JULY 29, 1963

ROBERT A. ROE, *Commissioner*
Department of Conservation and
Economic Development
Trenton, New Jersey

FORMAL OPINION 1963—No. 4

DEAR COMMISSIONER ROE:

We have been asked whether a municipality has a priority over the upland owner of tideland for a grant by virtue of the provisions of R.S. 12:3–33. It is our opinion, based upon former opinions and case law, that the municipality has such priority.

The title to all lands now or formerly flowed by tidewater within the boundaries of the State of New Jersey is vested in the State by virtue of the sovereignty derived from the Crown after the Revolution. *Bailey* v. *Driscoll*, 19 N.J. 363 (1955); *Schultz* v. *Wilson*, 44 N.J. Super. 591, 596 (App. Div. 1957), certif. denied, 24 N.J. 546 (1957). It had been the rule of the common law or local custom that the upland owner had the right to gain a fee simple title in submerged lands between the mean high and mean low water marks providing he filled in or improved such land in front of his property. Such right was necessarily inchoate until exercised by the upland owner. This right was made part of the legislation under what was known as the Wharf Act of 1851. L. 1851, p. 335. Upon repeal of the Wharf Act a procedure was set up whereby the owner of the uplands had a right, often referred to as a pre-emptive right, to apply for a grant of the lands in front of his property. Such right was in effect and has been often referred to by our courts as a revocable license. *Bailey* v. *Driscoll*, 19 N.J. 363 (1955). In effect this means that upon making a proper application for the grant and paying the necessary compensation the upland owner had the first option before all others to receive the grant. The statute sought to protect this right by requiring any third persons interested in obtaining a grant of tideland to give six months' notice to the owner of the uplands. R.S. 12:3–7. However, such requirement did not affect the absolute right of the Legislature to deal with the tidelands before any grant had been made. *Schultz* v. *Wilson, supra*, 44 N.J. Super. at 597.

The Legislature added a limitation on the pre-emptive right by permitting public bodies to obtain riparian grants, notwithstanding the fact that they were not the abutting owners. This was the background of the present R.S. 12:3–33. The import of the statute is to allow a municipality to obtain a riparian grant even as against the upland owner. This grant may be given without notice to the upland owner and without compensation to him.

That the municipality does not have to give notice, as other persons and corporations are required to do by R.S. 12:3–7, has been determined by the Superior Court of New Jersey in *Leonard* v. *State Highway Department*, 24 N.J. Super. 376 (Chan. Div. 1953), aff'd, 29 N.J. Super. 188 (App. Div. 1954). In that case the State Highway Department obtained a grant as against the upland owner without giving six months' notice. Reliance was placed upon R.S. 12:3–33 as authority for dispensing with the notice and the court stated, in 24 N.J. Super. at 384:

> "* * * The State Highway Commission there, as here, was not a riparian proprietor of the lands adjacent to those for which an application for a ri-

parian grant had been made. It had, however, 'laid out or provided' for a highway along or extending to the tidelands. No notice of the proposed application was given to the riparian owner.

There seems no logical reason which would bar the State from, in effect, retaining title in itself to land under water for some of its needed public purposes. The riparian proprietor has a pre-emptive right to such a grant as against any individual but not as against the State itself. The right of such riparian proprietor is subject to the prior right of the State to use such lands for its own purposes. It cannot be forced to convey such lands to an individual as may be required by one of its agencies for its own needs."

This decision was affirmed by the Appellate Division of the Superior Court at 29 N.J. Super. 188 (App. Div. 1954) wherein, at page 195, the court said, "We agree with the conclusion reached by the Chancery Division that the State Highway Commissioner, as applicant, did not have to notify plaintiffs, as riparian proprietors, of his application for a riparian grant." In addition, the court found that the State, or its agent, did not come within the definition of person or corporation as referred to in R.S. 12:3–7 and was therefore not covered by that provision. In this regard the court points out that R.S. 12:3–33 had its source in the Laws of 1916, which was a considerable time after the enactment of R.S. 12:3–7.

The right of pre-emption, sometimes referred to as a property right, is in truth a privilege of purchase or a right subject to divestment by the Legislature. See *American Dock & Improvement Co.* v. *Trustees for Support of Public Schools,* 39 N.J. Eq. 409, 444 (Ch. 1885).

It seems clear that to require a municipality to adhere to the notice provisions of R.S. 12:3–7 would negate the authority of R.S. 12:3–33 and, of course, the Legislature will not be presumed to have enacted ineffective legislation. The former opinion issued by this office in 1953 which did not consider the *Leonard* case was based upon the premise that a street laid out by a municipality was nothing more than an easement upon the land of the riparian owner, that R.S. 12:3–33 limited a riparian grant to a municipality only to that land which was necessary for street purposes and that the right to acquire all other lands lying in front of and seaward of the street belonged to the riparian owner. In formulating this opinion the author relied on R.S. 12:3–18 which provides as follows:

"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 12:3–17 of this title; provided, that nothing in this section shall affect the rights of the state to the lands lying under water."

Clearly the reference is to the taking or granting of a right of way or easement and not to a fee simple absolute title. The statute was passed to clarify the position of riparian owners during the era of railroad and canal construction. These quasi-public bodies which were endowed with powers of condemnation were entitled nor-

mally to take an easement and not a fee, leaving the owner of the *ripa* with ownership but without possession and use. In discussing this statute, Vice Chancellor Van Fleet in *New Jersey Zinc and Iron Co.* v. *Morris Canal and Banking Co.*, 44 N.J. Eq. 398 (Chancery 1888), affirmed, o.b., 47 N.J. Eq. 598 (E. & A. 1890), said at page 408:

> "* * * It puts in the form of positive law, what, prior to its enactment, existed only as a deduction to be made from a local custom or a principle of local common law. The statute was undoubtedly passed to clear up doubts, which it was thought might exist, respecting the rights of two different classes of persons in the same piece or tract of the public domain. There is nothing on its face which indicates an intention, on the part of the legislature, to take anything from the riparian owner; on the contrary, its main purpose seems to be to make his rights more certain and secure. Nor was it designed to establish a new rule of law, for it never was the law, that the acquisition of a mere easement, by one person in the land of another, operated to transfer the fee, nor to deprive the owner of the servient land of the right of making any use of it which did not interfere with the full and free enjoyment of the easement. The principal design of the statute, as I read it, was to declare what before was, on general principles of law, entirely certain and clear, and that is, that the acquisition by a canal or railroad company of an easement, simply for a right of way over the lands of a riparian owner, along or on the shore of his lands, should not operate to deprive him of his right or equity to preserve and improve the connection of his land with tidewater."

R.S. 12:3–18 was not intended to affect the riparian ownership of the state which remained absolute and superior to any pre-emptive right in the upland owner. The manifest implication of R.S. 12:3–33 is to cut off the pre-emptive right whenever a municipality makes an application for the grant and receives it. A municipality is a political subdivision of the state. *Village of Loch Arbour* v. *Ocean Twp.*, 55 N.J. Super. 250 (Law Div. 1959), aff'd, o.b., 31 N.J. 539 (1960). The authority of the state to prefer the application of the municipality in these circumstances arises out of its absolute ownership and control of the riparian lands and is justified by the fact that such lands will be used for broad general public purposes. To the extent that Formal Opinion 1953, No. 56 is in conflict with Formal Opinion 1960, No. 18, Memorandum Opinion of July 11, 1955 and this Opinion, it is hereby expressly overruled.

Very truly yours,

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