

DECEMBER 29, 1953.

HONORABLE CHARLES R. ERDMAN, JR.,
Commissioner, Department of Conservation and Economic Development,
520 East State Street,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 56.

DEAR COMMISSIONER:

You have requested our opinion as to who has the prior right to a riparian grant under the following circumstances. A developer has filed a map of certain property fronting upon tidal waters, showing a dedicated street 100 feet in width running along and parallel to the shore line. The mean high-water line is located, both on the filed map and at the present time, approximately in the middle of the 100 foot right of way for its full length along the waterfront of the property in question. The land on the in-shore side of the street is subdivided into lots. Several of the lot owners, and the municipality to which the street was dedicated, have both applied for a grant of the riparian lands in front of said lots.

Thus the question has arisen as to whether the municipality or the owner of a lot which abuts the in-shore side of the street has the prior right to acquire the land under water lying seaward of the 100-foot right of way and within the lot lines as extended. We are assuming here that the dedicator did not reserve to himself, as against the lot owners, the fee title to the bed of the street, but that said title passed by the deeds from the dedicator to the lot owners. Whether this is so in any particular case will depend upon all the relevant facts there presented. See *Ocean City Hotel Co. vs. Sooy*, 77 N. J. L. 527, 531.

On the foregoing set of facts, it is my opinion that the prior right belongs to the lot owner, and that the city has no right to acquire the riparian lands in question without the former's consent.

The dedication of a piece of property as a street gives to the public merely an easement, that is, the right of passage, and the owner of the fee still has all the rights of ownership which are not inconsistent with the public right of passage. *Laurel Garden Corp. vs. N. J. Bell Telephone Co.*, 109 N. J. L. 171; *823 Broad Street vs. Marcus*, 17 N. J. Misc. 25. Since one of the property rights of an abutting owner is the right to a grant of the riparian lands adjoining his upland, he retains such riparian rights regardless of the dedication of the right of way to the municipality.

This conclusion not only rests upon the foregoing common law principles, but also appears necessitated by the express provisions of R. S. 12:3-18 (P. L. 1877, c. 77, page 113), which reads as follows:

"12:3-18. *Right of way separating riparian owner's lands from tidewater; effect on leases and grants.*

When lands have been or shall be taken or granted for a right of way and such right of way has been or shall be so located on land of a riparian owner as to occupy the same along or on the shore line, thereby separating the upland of the riparian owner adjoining that used for the right of way from tidewater, such owner of the land so subject to such right of way shall be held to be a riparian owner for the purpose of receiving any grant or lease heretofore or hereafter made of the lands of the State under water, or for the purpose of receiving any notice under sections 12:3-2 to 13:3-17 of this Title; provided, that nothing in this section shall affect the rights of the State to the lands lying under water."

The dedication by a developer seems plainly to be a grant within the meaning of the foregoing section. See *Trustees of M. E. Church vs. Council of Hoboken*, 33 N. J. L. 13, 18-19; *George Van Tassel's, Inc. vs. Town of Bloomfield*, 8 N. J. Super. 524, 528, 529. Our opinion need not rest upon the statute, however, because it was enacted merely to codify what was already a general principle of the common law, that the acquisition of a mere easement over the lands of a riparian owner did not deprive him of any rights in his property except as was necessary to the full and free enjoyment of the easement. *N. J. Zinc & Iron Co. vs. Morris Canal & Banking Co.*, 44 N. J. Eq. 398, affirmed on opinion below, 47 N. J. Eq. 598.

There remains to be considered the effect of R. S. 12:3-33 and 12:3-34, which respectively provide:

"12:3-33. *Grant of riparian lands for public park, place, street or highway.*

Whenever a public park, place, street or highway has been or shall hereafter be laid out or provided for, either by or on behalf of the state or any municipal or other subdivision thereof, along, over, including or fronting upon any of the lands of the State now or formerly under tidewater, or whenever a public park, place, street or highway shall extend to such lands, the board of commerce and navigation, upon application of the proper authority of the State, or the municipal or other subdivision thereof, may grant to such proper authority the lands of the State now or formerly under tidewater, within the limits of or in front of said public park, place, street or highway."

"12:3-34. *Conditions in grant.*

The grant shall contain a provision that any land so granted shall be maintained as a public park, place, street or highway, or dock for public use, resort and recreation, and that no structures shall be erected on the land so granted inconsistent with such public use."

These sections should be construed in the light of R. S. 12:3-18, above quoted, and of the general policy enunciated in the *N. J. Zinc* case, *supra*, where the court said (44 N. J. Eq. at page 407):

"Public sentiment, from the earliest times to this day, and the whole course of legislative action in this State, have recognized a natural equity, so to speak, in the riparian owner to preserve and improve the connection of his property with the navigable water, and the consequence is, that a strong presumption arises against an implication of an intention on the part of the Legislature to violate such equity. In my opinion, such a design should not be deduced from the words of any statute, either general or special, except when it contains language not susceptible of any other rational interpretation."

In view of the foregoing considerations, it is my opinion that R. S. 12:3-33 and 12:3-34 give to the municipality the right to a grant, for street purposes only, of all lands under tidewater within the limits of the street as laid out to a width of 100 feet. However, the municipality is not otherwise an upland owner, and therefore it has no further right to acquire the riparian lands lying in front of the street. Such a right, in my opinion, is granted by R. S. 12:3-33 to the municipality only where the high-water line marks the terminus of the street. In such a case, it is reasonable that the municipality should have the right to acquire the lands necessary for the construction of a bulkhead or wharf at the terminus. On the other hand,

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where the street runs parallel to the shore line, there appears no good reason why R. S. 12:3-33 should be construed to authorize a grant to the municipality of riparian lands in front of the street, in derogation of the common law principles above outlined.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THOMAS P. COOK,
Deputy Attorney General.

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