We therefore conclude that by Laws of 1888, c. 108 and by R.S. 50:1–24 the Legislature intended to reconcile the major policies and thus foreclosed riparian grants of lands housing natural oyster beds for purposes other than to facilitate the applicant or those entering upon the tidelands by virtue of his grant to reach navigable waters. Our conclusion is reinforced by the fact that wharfs, bulkheads and piers are in fact constructed to provide for the docking of vessels. Further "wharves" and "piers" were expressly authorized under the first and second sections of the Wharf Act. Hence, ordinarily a riparian grant of lands housing natural oyster beds should not be made to persons other than abutting owners. In this regard it should be noted that the Legislature by Laws of 1916, c. 98, R.S. 12:3–33 et seq., provided that whenever any municipal corporation or other subdivision of the State desires to place a public park, place, street or highway on any tidelands of the State, it can do so upon the securing of a riparian grant notwithstanding the fact that it is not an abutting upland owner. *Leonard* v. *State Highway Dept.*, 29 N.J. Super. 188 (App. Div. 1954). Grants so issued ordinarily are not made to aid any person to reach water navigable in fact and thus are forbidden if the granted lands house natural oyster beds. Finally, riparian grants to abutting owners may not be made for lands housing natural oyster beds except to facilitate the applicant's efforts to reach navigable water from his upland.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: MORTON I. GREENBERG
Deputy Attorney General

JULY 26, 1960

HONORABLE SALVATORE A. BONTEMPO
Commissioner of Conservation and Economic Development
205 West State Street
Trenton, New Jersey

FORMAL OPINION 1960—No. 18

DEAR COMMISSIONER BONTEMPO:

You ask whether R.S. 12:3–33 et seq. authorizes the issuance of a riparian grant to a school district for a site of a school building and whether that section permits a grant to be made to a municipality for an athletic field, particularly when the municipality will charge admission for entrance to its athletic programs. In addition, you inquire whether any riparian grant may be made to a municipality for a consideration less than the fair market value of the property conveyed.

We deal first with the power of the State to make riparian grants for the specified purposes. Ordinarily, riparian grants may be made only to the owner of the upland abutting the riparian lands. R.S. 12:3–9; R.S. 12:3–23. An upland owner may use his granted premises for any lawful purpose consistent with applicable zoning ordinances upon the securing of a permit for the purpose from the Department of

Conservation and Economic Development. R.S. 12:5-3. But R.S. 12:3-33 to 36 permits the conveyance of riparian lands to public bodies even though they do not own the abutting upland. The aim of these sections is the limited one of providing a supplemental basis to the general authority to make grants otherwise contained in Chapter 3 of Title 12 of the Revised Statutes. Without regard for R.S. 12:3-33, Chapter 3 of Title 12 of the Revised Statutes allows a public body in common with other owners to secure a riparian grant if it owns the abutting upland, or if it has served six months' notice of the application with the abutting owner who neglects to apply within the six months for the grant. In addition, your Department properly permits an abutting upland owner to waive his pre-emptive right, thereby authorizing a riparian grant to be made to some other person without six months' notice.

Though a principal purpose of a riparian grant is to permit an upland owner to reach navigable water, there is no doubt but that a riparian grant may be issued to a municipality under the sections other than R.S. 12:3-33 to 36 for school or athletic field sites. Laws of 1889, c. 199 is the earliest discovered statute permitting public bodies to secure riparian grants without regard for abutting ownership. That act authorized municipalities owning easements for public squares or parks fronting on the riparian lands to receive grants of the adjacent riparian lands if a written assent to the grant were secured from the person owning the fee interest in the uplands. See also Laws of 1901, c. 28. By Laws of 1903, c. 202 the Legislature went further than it had in Laws of 1889, c. 199 in that it authorized a municipality owning an easement for a park to receive a grant without the consent of the upland owner, and it provided that when streets or highways extend to the riparian lands, the municipality may secure a grant of the abutting riparian lands without consent of the owner of the fee in the upland. By Laws of 1914, c. 228, another step was taken toward limitation of pre-emptive rights of upland owners when it was provided that a riparian grant could be made to a municipality for use as a highway or street when the proposed right of way ran along the riparian lands. Finally, two years later, Laws of 1916, c. 98, the source for R.S. 12:3-33 to 36, was enacted. R.S. 12:3-33 and 34 in substantially the language of Laws of 1916, c. 98 provide as follows:

> "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." (R.S. 12:3-33.) (Emphasis added.)
>
> "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 lands so granted inconsistent with such public use." (R.S. 12:3-34.)

This statute, applicable to all public bodies, went still further in abrogating the pre-emptive right of the upland owner; the categories of parks, streets and highways were expanded by the addition of "place." The Legislature broadened the prior statutes to permit grants to municipalities and other public bodies that would have

not been previously allowed unless the applicant owned the upland or gave six months' notice of his application to the upland owner. Any other construction would render superfluous the inclusion of the word "place." Accordingly the rule of *ejusdem generis* does not apply to R.S. 12:3–33.

The meaning of "public place" may change depending upon the context of its use. Within R.S. 12:3–33, a "public place" includes a school or place which the general public may frequent and enjoy. This result is reached for two reasons. First, the line of statutes above cited demonstrates a consistent legislative purpose to make the riparian lands available for entry to ever widening sections of the public. Second, R.S. 12:3–34 requires that a grant under R.S. 12:3–33 carry a proviso that the lands be held "for public use, resort and recreation." Therefore, a school may be constructed on lands granted pursuant to R.S. 12:3–33. *City of Passaic* v. *State of New Jersey*, 33 N.J. Super. 37 (App. Div. 1954), *affirming*, 30 N.J. Super. 32 (L. Div. 1954) is not to the contrary. There the Court held that a restrictive grant given under authority of Laws of 1914, c. 228 could not be used for a housing development. Inasmuch as the case concerns a grant under a more restrictive statute than the statute now in force, it is not controlling. It might be noted that Laws of 1916, c. 66, approved one day before Laws of 1916, c. 98, declared that within the section of the school law dealing with the posting of notices for school elections a schoolhouse is a public place. While, of course, the two statutes dealt with different subjects, nonetheless Chapter 66 evidences a legislative recognition that for at least some purpose a school is a public place.

The question raised by the construction of an athletic field is not troublesome for such a facility qualifies as a park and public place for public use, resort or recreation within R.S. 12:3–33. *Cf. Hill* v. *Collingswood*, 9 N.J. 369 (1952); *Aquamsi Land Co.* v. *City of Cape Girardeau*, 346 Mo. 524, 142 S.W. 2d 332 (Sup. Ct. 1940). Charging admission fees to an athletic program on the granted lands does not destroy the character of the use. *Baird* v. *Board of Recreation of Commissioners of South Orange*, 110 N.J. Eq. 603 (E. & A. 1932).

Your final question is whether a riparian instrument may be given a municipality or State agency for a price less than its fair market value under R.S. 12:3–33 et seq. or under any other statute. Article VIII, § 4, par. 2 of the Constitution of 1947 provides in language substantially similar to Article IV, § 7, par. 6 of the Constitution of 1844 that the fund for the support of the free public schools shall be forever inviolate. By Laws of 1894, c. 71, and Laws of 1903, c. 1, § 168, codified as R.S. 18:10–5, the riparian lands were placed in the fund, *In re Camden*, 1 N.J. Misc. 623 (Sup. Ct. 1923), or at least made a source of it, *River Development Corp.* v. *Liberty Corp.*, 51 N.J. Super. 447, 475 (App. Div. 1958), *aff'd per curiam*, 29 N.J. 239 (1959). Under either construction the lands are irrevocably devoted to aggrandizement of the fund. Therefore, it has long been held that a grant of riparian lands even to a municipality or other public body for a governmental purpose for other than a full consideration is void. *Henderson* v. *Atlantic City*, 64 N.J. Eq. 583 (Ch. 1903); see *In re Camden, supra.* Insofar as it is inconsistent herewith *Formal Opinion* No. 39, 1953, holding to the contrary, is overruled. Although not controlling, the analogous trend in our law requires the State to pay a full consideration when taking municipally owned lands held in trust for a public purpose. *State* v. *Cooper*, 24 N.J. 261 (1957), *cert. denied*, 355 U.S. 829 (1955).

As indicated in *Henderson* v. *Atlantic City, supra,* the devotion of the riparian lands to the school fund did not deprive the appropriate State officers of "discretion

when and how to transmute this property into money and to make all reasonable regulations for the use of the property until it was sold. It could probably grant a perpetual right to lay out its streets or highways through it, regarding the presence of such streets as likely to enhance the value of this property. So, too, perhaps, a privilege could be granted to a municipality to use it as a park until such times as the State thought it to the benefit of the school fund to transmute the land into money by sale or lease." 64 N.J. Eq. at 587. Apparently mindful of the above language the Legislature in the Laws of 1916, c. 98 provided as follows:

> "If said board, commission, officers, body or authority shall be unable or unwilling for any reason to pay the price fixed for such lands now or formerly under tidewater by the said Board of Commerce and Navigation, the said board is authorized to grant to such board, commission, officers, body or other proper authority, a revocable lease of or permit to use the said lands now or formerly under tidewater for such park, place, street or highway, or dock use and purpose for a nominal consideration until such time as the said Board of Commerce and Navigation shall decide to make a grant in fee of said lands under tidewater to such board, commission, officers, body or other proper authority, or to other grantees, for such consideration as the said Board of Commerce and Navigation may determine to be *adequate compensation* for such lands. Such revocable lease or permit may contain a provision that if the same shall be revoked and the lands in question granted to a grantee other than said board, commission, officers, body or other proper authority, that said new grantee shall be required to pay as a condition of such new grant, the cost of any improvements that may have been constructed upon said lands under water which were the subject of the said revocable lease or permit." (Emphasis added.)

This provision is now R.S. 12:3–36. Inasmuch as this statute was passed after *Henderson* v. *Atlantic City*, it is clear that the Legislature by the use of the term "adequate compensation" did not intend that a grant could be made for less than the fair market value but more than a nominal price. Quite to the contrary, by "adequate" the Legislature intended that the consideration be constitutionally sufficient. Thus R.S. 12:3–36 cannot permit a different result than that reached.

Further, R.S. 12:3–36 may not be used as a means of indirectly depriving the school fund of the benefits of a sale of riparian lands. The statute authorizes the issuance of a revocable lease at "nominal" consideration with the right to require the ultimate grantee for "adequate" consideration to pay for improvements on the property. However, this authority would violate the constitution if exercised in a manner that would prevent or greatly discourage an irrevocable conveyance for full consideration at a later date. Ordinarily a revocable lease or permit should not require a subsequent grantee or lessee to reimburse the municipality for its improvements. Such a requirement could well impede the granting or leasing of the premises, particularly if the improvements were of limited use. Thus a lease or permit revocable in law would be perpetual in fact.

Very truly yours,

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