20 for the full width of said highway, and the one at station 881/16 was reconstructed at its exact former location to conform to the widening of the highway. The original drains, I am informed, had existed since about 1919.

The mere lengthening of the pipes under the highway as widened for these cross drains does not appear to have caused any more water to flow through them than before.

Thereafter part of the remaining property of the said Bosshart was improved by the then owner by the erection of houses and the construction of some sidewalk and curbing. Water now ponds in certain places on this remaining property and particularly at the foot of the embankment of the Pennsylvania Railroad which runs about parallel with the highway but some distance to the north, about the existence of which water the owners of the said houses complain and because of which they claim damage to their properties.

It would appear from observation of the ground that none of the water complained of comes from the cross drain at station 881/16, and that it would be practically impossible to determine exactly how much of it comes through the cross drain at station 876/20 as compared with that which comes off the highway itself or from the portion of the remaining land between the highway and the houses. While this does not affect the basis of this opinion, it should be noted in passing.

I have been further informed that the cross drains referred to were and are necessary and desirable to the adequate drainage and protection of the said highway and are no more than what is reasonably necessary and desirable for those purposes.

Under these circumstances it is my opinion that any one who purchased or acquired rights in said remaining property of the said Bosshart subsequent to said deed had (a) notice by record subsequent to the recording thereof of the rights of the State thereunder, and (b) actual notice, sufficient to put him upon inquiry, of the drainage rights of the State, or its claim thereto, by said deed, prescription or otherwise, by the open and visible existence and use of the said two cross drains, and hence purchased or acquired his rights in said remaining property subject to the rights of the State granted by said deed or otherwise acquired in, to or over said remaining property.

It is further my opinion that under the broad definition of "drain" under many authorities, the conditions existing at the time the deed referred to was given, as well as prior and subsequent thereto, the fact that the closing of an existing cross drain at one location and opening one at the other imposed no burden upon the remaining land aforesaid additional to that it had borne since 1919, and particularly the wording of the quoted clause of the deed, which includes not only the right to drain the highway itself, but also "drainage rights" "necessary and desirable" "adequately" to "protect" the said highway, the State of New Jersey has a right to maintain the two cross drains aforesaid as heretofore so far as the said remaining land of said Bosshart is concerned against the said Bosshart and against any and all purchasers thereof or claimants to rights therein from him, as set forth in the preceding paragraph.

And it is further my opinion that the said State, or the State Highway Commissioner or State Highway Department thereof, has in no way wrongfully or unlawfully caused the water conditions complained of, or any part thereof, as set forth above, and that neither it, nor its commissioner or department aforesaid, is liable for the damage complained of which may be caused thereby.

Very truly yours,

FRANK A. MATHEWS, JR.,
Deputy Attorney General.