STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY

ROBERT J. DEL TUFO
ATTORNEY GENERAL

April 19, 1991

Scott Weiner, Commissioner
Department of Environmental Protection
401 East State Street
CN 402
Trenton, New Jersey 08625

Re: Formal Opinion No. 3 (1990): Reprise

Dear Commissioner Weiner:

1.
Introduction

Information which has reached me, coupled with recent press reports and observations, suggest that Formal Opinion No. 3 (1990) may be the subject of misinterpretation both as to the role of this office in issuing it and, more importantly, as to its substantive content. Such misinterpretation seems rather evident among some members of the public and some members of your departmental staff. We are both well aware that the Governor is dedicated to having any confusion or misconceptions promptly and clearly eliminated. Both of us share these concerns. And so I write in an effort to accommodate these wishes.

Preliminarily, the misinterpretation of role overlooks the fact that the exemptions are a reflection of legislative will and policy judgment, not those of the Attorney General. The substantive misinterpretation falls into two areas. One involves the misbelief that an exempted project can encompass little more than conceptual statements or designs or the like. The other error is the view that a subdivision or site plan approval or application involving or affecting only a portion of a piece of property exempts the entire property from wetlands regulation. These erroneous interpretations were well-described in your memorandum to me of April 10, 1991 (a copy of which is annexed as Exhibit A) under which you requested additional guidance or

advice.[1]

As will be discussed in more detail below, the exemption contemplated by the Legislature did not cover "concepts" but rather centered exclusively upon projects which had reached the preliminary approval stage and thus upon projects substantially well along in planning and development. Moreover, the exemption covers only the specific property involved. Accordingly, if the preliminary approval or the application for it covers only a portion of a piece of property then only the affected portion -- i.e. the portion for which preliminary approval is sought -- not the balance of the tract, is exempted.

These conclusions were reached in Formal Opinion No. 3 (1990). I apologize if they were not as clearly articulated as they should have been so that any confusion might have been avoided from the outset. But I hope that this letter will serve to remedy the situation and to eliminate any outstanding ambiguity.

2.
Role of the Attorney General

The misconception concerning the role of the Attorney General is to suggest that the Attorney General is somehow responsible for the exemptions set forth in the Freshwater Wetlands Act and thus that we are somehow instrumental in defining wetlands exemption policy. Both points are inaccurate and far from the mark.

The Attorney General obviously has no power or authority to legislate, but only to define and interpret what the Legislature has said and has intended in response to requests for such advice by state agencies. Formal Opinion No. 3 (1990) was proffered in responding to a request from the Department of Environmental Protection for an interpretation of the legislative meaning and intent of the Act's exemptions section.

In this connection, the Freshwater Wetlands Act was debated keenly and hotly over many years by many competing interests and its enactment well predated this administration's tenure. In it, the Legislature specifically exempted certain specified projects from the operational effect of its terms. Among them were projects which had received "preliminary site plan or subdivision" approval "from the local authorities

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1. Your memorandum also indicated that Department of Environmental Protection staff was even proposing to memorialize the inaccurate latter viewpoint in proposed wetlands regulations. This circumstance assuredly confirms a rather pervasive misconstruction and miscommunication and further insists upon the within clarification.

pursuant to the 'Municipal Land Use Law,'...prior to the effective date of [the]...Act" and projects for which "preliminary site plan or subdivision applications [had]...been submitted prior to June 8, 1987...."

The language is very clear. The Legislature chose to exempt projects for which preliminary site plan or subdivision applications or approvals had been filed or received prior to the specified dates. And this is precisely what Formal Opinion No. 3 (1990) stated. The policy was made by the Legislature when it enacted the law, not by Formal Opinion No. 3 (1990) in pointing out its clear meaning. Any disappointment over the legislation as enacted, or advocacy for a change in policy, must be addressed to the Legislature which is the only governmental body capable of changing the policy articulated in the statute and of moving in a different policy direction.

3.
Preliminary Approval

As stated in Formal Opinion No. 3 (1990), the legislative exemptions based upon the Municipal Land Use Law were designed to balance "the Legislature's concern for strictly regulating future development in freshwater wetlands and transition areas with a recognition that ongoing development projects not be halted after the expenditure of significant funds, planning and time." (p.5). The accommodation was reached only after much discussion and compromise by and between environmentalists and those whose projects were substantially well along and would possibly be inequitably affected by new regulation. The polestar here involves substantial investment of effort and other resources. The exemption identified in the Act thus revolves around the event of preliminary approval of major subdivisions and preliminary approval of site plans. This is not sketch plat approval or minor subdivision approval. And it does not involve "concepts" or tentative plans or sketches. It is, as stated, exclusively preliminary approval, a step which implicates "specific procedures well-defined in the Municipal Land Use Law...and in municipal planning ordinances..., procedures which necessarily call for the submission of concrete plans and information." Formal Opinion No 3 (1991), p.5.

The last point cannot be over-emphasized. Preliminary approval of a major subdivision or of a site plan is probably the most important stage in the development process and the legislative choice for identifying projects which are well along and have consumed significant resources. For example, pursuant to N.J.S.A. 40:55D-49, preliminary approval of a major subdivision or a site plan confers rights upon the applicant which persist for a 3-year period of time and which include a commitment that "the general terms and conditions on which preliminary approval was granted shall not be changed, including but not limited to use requirements; layout and design standards for streets, curbs and sidewalks; lot size; yard dimensions and off-tract improve-

ments; and, in the case of site plan, any requirements peculiar to site plan approval pursuant to...[N.J.S.A. 40:55D-49(a)]." An application for preliminary major subdivision approval must satisfy articulated criteria which often call for detailed drainage, engineering, utility, landscaping, soil and environmental data as well as a property survey with topographical characteristics, lot and street layouts, and natural features duly noted. A proper preliminary site plan application mirrors most of these requisites. In short, the application must address those numerous and substantively significant subjects required by statute to be included in ordinances regulating subdivisions and site plans (see N.J.S.A. 40:55D-38 and 48).[2]

Confirming, and clarifying, the conclusion reached in Formal Opinion No. 3 (1990), then, the exemptions which turn upon a reference to the Municipal Land Use Law focus exclusively upon the very substantial step attending preliminary approval of a major subdivision or site plan and the filing of an application for such preliminary approval. Moreover, consistent with the compromise which the Municipal Land Use Law exemption reflects, to gain exemption an application for preliminary approval must have been in proper form, must have been accompanied by all plans, data and information called for by the local planning ordinance and by statute for either a major subdivision or a site plan, as the case may be, and thus must have been in fact complete prior to the statutory deadline. Categorically excluded from exemption is anything short of either preliminary approval of a major subdivision or site plan itself or a proper and complete application for either one.

4.
Project vs. Property

As stated above, the exemptions involving the Municipal Land Use Law were put there so that ongoing development projects which progressed to the advanced stage of the formal municipal preliminary approval process would not be halted. This was done out of equitable recognition of the significant and legitimate private interests implicated by the expenditure of funds, effort and time in getting to that point. Consistent with this ration-

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2. Representatives of the Division of Law reviewed various subdivision ordinances which also describe the volume and detail of information required to be supplied. The Princeton Township ordinance is fairly representative. Enclosed is an excerpt (Exhibit B) and a checklist used by the Princeton Township Planning Board (Exhibit C).

ale, and as Formal Opinion No. 3 (1990) stated,[3] the only lands exempted from wetlands regulations are those for which preliminary approval was granted or which were the subject of a proper application for preliminary approval. If the land subject to the application was part of a larger tract, neither the legislation nor Formal Opinion No. 3 (1990) would exempt the remaining, contiguous portions of the tract which were not the subject of either the preliminary approval or the application for preliminary approval.[4] A contrary view would greatly overstate the equitable need, strip the exemption of its required close connection to the municipal preliminary approval process and do violence to the clear legislative mandate.

Accordingly, the Municipal Land Use Law exemptions run only to that portion of a tract of land which is the physical location of the proposed economic development project for which preliminary major subdivision or site plan approval was granted

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3. Formal Opinion No. 3 (1990), in referring to the statutory language, the unambiguous legislative decision and the policy basis for the approach emphasized that only the project which had received, or which had properly applied for, preliminary approval fell within the scope of the municipal land use exemptions. Assuredly only those lands affected by the project would escape wetlands regulation. Other lands, whether as the remainder of a larger tract or as contiguous property in common ownership would not benefit and would remain subject to wetlands strictures.

4. The conclusion would not be altered by the fact that some depiction of a future development concept on the remainder of the parcel might be required by the Planning Board. Section 10B-158(g) of the Princeton Township Ordinance provides, for example, as follows:

> "Where the preliminary plat covers only a part of the entire holding, a sketch of the prospective future street system of the unsubmitted part shall be fur ished. The street system of the submitted part will be considered in the light of adjustments and connections with the future street system of the part not submitted."

The only portion of the property gaining wetlands exemption would be that "submitted" for preliminary approval and shown as such on the preliminary plat. The "unsubmitted" portion -- i.e. the remainder of the land not part of the preliminary application -- will not be exempted notwithstanding the required sketching of possible future street layout if ever submitted for preliminary approval.

or was sought.[5]

5.
Miscellaneous

In closing, allow me to make some additional points and observations:

(1) Neither Formal Opinion No. 3 (1990) nor this letter have specifically addressed the question of whether a substantial change in a project which has either gained preliminary approval or for which an application for preliminary approval was timely filed would result in the loss of wetlands regulation exemption. I understand that you seek our advice on this question and we shall provide it under separate cover.

(2) Hopefully to avoid any further confusion or misconception, I suggest that the resources of my office be utilized by you to assess specific exemption claims, challenges or questions on a case by case basis in an effort to tie both the legislative will evidenced in the exemptions section of the wetlands legislation and the interpretative strictures of Formal Opinion No. 3 (1990) and this letter directly to a particular municipal preliminary approval decision or to a particular application for such approval. As we collectively apply the law to specific situations, a body of decisions will develop capable of giving guidance to the Department of Environmental Protection and to the regulated community.

(3) The proposed regulation which substitutes "property" for "project" is infirm in terms of both the act of substitution and the language of the definition of property itself. There may be other such instances of misconception and error. And there may be several other ways of strengthening the language and purport of the proposals. Under the circumstances, I would urge that you defer approving the regulations for publication until we have had an opportunity to confer further and to give the matter our further personal attention. Accordingly, I have directed my staff that the review of the proposed regulation be

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5. As an example, very often a large tract is developed by sections. A completed, final and accepted application for preliminary approval of Section 1 which may show the balance of the tract to be later developed as Sections 2 and 3 (and may even show some general layout of future sections -- see footnote 3, supra) results solely in the exemption of Section 1.

given the highest priority and that their efforts should be coordinated with the work of the Division of Coastal Resources.

Sincerely yours,

Robert J. Del Tufo
Attorney General

RJD:vs