

ATTORNEY GENERAL

May 26, 1978

DONALD T. GRAHAM, *Director*
Division of Marine Services
Department of Environmental Protection
Labor and Industry Building
Trenton, New Jersey 08625

FORMAL OPINION NO. 8—1978

Dear Director Graham:

You have asked whether Laws of 1975, c. 354, N.J.S.A. 12:3-37.1,¹ changes the requirement that the conveyance of an interest in State tidelands must be supported by adequate consideration in the amount of the fair market value of the interest being conveyed. In particular, you wish to know whether the New Jersey Department of Environmental Protection² may grant a perpetual lease of such lands to a municipality for no or nominal consideration under the above statute. For the reasons set forth herein you are advised that both questions must be answered in the negative.

Article VIII, §4, par. 2 of the Constitution of 1947³ establishes a permanent school fund for the equal benefit of all the people of this State. In so doing, the Constitution provides a mechanism whereby the legislature "may" appropriate "money, stock and other property" to that fund. However, the Constitution also establishes that, once appropriated, such "money, stock and other property" is irrevocably dedicated to the school fund. The language of Article VIII is unequivocal; the fund for the support of free public schools is to be "perpetual" and may not be violated "for any other purpose, under any pretense whatever."

The dedication of State-owned lands "now or formerly lying under water" to the permanent school fund by the State legislature (N.J.S.A. 18A:56-5)⁴ fulfills the mandate of Article VIII. Thus, the constitutional provision, in conjunction with the legislative enactment, "identifies the fund therein referred to" and operates to protect the fund, both capital

1. "The State is authorized to lease or otherwise permit the municipal use of riparian lands owned by the State and situate within or contiguous to said municipality, when said lease or use is approved by the Department of Environmental Protection, without consideration or at nominal consideration, and to be maintained and used exclusively for park and recreational purposes. Said lease or use agreement shall contain a limitation that if the riparian lands are not maintained and used in accordance with the provisions of this act, such lease or use agreement shall be of no further force and effect."

2. The Natural Resource Council is presently authorized, subject to the approval of the Governor and the Commissioner of the Department of Environmental Protection, to convey State owned riparian lands. Conveyances are signed by the Attorney General and the Secretary of State as attesting witnesses and the Secretary of State affixes the Great Seal to the document. N.J.S.A. 12:3-7; 12:3-10; 13:1B-13; 13:1D-3(b).

3. Substantially a restatement of Article IV, §7, par. 6 of the Constitution of 1844.

4. Initially L. 1894, c. 71, and L. 1903, c. 1, §168, codified as R.S. 18:10-5.

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and income derived therefrom, "against trespass by the legislature." *Everson v. Board of Education*, 133 N.J.L. 350, 352, 353 (E. & A. 1945), *aff'd* 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1946); *see State v. Rutherford*, 98 N.J.L. 465, 466, 467 (E. & A. 1923). Together, Article VIII and N.J.S.A. 18A:56-5 prevent the removal of riparian lands from the school fund and impose limits on the use of such lands in order that the fund may not be impaired.

The earliest cases dealing with riparian land questions confirm the inviolability of the school fund. Thus, the restrictions of the Constitution were held to prevent the grant or conveyance of tide flowed lands for less than adequate consideration, even to a municipality for a public purpose. *Henderson v. Atlantic City*, 64 N.J. Eq. 583 (Chan. 1903);⁵ *In re Camden*, 1 N.J. Misc. 623 (Sup. Ct. 1923). *Seaside Realty Co. v. Atlantic City*, 74 N.J.L. 178 (Sup. Ct. 1906), *aff'd* 76 N.J.L. 819 (E. & A. 1908), underscored this position by validating L. 1903, c. 387, which required the payment of consideration as then fixed by law for tidelands purchased by a municipality for recreational purposes. By declaring that "the schedule of the rates fixed for all purchasers" was to be applied in this situation, the Court insured that proper compensation was received by the State. 74 N.J.L. at 181. It is clear then, from the early cases, that adequate consideration must be received for land held by, or as a source for, the school fund. *Cf. River Development Corp. v. Liberty Corp.*, 51 N.J. Super. 447 (App. Div. 1958), *aff'd per curiam* 29 N.J. 239 (1959).

Later cases have not changed the basic approach of these early decisions. *Garrett v. State*, 118 N.J. Super. 594, 599 (Ch. Div. 1972), reiterates the *Henderson* proposition that "a gift of (State tidelands), even for public purpose is, unconstitutional." Other cases have affirmed the State's "discretion when and how to transmute this property into money and to make all reasonable regulations for the use of the property until it (is) sold." *Henderson v. Atlantic City*, *supra*, 64 N.J. Eq. at 587. *See LeCompte v. State*, 65 N.J. 447 (1974) (the State has broad powers in setting the compensation to be paid for any grant of tidal lands); *Atlantic City Electric Co. v. Bardin*, 145 N.J. Super. 438 (App. Div. 1976) (the State may grant a revocable license to lay submarine cable beneath tideland waters and determine the consideration thereof); *LeCompte v. State*, 128 N.J. Super. 552 (App. Div. 1974), *certif. den.* 66 N.J. 321 (1974) (the Natural Resource Council, with the approval of the Governor and the Commissioner, has

5. Dictum in *Henderson v. Atlantic City* suggests that a "privilege could be granted to a municipality to use (State owned tidelands) 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. N.J.S.A. 12:3-36 permits the use of such lands by a municipality for park and other public purposes "for a nominal consideration" until the State decides to grant a fee in this property to such municipality "or to other grantees for . . . adequate compensation . . ." *Formal Opinion-1960*, No. 18, which addresses questions raised by N.J.S.A. 12:3-36, interprets "adequate" to mean "constitutionally sufficient" but cautions that this statute may not be used to "indirectly" impair the school fund. *Id.* at 40. Should an "irrevocable conveyance for full consideration at a later date" be in any manner prevented or substantially impeded, then "a lease or permit revocable in law would be(come) perpetual in fact" and, therefore, unconstitutional. *Id.* at 40.

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complete discretion as to whether, when and at what price it will issue a grant of riparian lands); *cf. O'Neill v. State Highway Dept.*, 50 N.J. 307 (1967) (the State's interest in riparian lands cannot be lost by adverse possession or prescription, nor can the State be estopped from asserting title to such lands by delay or inaction). *See also Meadowlands Regional Redevelopment Agency v. State*, 112 N.J. Super. 89 (Ch. Div. 1970), *aff'd per curiam* 63 N.J. 35 (1973), *appeal dismissed* 414 U.S. 991, 94 S. Ct. 343, 38 L. Ed. 2d 230 (1973) (expenditures for land reclamation may be deducted from the proceeds paid over to the school fund by the Hackensack Meadowlands Development Commission).

Also, the courts in recent cases have affirmed the well settled proposition that in addition to the interests of the school fund, an essential purpose of the State's ownership in tidelands extends as well to its use for the recreational needs of the citizens of the State in furtherance of the public trust. *Borough of Neptune City v. Borough of Avon-by-the-Sea*. 61 N.J. 296, 309, 310 (1972) and cases cited therein. It is therefore necessary that the constitutional obligation to preserve the assets of the school fund be read together and consistent with the furtherance of the public trust in these tide flowed lands.

Chapter 354 of the Laws of 1975, N.J.S.A. 12:3-37.1, authorizes the State "to lease or otherwise permit the municipal use of riparian lands owned by the State . . . without consideration or at a nominal consideration . . . exclusively for park and recreational purposes." A statute should be interpreted in a manner to render it constitutional. *State v. Profaci*, 56 N.J. 346, 350 (1970). Furthermore, the legislature is deemed to be thoroughly conversant with its own legislation and its judicial construction. *Brewer v. Porch*, 53 N.J. 167, 174 (1969). Thus, the legislature presumably was aware of the line of cases which has consistently held the school fund to be inviolate. It also undoubtedly acted in recognition of the public trust doctrine as well as the constitutional limitations imposed by the school fund. Therefore, it must be assumed to have been the implicit purpose in the enactment of this statute to authorize the grant of riparian lands consistent with these considerations. To grant perpetual leases and irrevocable licenses to municipalities for no or nominal consideration would be an improper exercise of authority by the Natural Resource Council. On the other hand, the use of State tidelands for parks and recreational uses by municipalities in furtherance of the public trust doctrine may be effectuated by the grant of revocable leases or licenses consistent with the interests of the school fund.

In conclusion, therefore, it is our opinion that the Natural Resource Council may not, pursuant to Laws of 1975, c. 354, N.J.S.A. 12:3-37.1, grant a perpetual lease of State tidelands to a municipality for park and recreational purposes at no or nominal consideration. Such a conveyance must be supported by adequate consideration in the amount of the fair market value of the interest being conveyed.

Very truly yours,
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Attorney General

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