JANUARY 24, 1961

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

FORMAL OPINION 1961—No. 2

DEAR COMMISSIONER BONTEMPO:

You have asked whether or not the Department of Conservation and Economic Development must give consideration to the use to which beaches along the Atlantic Ocean are devoted when allocating funds for the construction of bulkheads, seawalls, breakwaters, etc., under N.J.S.A. 12:6A–1. That section provides in part that the Commissioner of Conservation and Economic Development, succeeding to the powers formerly in the State Department of Conservation and Economic Development is,

> ". . . authorized and empowered to repair, reconstruct, or construct bulkheads, seawalls, breakwaters, groins or jetties, beachfills or dunes *on any and every beach front* along the Atlantic Ocean, in the State of New Jersey, or any beach front along the Delaware bay and Delaware river, Raritan bay, Barnegat bay, and Sandy Hook bay, or at any inlet or estuary or any inland waters adjacent to any inlet or estuary along the shores of the State of New Jersey, to repair damage caused by erosion and storm, or to prevent erosion of the beaches and to stabilize the inlets or estuaries." (Emphasis supplied.)

Under Art. VIII, Sec. III, par. 3 of the New Jersey Constitution, public funds may be appropriated only for public purposes. Any undertaking is a public purpose when it provides a general utility to the public at large, and it has long been the law of this state that if the public interest is involved to any substantial extent and the statute is promotive of the welfare and convenience of the community, "the legislative adoption of such project is a determination of the question * * *." *The Tidewater Company* v. *Coster*, 18 N.J. Eq. 518, 522 (E. & A. 1866).

On the topic of shore erosion, the New Jersey Legislature has enacted many statutes other than the one in question.

As early as 1897 the Legislature provided that any borough shall have the power to take steps necessary for "the protection of property from the encroachment of the sea," L. 1897, c. 161, § 28. Thereafter, as the problem of beach protection became more acute and in need of greater financial assistance, the Legislature provided in a series of enactments for the expenditure of moneys from all levels of government. Thus, in 1915 the Legislature stated that any borough could protect its beach front by the construction and maintenance of bulkheads and jetties, N.J.S.A. 40:92–9, to be paid for as an improvement out of general taxation, N.J.S.A. 40:92–10 and 40:56–1. In 1954, municipalities owning beach front were empowered to charge and collect reasonable fees for the use of the beaches, such funds to be devoted to beach protection. N.J.S.A. 40:185–5. Counties bordering upon the Atlantic Ocean may appropriate moneys from the county treasury to the municipalities, N.J.S.A. 40:29–10, and to the Federal government, N.J.S.A. 40:29–1, for beach protection. So important is the question of beach erosion that the Legislature saw fit in 1949 to establish a per-

manent State Beach Erosion Commission to study beach protection and to effectuate the preservation of the beaches and shore front. N.J.S.A. 52:9J–1. The importance of beach protection was not overlooked in the remedial legislation in the Municipal Finance Commission Act, which provided for the appointment by any municipality operating under the Act of a beach commission with the powers to maintain bulkheads, seawalls, jetties, etc., N.J.S.A. 40:55A–1, *et seq.* Comprehensive policies for the prevention and control of beach erosion were vested in the Navigation Council, N.J.S.A. 13:1A–30, and subsequently transferred to the Planning and Development Council, N.J.S.A. 13:1B–7, among whose duties is that of formulating "comprehensive policies for the prevention and control of beach erosion." N.J.S.A. 13:1B–11. Thus, it is evident that the protection of the New Jersey beach front has been and continues to be considered by our Legislature a most important function of municipal, county and state government. The legislative declaration of public purpose is supported as far back as 1866 by Chief Justice Beasley in *Tide-water, supra*:

> "A statute, authorizing the erection of a dyke at the public charge, for the purpose of protecting large sections of land within the state from the overflow of freshets or the reflux of the tides, would be universally acknowledged to be clearly within the bounds of legitimate legislation, . . ." (p. 523).

And in 1915, it was said:

> "It is manifest that the protection of the borough territory at large from the encroachment of the sea is a public purpose, at least so far as it relates to the streets and other public places; and it is likewise for a public purpose in protecting the property of the citizens generally from such encroachment. . . . It seems to be generally held that the construction of drains and levees by a public agency for the benefit of citizens at large is a public use . . ., and indeed we do not see how it could well be held otherwise." *Donnelly* v. *Longport*, 88 N.J.L. 68, 70 and 71 (Sup. Ct. 1915).

Beach protection is, therefore, a public purpose to which state funds may be devoted. The fact that benefits are directly or indirectly conferred upon property other than public beaches and that some beaches are devoted to proprietary uses does not prohibit such benefits from being conferred. Beach protection inherently is not subject to isolated action, but frequently requires broad and comprehensive measures. This is supported by the legislative authority set forth above to deal with "any and every" beachfront.

> "One section of the beach cannot be eroded without the effect of the change being felt on other beaches—no section of the beach can be added to by artificial accretions without the effect of this being felt on beaches nearby." *Report by Board of Commerce and Navigation of N. J. on the Erosion and Protection of the New Jersey Beaches* (1922).

This report went on to say that the major part of erosion is caused by wind-driven waves striking the beach obliquely and producing an along-shore current carrying away material.

> "Protection, then, demands at least partial protection from these waves and a breaking up of the continuity of the current produced. In general this could not be accomplished by a few extensive, widely separated groines or breakwaters. Any structures to be effective should be sufficiently close

> together to divert wave accessibility to any considerable extent of the beach . . . the actual distance apart of these structures will be a function of the direction from which the waves strike the beach. . . ." Id., p. 15.

It may be impossible, then, to protect isolated shore areas. The scope of action to meet the public purposes of beach protection is a matter for the judgment of the Commissioner of Conservation and Economic Development. Beach protection measures taken under the statute in question are not impaired by the conferring of a benefit upon neighboring property and individuals, *Simon* v. *O'Toole*, 108 N.J.L. 32 (Sup. Ct. 1931). These special benefits to abutting owners do not ". . . cause an otherwise authorized governmental activity to run afoul of the constitutional provisions relating to donations of public moneys." *Hoglund* v. *City of Summit*, 28 N.J. 540 (1959). Further, the public nature of the program is not destroyed by the proprietary use of beaches. This was clearly held in *Martin* v. *Asbury Park*, 114 N.J.L. 298 (E. & A. 1934) as follows:

> "The previous case [*Martin* v. *Asbury Park*, 111 N.J.L. 364 (E. & A. 1933)] decided that the operation of a bathing establishment was a private and proprietary business, and further held that the land in question was used in such business. Such a finding as to the *use* of such land is not necessarily a finding as to the *purpose* of the use, and therefore as to the public or private nature of the property."

You are therefore advised that beach protection is a public purpose for which funds may be expended; that such purpose is not eliminated by the necessary use of and incidental benefit to private land; that the proprietary use of the beaches does not defeat the legality of the statute; and that, subject to your determination that a particular project is designed to protect the land and beaches in a certain area or is a part of a general program of beach protection along any one of the enumerated bodies of water, you may allocate funds under R.S. 12:6A–1, *et seq.* notwithstanding the proprietary use of such beaches.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: G. DOUGLAS HOFE, JR.
Deputy Attorney General

FEBRUARY 6, 1961

HON. LEROY J. D'ALOIA
Speaker of the General Assembly
State House
Trenton, New Jersey

FORMAL OPINION 1961—No. 3

DEAR MR. D'ALOIA:

You have sought my opinion as to whether 30 or 31 members constitute a majority of "all the members" of the General Assembly as required by Art. IV, § 4, para. 6 of the State Constitution for the passing of bills and joint resolutions.