March 14, 1983

DAVID F. MOORE, *Chairman*
Tidelands Resource Council
CN 401
Trenton, New Jersey 08625

FORMAL OPINION NO. 3—1983

Dear Chairman Moore:

The Tidelands Resource Council has asked for our advice concerning the exercise of its authority to fix a price for a grant of an interest in state owned tidelands. In particular, the Council has inquired whether it may fix a price in an amount less than fair market value for a grant of state owned tidelands which have been improved by private parties in good faith. For the following reasons, it is our opinion that the Council does have the discretion to fix a price for a grant of the state's interest in tidelands based on its underlying value without any improvements. It is also our opinion that in an instance where the state's claim to tidelands is in dispute, the Council's determination of an appropriate price should reflect the strength of the state's claim to those lands as determined by the Attorney General.

A review of the legislative scheme demonstrates that the legislature has given the Council broad discretion to fix an appropriate price for a grant of state owned tidelands.[1] The statutory provisions, however, do not provide any specific guidance for the determination of an appropriate price but rather provide only some general direction. For example, the price should be "reasonable" (N.J.S.A. 12:3-7) or "within the limits prescribed by law" (N.J.S.A. 12:3-16), or "reasonable, fair and adequate," (N.J.S.A. 12:3-47).[2] This lack of detailed guidance reflects a legislative recognition of the need for broad delegations of discretion to agencies exercising proprietary functions which involve price determinations. *Atlantic City Electric Co. v. Bardin,* 145 N.J. Super. 438, 444-445 (App. Div. 1976). These statutory provisions have been construed as entrusting to the Council discretion subject to approval of the Governor and the Commissioner of

1. With certain exceptions, the state is the owner of all lands that have been flowed by the tides up to the high water line. This doctrine and all of its difficulties are reflected in numerous recent decisions including *Gormley v. Lan,* 88 N.J. 26 (1981); *Newark v. Natural Resource Council in the Dept. of Environmental Protection,* 82 N.J. 530 (1980); *Borough of Wildwood Crest v. Masciarella,* 51 N.J. 352 (1968); *Ward Sand & Materials Co. v. Palmer,* 51 N.J. 51 (1968); *O'Neill v. State Highway Dep't.* 50 N.J. 307 (1967), but in November 1981 a constitutional amendment, Art. 8, §5, ¶1 was adopted which provides that lands which have not been tidally flowed for 40 years shall not be riparian and state owned unless within the 40 year period the state has specifically defined and asserted a claim pursuant to law. With respect to lands that were not tidally flowed for 40 years immediately before the adoption of the constitutional amendment, the state was given an additional year after the adoption of the amendment to assert its claim. *See also Dickinson v. the Fund for the Support of Free Public Schools,* 187 N.J. Super. 224 (App. Div. 1982).

2. The single exception is N.J.S.A. 13:1B-13.9, applying to riparian meadowlands, which is discussed *infra.*

Environmental Protection to fix such price or compensation as it shall see fit for the conveyance of State tidelands. *LeCompte v. State,* 128 N.J. Super. 552, 560 (App. Div. 1974), *cert. den.* 66 N.J. 321 (1974); *LeCompte v. State* (related case), 65 N.J. 447, 451, 452 (1974).

The Council's discretion, however, is not unlimited. It is circumscribed by the relationship between the tidelands and the public school fund. All tidelands owned by the State or the proceeds from their sale as well as the income resulting from such ownership are irrevocably pledged to a fund for the support of the public schools. N.J.S.A. 18A:56-5 provides in pertinent part as follows:

> All lands belonging to this state now or formerly lying under water are dedicated to the support of public schools. All moneys hereafter received from the sales of such lands shall be paid to the board of trustees, and shall constitute a part of the permanent school fund of the state.

This legislative commitment of the proceeds of the sale or lease of state owned tidelands toward the support of public schools is a long-standing one and has continued in substantially similar terms since 1894. It is carried out by the depositing of the proceeds of the sale, lease or conveyance of tidelands in a constitutionally mandated irrevocable fund from which income is annually appropriated to assist public schools. Article 8, §4, ¶2 provides in part:

> The fund for the support of free public schools, and all money, stock and other property, which may hereafter be appropriated for that purpose, or received into the treasury under the provisions of any law heretofore passed to augment the said fund, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of free public schools, and for the equal benefit of all the people of the State; and it shall not be competent, except as hereinafter provided, for the Legislature to borrow, appropriate or use the said fund or any part thereof for any other purpose, under any pretense whatever.

In the exercise of its discretion to set an appropriate price for a grant of the state's tidelands, the Council is obliged to obtain sufficient consideration generally equivalent to fair market value to implement the above stated constitutional and legislative objective to use those tidelands as a source for the support of free public schools. But it is also clear that the Council need not obtain for the benefit of the school fund the full fair market value of improved property in all instances.[3] Rather, the Council may convey improved state owned tidelands at a consideration below its equivalent fair market value where a reduction from fair market value is justified by the equities of a particular case. Payment of the value of the land in its unimproved state may then in appropriate instances satisfy the legislative dedication.

In *Meadowlands Reg. Dev. Agency v. State,* 112 N.J. Super. 89, 130-131 (Ch. Div. 1970), *aff'd per curiam* 63 N.J. 35 (1973), the court considered a challenge to the validity of L. 1968, c. 404, §99, dealing with the development and reclamation of the Hackensack Meadowlands. This section provides as follows:

> The net proceeds from the sale, lease or transfer of the State's interest in the meadowlands shall be paid to the Fund for the Support of Free Public Schools established by the Constitution, Article VIII, Section IV, *after deducting from the net proceeds any expenditures of the Hackensack Meadowlands Development Commission for reclaiming land within the district.* The amount of said deduction for reclamation shall be paid to the Hackensack Meadowland Development Commission. [N.J.S.A. 13:1B-13.13.] [Emphasis added.]

Thus under this section, the school fund receives, in effect, the value of the land less the value of the improvements made by the Hackensack Meadowlands Development Commission. This arrangement was found by the court to be in compliance with Art. 8, §4, ¶2 and the statutory dedication of the tidelands to the support of public schools.

Also, in an instance where state owned tidelands have been improved by record owners in good faith under color of title, the Council need not obtain for the school fund the value of those improvements. The Council may take into account various equities which arise in favor of the improver or successor in title. These equities were first recognized by the Supreme Court in a case concerning the former tide flowed status of improved Meadowlands. The court stated:

> We are mindful that the actual application on the ground of the legal test of tideland ownership, to which we will presently refer, presents some obsecure and difficult situations in which private equities, particularly with respect to improvements, may be entitled to protection consistent with the preservation of the State's interests. . . . [*O'Neill, supra* at 322.]

This proposition established by *O'Neill* is generally consistent with general principles of law in analogous cases. The equities in favor of one who has in good faith made improvements on the land of another have long been recognized. Generally stated, where, under all the circumstances, the result will be fair and equitable to both the owner and the improver,

3. *Atlantic City Electric Co. v. Bardin, supra* at 446; *Seaside Realty Co. v. Atlantic City,* 74 N.J.L. 178, 181-182 (Sup. Ct. 1906) *aff'd* 76 N.J.L. 819 (E. & A. 1908). See also cases where constitutional restrictions were held to prevent the grant 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 (Chancery 1903); *In re Camden,* 1 N.J. Misc. 623 (S. Ct. 1923), but which also have confirmed the state's "discretion when and how to transmute this property into money, . . ." *Henderson* at 587.

relief of one form or another may be afforded to the improver. See, for example, *Brick Twp. v. Vannell,* 55 N.J. Super. 583 (App. Div. 1959) (stating the rule that an improver will be awarded the value of improvements mistakenly made on another's land where the mistake does not result from culpable negligence and the true owner has actual or constructive knowledge); *Citizens & So. Nat. Bank v. Modern Homes Const. Co.,* 149 S.E. 2nd, 326, 248 S. C. 130 (1966) (improver permitted to remove a house constructed by mistake where mortgagee would be compensated for any resulting damage and would thus be deprived of nothing to which he was justly entitled); see also *Campbell v. Roddy,* 44 N.J. Eq. 244 (E.&A. 1888); *State v. Jones,* 27 N.J. 257, 261-263 (1958) (condemnor who enters upon another's property and makes improvements thereon prior to condemning is not required to pay the property owner for the value of such improvements), see also 4 Nichols on *Eminent Domain,* §13.15 at p. 13-91 (1981); N.J.S.A. 2A:35-3 (good faith improver may set off value of improvements against plaintiff's damages to the extent thereof).

The relevance of the improvers' equities in the case of the state's tidelands is particularly compelling. Owners of tidelands with record title who make improvements in good faith based on their apparent ownership interest in those lands do so at their own expense and for their own benefit. Also, a purchaser of an improved parcel after several conveyances following the original improvement may have a "difficult" time in ascertaining whether those lands were once tidal flowed. *Gormley v. Lan, supra* at 29. An improver's or a subsequent purchaser's equity in those improvements may be recognized with no detriment to the state by a conveyance for a price based on the current value without the improvements. The state relinquishes only that improvement that was added at the expense and for the sole benefit of the owner in possession. Consequently, an allowance given for the equitable interest of the improver or present owner of improvements in those cases does not impair the property contemplated by the legislature to be held for the support of public schools. Further, an allowance given to a prospective grantee for the value of improvements made in good faith is a demonstration of the fundamental responsibility of the Council to act fairly. In *Newark v. Natural Resource Council,* 133 N.J. Super. 245, 250 (L. Div. 1974) *aff'd* 148 N.J. Super. 297 (App. Div. 1977), the trial court in describing the Council's obligation with respect to formerly tide flowed lands dedicated to the support of public schools stated:

> Thus, the State, as represented by respondent Council, has a solemn duty to preserve these assets. However, it cannot act in a manner which violates the more fundamental duties of a sovereign to act reasonably and in a manner which least harms its citizens.

This proposition was expressly recognized by the legislature in the case of tidelands situated in the meadowlands. Meadowlands are defined as lands "now or formerly consisting chiefly of salt water swamps, meadows, or marshes." N.J.S.A. 13:1B-13.1(a) The Council has been expressly directed to take into account improvements made by record owners in

good faith in fixing the consideration for grants of those lands. N.J.S.A. 13:1B-13.9 provides:

> The Council shall further determine the fair market value of the property at the time of the lease, conveyance, license or permit and shall fix the proper consideration to be charged . . . In determining such consideration the Council shall take into account the actions of a claimant under color of title who in good faith made improvements or paid taxes, or both, on the lands in question. . . .

The good faith of the improving party under that statute was considered by the court in *LeCompte v. State, supra.* An upland owner having no claim of ownership to the state's adjoining unimproved tidelands made improvements on those lands between the time of her application for a grant and before receiving the grant. The court found that N.J.S.A. 13:1B-13.9 was inapplicable in that circumstance since the state's title was never in dispute. It therefore concluded that the fair market value of the property in its improved state was an appropriate measure of consideration. The court further stated, on the other hand, that the good faith standard spelled out in the statute would be applicable to meadowlands improved in good faith by a record owner under color of title to which the state only has a potential claim of ownership. The court stated: "Obviously . . . it would be entirely inequitable to determine the fair market value of the property in its improved state." Therefore, it can be fairly concluded that *LeCompte* establishes the principle that an allowance of credit for good faith improvements in the fixing of a price for a grant of tidelands to which the state has only made a claim is consistent with the constitutional and statutory dedication.

The "good faith" standard set forth in N.J.S.A. 13:1B-13.9 is on its face obviously directed to the meadowlands because of the widespread filling and development which has taken place in those lands. There is no reason to assume, however, that the legislature intended that the good faith of an improving party in possession would be strictly limited to meadowlands or to have less force with regard to tidelands outside of meadowlands. Clearly, problems concerning improvements made on tidelands by a record owner to which the state either has or may make a claim can be present anywhere in the state. In its dedication of proceeds from the sale of tidelands to the support of public schools, it cannot be inferred that the legislature intended to aggrandize the school fund with the value of the improvements made at the expense of a private owner acting in good faith who has mistakenly made improvements on other than meadowlands. It is our judgment that where there is any doubt, an interpretation of legislative intent to lead to such an inequitable result should be avoided. Therefore, it is our conclusion that the Council has the discretion to grant the state's interest in tidelands upon which improvements have been made in good faith by record owners under color of title for a price based upon the current fair market value of the state's interest in those lands without the improvements.

In addition, the Council has the authority to make a grant of the

state's interest in tidelands where the state's claim to title is disputed. In many cases, the state has made a claim of ownership to filled lands based upon mapping and scientific findings as to the former tide flowed status of those lands. The state's demonstration of title often is a complex one. It is dependent upon the adequate definition and assertion of a claim in in individual cases. Therefore, the record owner in possession often vigorously disputes the state's claim and the strength of the state's claim is in effect no greater than its ability to prove it pursuant to law. Consequently, in those circumstances, a grant of the state's interest is nothing more than a relinquishment of its right to litigate its title with the record owner. Where the state's claim to a particular parcel is less than entirely clear, the Council has the discretion to fix a price for a grant of the state's interest at an appropriate fraction of the value of indisputable clear title to the parcel. Such a conveyance of the state's interest for less that the fair market value of the parcel is in our judgment consistent with the legislative dedication of the proceeds of the sale of tidelands to the support of public schools. Certainly the legislative dedication of tidelands as property held by the state for the support of public schools is referenced to those lands over which the state can demonstrate its claim of ownership. Since the determination of the strength of the state's claim is dependent upon a careful evaluation of the adequacy of the state's proofs of ownership and its ability to successfully demonstrate that ownership in court, a judgment to give a grant at a fraction of its fair market value should be made only after the receipt of advice from the Attorney General.

As a general proposition the Council in fixing a price should be guided by a reasonable estimate of the fair market value of the state's interest being conveyed. This is particularly true in cases of unimproved tidelands to which the state has undisputed title. A reasonable estimate of the fair market value should also serve as a reference point in establishing an appropriate price where either allowances are made to the record owner for improvements made in good faith or where allowances are being made because of questions concerning the ability of the state to prove its claim to disputed tidelands. In the case of improvements, an allowance may be made only after the Council has made a thorough inquiry into the facts of each case. In particular, those facts which bear on the knowledge or opportunity for knowledge of the applicant to the existence of the state's title and the extent to which either the applicant for a grant was responsible for making the improvements in question or paid its predecessor in record title for those improvements should be explored. It also would be important to know what, if any, alternative recourse an applicant may have to recover the cost of improvements from a predecessor in record title or other responsible party. The Council then may take these and any other relevant factors into account in fixing an appropriate price. When it is satisfied after receiving appropriate legal advice, the Council may make a commensurate allowance to the fair market value of the state's interest in those lands being granted.

In sum, it is our opinion that the Tidelands Resource Council has the discretion to grant the state's interest in tidelands upon which improvements have been made in good faith by a record owner under color of title for a price based upon a reasonable estimate of fair market value of

state's interest without such improvements. It is also our opinion that the price set by the Council for a grant of the state's interest where the state's claim to record title is in dispute may be adjusted to reflect an evaluation of the state's ability to successfully establish its claim of ownership.

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General

March 18, 1983

SCOTT A. WEINER
Executive Director
Election Law Enforcement Commission
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FORMAL OPINION NO. 4—1983

Dear Director Weiner:

You have asked for our advice as to whether statutory prohibitions on the making of political contributions by an insurance company doing business in this State extend to an out of state non-insurance holding corporation which owns all of its capital stock. You have further asked whether the non-insurance subsidiary corporations of the holding corporation are prohibited from making political contributions. For the following reasons, you are advised that a non-insurance holding corporation owning a majority of stock in an insurance company licensed to do business in this state is prohibited from making political contributions either in its own right or through its non-insurance subsidiary corporations.[1]

There are two statutory sections in the election law which address the question of corporate political contributions. N.J.S.A. 19:34-32 specifically forbids insurance corporations or associations from making any direct or indirect contributions for any political purpose whatsoever. N.J.S.A. 19:34-45 imposes a similar prohibition and provides in more comprehensive terms that:

> No corporation carrying on the business of a bank, savings bank, co-operative bank, trust, trustee, savings indemnity, safe deposit, insurance, railroad, street railway, telephone, telegraph, gas, elec-

1. The applicability of these provisions must be limited to contributions to candidates for political office under the government of this state or any of its political subdivisions, to any political party in this state or for any political purpose whatsoever in this state. It must be presumed that the Legislature did not intend any extraterritorial effect unless the language of the statute admits of no other construction. *Sandberg v. McDonald,* 248 U.S. 185, (1918).