

Too, the duty to pay for work or goods may be conditioned on the promisor's satisfaction as contracts requiring the work to be satisfactory to the employer are valid. *Williams v. Hirshorn*, 91 N.J.L. 419 (Sup. Ct. 1918); *Gwynne v. Hitchner & Yerkes*, 66 N.J.L. 97 (Sup. Ct. 1901); *Restatement, Contracts* §265.

Accordingly, the Division of Purchase and Property may validly provide in contracts that payment shall be conditional on the acceptance or approval of the work or materials by an agency or department which did not execute the contract on behalf of the State. As a matter of policy, there may be merit in conferring upon the using department which is versed in the field, the authority to accept the performance.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: HAROLD ASHBY
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SEPTEMBER 28, 1956

HON. JOSEPH E. McLEAN, *Commissioner*
Department of Conservation and Economic Development
State House Annex
Trenton, New Jersey

MEMORANDUM OPINION—P-30

DEAR COMMISSIONER McLEAN:

You have asked our opinion concerning the enforceability of a clause which is proposed to be inserted in deeds for the grant of riparian lands by the State. The clause reads:

"This grant is made with the understanding that the lands herein described and conveyed shall not be used for the purpose of ingress to or egress from a lagoon or bayou lying inshore of the aforesaid granted lands other than such lagoons or bayous as are shown on the map attached hereto and made part hereof until such permission is authorized, and upon payment of such additional compensation and upon such other terms as shall be fixed by said Department of Conservation and Economic Development, Division of Planning and Development, or its successors in function."

You inform us that additional compensation is charged to the upland owner for a grant of riparian lands if his application discloses a proposed lagoon or bayou construction inshore from the mean high water line. Instead of \$5.00 per front foot, for example, a lump sum consideration in excess of that amount (usually at the rate of one-tenth of the front foot consideration for each foot of lagoon frontage) is fixed by the Council as the purchase price of the grant, within its discretion to determine the compensation for riparian deeds pursuant to R.S. 12:3-10.

The lagoon clause is intended to guarantee additional compensation to the State at the same rate, in the event that the State's grantee or his assignee seeks a permit to dredge in order to admit tidal waters to his upland at any time subsequent to the

grant. In legal effect, this is a covenant that the grantee will not construct a lagoon on his upland without the payment of additional compensation upon application for a permit to dredge. In practical terms, a permit to dredge will be requisite in all cases because the flow of tidal waters into the lagoon is accomplished through dredging both below and above the mean high water line.

Grants of riparian lands by the State are authorized in Chapter 3 of Title 12 of the Revised Statutes. R.S. 12:3-12 specifically sets forth that the State may require in its interests covenants, clauses and conditions in such grants. The lagoon clause as a covenant is enforceable against the grantee, his heirs and assignees.

The only foreseeable challenge against the lagoon clause is that it violates the constitutional rights of the grantee under the equal protection clause of the fourteenth amendment to the Federal Constitution and of Article I, Paragraph 1 of the New Jersey Constitution. This opinion therefore deals with the enforceability of the clause upon such challenge.

Riparian grants are voluntarily entered into by the State and private persons as grantees. The owner of upland under the conclusive authorities in this State has no right to compel a grant of the adjoining lands under tidewaters by writ of mandamus or other legal process. *Leonard v. State Highway Dept.*, 24 N.J. Super. 376, 384 (Ch. Div. 1953).

The legal issue of the enforceability of the lagoon clause would arise therefore only in a proceeding to compel the issuance of a permit to dredge to open up a lagoon or bayou without the payment of additional compensation. The upland owners' argument depending upon the equal protection clause would be that the State penalized the landowner arbitrarily in denying a permit without the payment of additional compensation.

Under the facts supplied to us, there is, contrary to the above assertion, a reasonable basis for the covenant to pay additional compensation upon the construction of a lagoon. The Bureau of Navigation has received for filing in the past year maps showing an extension of 60 miles of waterfront through new lagoon construction. By the statute regulating power vessels on tidal waters (L. 1952, c. 157, N.J.S.A. 12:7-44) the State is compelled to supervise and police the additional miles of waterfront in lagoons and bayous. The employment of new personnel, including harbor masters, in the Department of Conservation and Economic Development, as well as the construction of further navigation aids, should necessarily result.

We are of the opinion, therefore, that the courts would enforce the lagoon clause which you have referred to us on the ground that the State may impose a supplemental charge upon property owners who add to the policing cost and burden of the State by opening up new tidal waters. The insertion of the lagoon clause in riparian deeds is a reasonable exercise of the discretion vested by the Legislature in the Council of the Division of Planning and Development and in the Commissioner of the Department of Conservation and Economic Development to issue deeds for riparian lands.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

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