

OPINIONS

OF THE

Attorney General

OF

NEW JERSEY

FOR THE

Period from January 1, 1960  
to December 31, 1963

**STATE OF NEW JERSEY**  
**Department of Law and Public Safety**  
**Division of Law**

January 1, 1960—December 31, 1963

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L. 1896, c. 185, sec. 43 ....	P. 12, 1960	L. 1938, c. 198 ....	F.O. 5, 1963
L. 1897, c. 148, sec. 2 ....	P. 7, 1960	L. 1941, c. 20 ....	F.O. 22, 1960
L. 1897, c. 161, sec. 28 ....	F.O. 2, 1961	L. 1941, c. 274, secs. 28, 36 ....	F.O. 4, 1960
L. 1899, c. 199 ....	F.O. 18, 1960	L. 1941, c. 310 ....	F.O. 3, 1961
L. 1900, c. 124, sec. 43 ....	P. 12, 1960	L. 1942, c. 251 ....	F.O. 4, 1961
L. 1900, c. 126, sec. 1 ....	F.O. 25, 1960	L. 1942, c. 268 ....	P. 18, 1961
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L. 1901, c. 28 ....	F.O. 18, 1960	L. 1943, c. 160 ....	P. 7, 1961
L. 1902, c. 165 ....	P. 7, 1960	L. 1944, c. 16, sec. 1 ....	F.O. 5, 1960
L. 1903, c. 1, sec. 168 ....	F.O. 18, 1960	L. 1944, c. 114 ....	F.O. 28, 1960
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L. 1903, c. 202 ....	F.O. 18, 1960	L. 1944, c. 255 ....	P. 7, 1960
L. 1903, c. 208, 2, 3(4) ....	F.O. 3, 1962	L. 1945, c. 22, sec. 19 ....	F.O. 17, 1960
L. 1918, c. 236, secs. 202, 203 ....	F.O. 3, 1962	L. 1945, c. 132, sec. 11 ....	F.O. 22, 1960
L. 1907, c. 252 ....	F.O. 21, 1960	L. 1945, c. 137 ....	F.O. 16, 1960
L. 1913, c. 74 ....	P. 30, 1961	L. 1945, c. 162, secs. 13, 27 ....	F.O. 25, 1960
L. 1914, c. 36, sec. 4 ....	P. 7, 1960	L. 1945, c. 290 ....	F.O. 1, 1961
L. 1914, c. 228 ....	F.O. 18, 1960	L. 1946, c. 155 ....	F.O. 15, 1961
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L. 1916, c. 98 ....	F.O. 18, 1960	L. 1948, c. 92 ....	P. 23, 1961
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L. 1950, c. 60	P. 11, 1960	L. 1959, c. 3	F.O. 16, 1960
L. 1950, c. 142, sec. 2	P. 18, 1961	L. 1959, c. 17	F.O. 28, 1960
L. 1950, c. 191	F.O. 31, 1961	L. 1959, c. 90	P. 16, 1960
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L. 1951, c. 4	F.O. 15, 1960		P. 26, 1961
L. 1951, c. 184, sec. 2	F.O. 3, 1962	L. 1959, c. 145	P. 23, 1961
L. 1952, c. 173, sects. 3,		L. 1960, c. 39	F.O. 10, 1961
30	F.O. 18, 1961	L. 1960, c. 44, sec. 6	P. 6, 1961
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L. 1953, c. 14, sec. 2	P. 12, 1960	L. 1960, c. 66	F.O. 22, 1961
L. 1953, c. 174	F.O. 10, 1960	L. 1960, c. 123	F.O. 28, 1961
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L. 1953, c. 438	F.O. 4, 1961	L. 1960, c. 124	F.O. 28, 1961
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L. 1954, c. 48	F.O. 21, 1961	L. 1961, c. 3	P. 8, 1961
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P. L. 1954, c. 236	F.O. 1, 1960		F.O. 34, 1961
L. 1955, c. 1	P. 12, 1961		F.O. 3, 1962
L. 1955, c. 198	P. 18, 1961	L. 1961, c. 32	F.O. 1, 1962
L. 1956, c. 22, sec. 2	P. 12, 1961	L. 1961, c. 39	F.O. 17, 1961
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secs. 18(8), 27	P. 4, 1961	L. 1961, c. 45	F.O. 1, 1963
L. 1956, c. 108	F.O. 9, 1960	L. 1961, c. 46	F.O. 1, 1963
L. 1956, c. 145, sec. 10	P. 26, 1961	L. 1961, c. 56	F.O. 6, 1963
L. 1957, c. 161	P. 18, 1961	L. 1962, c. 20	F.O. 3, 1962
L. 1958, c. 63, sec. 6	F.O. 25, 1960	L. 1962, c. 70	F.O. 1, 1962
L. 1958, c. 99, sec. 1	P. 12, 1961	L. 1962, c. 87	F.O. 3, 1962
L. 1958, c. 143	P. 14, 1961	L. 1962, c. 154	F.O. 3, 1962
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#### CONSTITUTION OF 1947

<i>Article</i>		<i>Article</i>	
II, par. 3	F.O. 34, 1961	VII, sec. II, par. 2	P. 29, 1961
II, par. 4	F.O. 19, 1960	VII, sec. III, par. 2	F.O. 3, 1961
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IV, sec. III, par. 1	F.O. 3, 1961		F.O. 34, 1961
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IV, sec. IV, par. 6	F.O. 3, 1961	VIII, sec. II, par. 3	F.O. 21, 1961
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V, sec. J, pars. 14-15	F.O. 3, 1961		

#### CONSTITUTION OF 1844

##### *Article*

II, par. 1	F.O. 19, 1960
	F.O. 7, 1961

#### ADMINISTRATIVE RULES AND REGULATIONS

Civil Defense	Corp. Tax, 16:10-2,110,
Auxiliary Police dated Sept. 23, 1954	4.200, 5.120, 3.125,
Auxiliary Police dated Oct. 10, 1957	4.270, 3.300, 4.320
	F.O. 2, 1960
	F.O. 4, 1961
Civil Service, Rule 45 (2)	F.O. 6, 1963
Civil Service, Rule 59 (c)	P. 17, 1961

JANUARY 25, 1960

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

FORMAL OPINION 1960—No. 1

DEAR COMMISSIONER:

We have been asked whether pursuant to the Power Vessel Act, Laws of 1954, c. 236, N.J.S.A. 12:7-34.1, power vessels operating on the Delaware River above tidewaters and on Greenwood Lake, a nontidal body in New York and New Jersey, should be registered and whether the operators of such vessels must be licensed. The Power Vessel Act provides in part:

"No person, company, or corporation shall operate any power vessel or motor on any of the waters of this State, other than tidal waters, unless such power vessel or motor shall have been first registered with the department, and such registration remains in force and the operator thereof shall have been duly licensed to operate a power vessel." (N.J.S.A. 12:7-34.4.)

"With each such registration there shall be delivered to the person, company or corporation registering the power vessel or motor a set of registration plates which shall be displayed on the bow of the power vessel. It shall be the duty of the person, company or corporation registering or operating a power vessel to have such vessel at all times when it is being operated, properly equipped with the required life preservers, fire extinguishers and lights pursuant to the rules and regulations prescribed by the department and operated only by a licensed operator, having in his possession an operator's license card issued by the department under the provisions of this act." (N.J.S.A. 12:7-34.5.)

Inasmuch as Congress may regulate vessels on navigable waters of the United States pursuant to Article I, section 8, clause 3 of the United States Constitution, the Commerce Clause, the effect of certain pertinent federal statutes on the Power Vessel Act must be considered. The Act of June 7, 1918, 40 Stat. 602, as amended, 46 U.S.C. § 288 (1952), provides in part:

"Every *undocumented vessel*, operated in whole or in part by machinery, owned in the United States and found on the navigable waters thereof, except public vessels, and vessels not exceeding sixteen feet in length measured from end to end over the deck excluding sheer, temporarily equipped with detachable motors, shall be numbered. Such numbers shall be not less in size than three inches and painted or attached to each bow of the vessel in such manner and color as to be distinctly visible and legible.

"The said numbers, on application of the owner or master, shall be awarded by the Coast Guard official of the district in which the vessel is owned and a record thereof kept in the district in which the owner or man-

aging owner resides. *No numbers not so awarded shall be carried on the bows of such vessel.*" (Emphasis added.)

The foregoing section is repealed as of April 1, 1960 by the Federal Boating Act of 1958, better known as the Bonner Act, 72 Stat. 1754, 46 U.S.C.A. § 527 et seq. (1958). The Bonner Act, with reference to navigable waters of the United States, authorizes the Secretary of the Department in which the Coast Guard is operated to establish "an overall numbering system" for *undocumented* vessels propelled by machinery of more than 10 horsepower and permits him to approve any state system for the numbering of vessels meeting standards set forth in the act. 46 U.S.C.A. § 527a (1958). The numbering system under the Power Vessel Act has not been so approved. It further provides that the owner of any undocumented vessel required to be numbered who keeps his vessel principally in a state not having an approved numbering system, must after April 1, 1960 carry a federal number issued by the Secretary. In language similar to that of 46 U.S.C. § 288 (1952) it is announced that no number not awarded pursuant to the act "... shall be carried on the bow of such vessel." 46 U.S.C.A. 527(f).

In view of the potential conflict between these federal statutes and the Power Vessel Act we must ascertain whether the two waterways are navigable waters of the United States. Waters, whether or not tidal, which in their ordinary condition or with reasonable improvements by themselves, or by uniting with other waters, form a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary mode in which such commerce is conducted by water are navigable waters of the United States. See *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940). The Delaware River, being traversable for commerce between New Jersey and Pennsylvania, is a navigable waterway of the United States in its entire length within this state. A similar conclusion must be reached for Greenwood Lake, it being of sufficient size for commerce by marine vessels between New York and New Jersey. These results accord with those heretofore reached by the United States Coast Guard.

A vessel is documented when issued a marine document by the Bureau of Customs. Title 46 of the United States Code provides three forms of documentation: (1) registration, see 46 U.S.C. § 11 (1952); (2) enrollment, see 46 U.S.C. § 252 (1952); and (3) licensing, see 46 U.S.C. § 263 (1952). Though it is unnecessary to set forth the prerequisites to documentation, it should be noted that Greenwood Lake and the nontidal waters of the Delaware River are used almost exclusively by undocumented vessels. Complete application of the Power Vessel Act on Greenwood Lake or the nontidal portion of the Delaware River would require a complying owner of a vessel governed by 46 U.S.C. § 288 (1952) or the Bonner Act to violate federal law by placing numbers not awarded by the Coast Guard on the bow of his vessel. Therefore, to the limited extent that the Power Vessel Act requires state numbers to be carried on the bows of vessels on navigable waters of the United States including Greenwood Lake and the Delaware River, it is unconstitutional as violative of the Supremacy Clause of the Federal Constitution and is superseded. Cf. *United Automobile Workers v. Wisconsin Employment Relations Bd.*, 351 U.S. 266, 271 (1956); *Local 24 v. Oliver*, 358 U.S. 283 (1959). The federal statutes, however, are not inconsistent with the provisions that the vessels on these waters be registered and their operators licensed. And the state police power extends to the regulation of persons and vessels on navigable waters of the United States. 56 *Am. Jur., Waters* § 197 (1947); see *The Vessel M/V "Tungus" v. Skovgaard*, 358 U.S. 588 (1959);

*Silas Mason Co. v. Tax Comm'n*, 302 U.S. 186 (1937); *Hamburg Am. S.S. Co. v. Grube*, 196 U.S. 407 (1905); *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855). Thus since there are no further constitutional infirmities in N.J.S.A. 12:7-34.4 and 34.5 it must be resolved whether the Legislature would have intended that the Power Vessel Act otherwise continue in effect to require registration of vessels even if the vessels could not display the issued plates. Registration without the carrying of plates would be useful for several reasons. Firstly, in cases of theft or disputed ownership a claimant could produce his plates or otherwise prove registration. Secondly, fees collected for registration are available for the use of the State without regard for the carrying of the plates. N.J.S.A. 12:7-34.10. Thirdly, registration provides an opportunity for the Department of Conservation and Economic Development to examine the registered vessel in order to determine whether the vessel complies with the equipment requirements in the regulations to the act. We therefore conclude that the Power Vessel Act is severable to the end that the unconstitutionality traceable to the federal pre-emption does not interfere with the registration of vessels on navigable waters of the United States. And, of course, operators must be licensed on navigable waters of the United States. But when vessels kept on Greenwood Lake or the Delaware River are registered, plates should be issued because they must be attached should the vessel be transported to a landlocked lake entirely within New Jersey or the nonnavigable portion of a river in New Jersey.

One further problem remains. By *Formal Opinion* No. 22, 1956, this office held that the boundary between Pennsylvania and New Jersey along the nontidal portions of the Delaware is the middle of the river. But by the Compact of 1783, Pennsylvania and New Jersey agreed that each State would "enjoy and exercise a concurrent jurisdiction within and upon the water . . . between the shores of said river." N.J.S.A. 52:28-25. Accordingly there is no doubt but that the Legislature could have authorized enforcement of the Power Vessel Act, so far as not pre-empted, on the entire nontidal portion of the Delaware. Such a construction must be adopted. The phrase "waters of this State" in the Power Vessel Act is used in a jurisdictional rather than proprietary sense for the State as sovereign does not own the nontidal waters of New Jersey or the soil beneath them. See *Baker v. Normanoch Ass'n*, 25 N.J. 407 (1957); *Formal Opinion* No. 22, 1956. And although the boundary between New Jersey and Pennsylvania above tidewaters is the middle of the river, jurisdictionally the power of the State to control the operation of vessels is of equal scope on either side. Further as was held in *Attorney-General v. Delaware and Bound Brook R.R. Co.*, 27 N.J. Eq. 631 (E. & A. 1876) and *Board of Health v. Phillipsburg*, 83 N.J. Eq. 402, 416 (Ch. 1914), *aff'd*, 85 N.J. Eq. 161 (E. & A. 1915) the object of the compact was "to secure the administration of justice and the use of the river as a public highway." The Power Vessel Act is directed at the latter object. Thus within that act the entire nontidal portion of the Delaware River between Pennsylvania and New Jersey is a "water of this state." While under N.J.S.A. 52:28-25 jurisdiction over the river is concurrent and not exclusive, it does not follow that consent of Pennsylvania is a prerequisite to enforcement of the Power Vessel Act on the Delaware. In *Commonwealth ex rel. Reed v. The Sheriff*, 13 Phila. 446 (Ct. Quar. Sess.) it was held that Pennsylvania could require licenses for pilots on the Delaware River though New Jersey had not consented to or participated in the administrative action. The court declared:

"After examining all the legislation, it is clear that, as between the States of Pennsylvania and New Jersey, concurrent jurisdiction exists, and as the relator was first arrested by the Pennsylvania authorities, under a Pennsylvania warrant, expressly authorized by the statute, we have jurisdiction; . . ."

Prosecutions for violation of the registration, licensing or other provisions of the Power Vessel Act on the Delaware River may be brought in a county or district court. N.J.S.A. 52:28-33 provides:

"The judicial investigation and determination of any capital or other offense, trespass or damage committed within and upon the water of the river Delaware, which this State is entitled to enjoy and exercise, by virtue of sections 52:28-23 to 52:28-28 of this Title, shall belong to and be exercised by the Superior Court or the courts and officers in the county lying and being nearest to the place where such offense, trespass or act was committed, as fully as if said place was within the body of such county, and it shall be lawful to describe said offense, trespass or act as having been committed in or upon the water of the river Delaware in the said county."

All violations of the Power Vessel Act are offenses within this section. By N.J.S.A. 12:7-34.28 the Legislature announced that violators of provisions of the Power Vessel Act not governed by a specific penalty section are disorderly persons. The only specific penalties are imposed for operation under the influence of narcotics or intoxicating liquors, N.J.S.A. 12:7-34.19, and these penalties are far more severe than those which may be awarded pursuant to N.J.S.A. 12:7-34.28 for other violations. Disorderly conduct has always been deemed an offense, *State v. Labato*, 7 N.J. 137 (1951); *Sauran v. Lemon*, 19 N.J. 606 (1955); *Cannon v. Krakowitch*, 54 N.J. Super. 93 (App. Div. 1959) and the severity of punishment afforded by N.J.S.A. 12:7-34.19 requires that violations of it be placed in the same category. Prosecution for such violations, however, should not be brought in the Marine Navigation Court because N.J.S.A. 52:28-33, in vesting the county, district and Superior courts with jurisdiction over Delaware River offenses, impliedly has excluded the navigation and municipal courts from such cases. See 2 *Sutherland, Statutory Construction* § 4915 (3d ed. 1943).

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: MORTON I. GREENBERG  
*Deputy Attorney General*

FEBRUARY 10, 1960

HONORABLE JOHN A. KERVICK  
*State Treasurer*  
State House  
Trenton, New Jersey

FORMAL OPINION 1960—No. 2

DEAR MR. KERVICK:

You have asked for our legal opinion as to whether the gain realized by corporations subject to the New Jersey Corporation Business Tax Act, N.J.S.A. 54:10A-1 et seq., is taxable to such corporations in either of the following two situations; i.e., first, where a parent corporation liquidates its wholly owned subsidiary and receives the latter's net assets having a present fair market value in excess of the tax basis of the parent's investment in the subsidiary, and pursuant to Internal Revenue Code of 1954, § 332, no gain is recognized for Federal Income Tax purposes; and secondly, where one corporation conveys all of its net assets to a second corporation, or to the latter's subsidiary, solely in consideration for the capital stock of the transferee which has a fair market value in excess of the tax basis of the transferor's net assets, and pursuant to Internal Revenue Code of 1954, § 368(a)(1)(c), no gain is recognized for Federal Income Tax purposes.

Section 5 of the Corporation Business Tax Act imposes a "franchise tax to be annually assessed to and paid by each taxpayer" upon, *inter alia* "1¾% of its entire net income or such portion thereof as may be allocable to this State as provided in Section 6." Therefore, whether the described transactions give rise to income which is taxable under that Act depends on whether the parent corporation in the first situation and the transferor of the assets in the second realize "entire net income" within the meaning of N.J.S.A. 54:10A-4(k).

The statutory definition of "entire net income" reads as follows:

"'Entire net income' shall mean total net income from all sources, whether within or without the United States, and shall include the gain derived from the employment of capital or labor, or from both combined, as well as profit gained through a sale or conversion of capital assets. For the purpose of this act, the amount of a taxpayer's entire net income shall be deemed prima facie to be equal in amount to the taxable income, before net operating loss deduction and special deductions, which the taxpayer is required to report to the U. S. Treasury Department for the purpose of computing its Federal income tax; provided, however, that in the determination of such entire net income. . ."

This definition employs the same language used by the courts to describe income which is subject to taxation under the 16th Amendment to the Constitution of the United States. See *Eisner v. Macomber*, 252 U.S. 189 (1920). Although this constitutional definition lies at the basis of the Federal income tax law, the implementation of the 16th Amendment in a workable tax system has required an enormously more elaborate specification of what constitutes taxable income.

New Jersey's Corporation Business Tax Act does not include the detailed specification of what constitutes "entire net income." Refinements of this definition are

left to administrative regulation (N.J.S.A. 54:10A-27) and the Internal Revenue Code. The New Jersey statute incorporates by reference various provisions and concepts of the Internal Revenue Code. For example, a taxpayer's fiscal reporting period is required to be the same for New Jersey purposes as for Federal. N.J.S.A. 54:10A-4(i). Receipts, for purposes of the allocation factor (N.J.S.A. 54:10A-5(c)) must be based on the same accounting method, cash or accrual, as used for the Federal tax. N.J.S.A. 54:10A-6(B). Adjustments of income made by Federal authorities must be reported to the New Jersey Corporation Tax Bureau within 90 days thereafter; and amended Federal returns must be reported to New Jersey within the same period. N.J.S.A. 54:10A-13. The Director of the New Jersey Division of Taxation, may require any taxpayer to submit copies or pertinent extracts of its Federal income tax returns to the New Jersey Bureau. N.J.S.A. 54:10A-14.

The regulations issued by the New Jersey Corporation Business Tax Bureau pursuant to Section 27 of the New Jersey Corporation Business Tax Act recognize the dependence of our statute on Federal law to supply necessary definitions and concepts. For example, accounting periods are to be those used for Federal income tax purposes. Regulation 16:10-2.110. The method of accounting is to be the same as the Federal. Regulation 16:10-3.125. "Federal taxable income" is to be adjusted where the franchise tax period of liabilities differs from the Federal reporting period. Regulation 16:10-3.300. The New Jersey receipts and payroll allocation factors follow the reporting basis used for the Federal tax. Regulations 16:10-4.200 and 16:10-4.270. Generally, the assets allocation factor adopts the basis of assets used for Federal tax purposes; the limiting word, "generally," refers to the New Jersey rule of restoring book values for fully depreciated assets which are still in use. Regulation 16:10-4.320. Changes in tax accounting years will not be permitted by New Jersey unless first authorized by the Commissioner of Internal Revenue. Regulation 16:10-5.120.

It is in this context that we must construe the operative definition of "entire net income" in the New Jersey statute; i.e., ". . . the amount of a taxpayer's entire net income shall be deemed *prima facie* to be equal in amount to the taxable income before net operating loss deductions and special deductions which the taxpayer is required to report to the U. S. Treasury Department for the purpose of computing its Federal income tax; providing . . ." It has been suggested that the use of the term "prima facie" in this definition connotes a presumptive identity between the concepts of Federal taxable income and New Jersey entire net income and that this presumption of identity can be rebutted under some unspecified circumstances. However, the Corporation Tax Bureau, which is responsible for administering the New Jersey statute, has rejected this interpretation. Its Regulation 16:10-3.300 states:

"Taxable income before net operating loss deduction and special deductions', hereinafter referred to as Federal taxable income, is the starting point in the computation of entire net income. After determining such Federal taxable income it must be adjusted as follows:

"a. Add to Federal taxable income: [various statutory adjustments];

"b. Deduct from Federal taxable income: [various statutory adjustments]."

The regulation does not appear to contemplate any departures from Federal taxable income other than those expressly prescribed in the statute. It is our opinion that, as suggested by the quoted regulation, the definition of "entire net income" is always equivalent to Federal "taxable income" and that the presumption, which the use of the term "prima facie" implies is subject to being rebutted, is a presumption as to the correctness of the *amount* of taxable income reported by the taxpayer or determined by the Internal Revenue Service rather than the *concept* of "taxable income." First of all, the intent that the New Jersey tax should be keyed to Federal taxable income is evident from the repeated references in the New Jersey statute and regulations to Federal concepts and definitions. Secondly, the provisions of the New Jersey statute for the imposition of a franchise tax measured by corporate income contain only a cursory definition of income; if a far more detailed definition were not provided by incorporation of the pertinent provisions of the Federal Internal Revenue Code, it is questionable whether the New Jersey statute would contain a sufficiently detailed standard to provide constitutionally adequate guidance for the administration of the act. Thirdly, it is to be presumed that the Legislature adopted a statute whose enforcement and application is administratively feasible; if the New Jersey statute authorized departure from the Federal concepts of taxable income in cases of corporate reorganizations and mergers, extremely difficult administrative problems of valuation and auditing would be created.

The conclusion that the statute does not authorize a departure from the Federal concept of "taxable income" in cases of corporate reorganizations and mergers carried out in compliance with the non-recognition provisions of the Internal Revenue Code is confirmed by consideration of the construction given to the similar New York statute. *McKinney's Consolidated Laws of New York*, Taxation, Section 208, subsection 9, defines "entire net income" as "total net income from all sources, which shall be presumably the same as the entire taxable income which the taxpayer is required to report to the United States treasury department, or which the taxpayer would have been required to report, if it had not made an election under subchapter s of chapter one of the Internal Revenue Code, except as hereinafter provided." The similarity between the New York and New Jersey definitions of entire net income as well as like similarities between other sections of the two statutes makes it apparent that the form of the New Jersey statute was borrowed in part from that of New York. The New York cases have consistently held that "entire net income" for New York purposes will always be identical in concept with Federal "taxable income" except insofar as the New York statute has specifically prescribed otherwise. The word "presumably" in the quoted definition of New York entire net income is interpreted to permit a departure from reported Federal taxable income in amount, but not in definition. *People ex rel. Conway Co. v. Lynch*, 258 N.Y. 245, 179 N.E. 483 (N.Y. Ct. of App. 1932); *People v. Law*, 237 N.Y. 142, 142 N.E. 446 (N.Y. Ct. of App. 1923); *People ex rel. Barcalo Mfg. Co. v. Knapp*, 227 N.Y. 64, 124 N.E. 107 (N.Y. Ct. of App. 1919). The New York Department of Taxation and Finance, basing itself on these and similar cases, has issued an administrative ruling holding that where gains or losses are not recognized for Federal income tax purposes because of the non-recognition provisions of the Federal Code, such gains or losses will not be included in computing New York entire net income.

We conclude, therefore, that the corporate transactions which prompted your request for an opinion do not give rise to "net income" within the meaning of the

New Jersey Corporation Business Tax Act if they fall within the non-recognition provisions of the Internal Revenue Code.

Very truly yours,

DAVID D. FURMAN  
Attorney General of New Jersey

By: MURRY BROCHIN  
Deputy Attorney General

FEBRUARY 29, 1960

FREDERICK M. RAUBINGER, Commissioner  
Department of Education  
175 West State Street  
Trenton, New Jersey

FORMAL OPINION 1960—No. 3

DEAR DR. RAUBINGER:

You have asked for our legal opinion on two related questions: First, whether a candidate who has received the greatest number of votes in an election for member of the board of education of a local school district organized under Chapter 7 of Title 18 of the Revised Statutes is qualified to serve in that position although he will not have been a resident of the territory contained in the district for at least three years prior to the date upon which newly elected members are scheduled to take office; and, secondly, if not, then how the office for which he was a candidate should be filled.

The qualifications for members of the board of education of a local school district organized under Chapter 7 of Title 18 of the Revised Statutes are set forth in R.S. 18:7-11 as follows:

"A member of a board shall be a citizen and resident of the territory contained in the district, and shall have been such for at least three years immediately preceding his becoming a member of the board. He shall be able to read and write. He shall not be interested directly or indirectly in any contract with or claim against the board."

The mandatory character of the quoted residence requirements are emphasized by R.S. 18:7-12 which states:

"A member of a board shall, before entering upon the duties of his office, take and subscribe an oath, before an officer authorized to administer oaths, that he possesses the qualifications prescribed in section 18:7-11 of this Title, and the oath prescribed by section 41:1-3 of the Revised Statutes. The oaths shall be filed with the secretary."

A person who does not have the qualifications set forth in R.S. 18:7-11 cannot take the necessary oath and is therefore disqualified from "entering upon the duties of his office." Cf. *Waldor v. Untermann*, 7 N.J. Super. 605 (Law Div. 1950) aff'd 10 N.J. Super. 188 (App. Div. 1950).

In order to be elected as a member of a local board of education, a candidate for that office must have received "a plurality of the votes cast. . ." R.S. 18:7-41.

Unless the votes cast for the candidate who received the highest number of votes can be disregarded because he is disqualified, no candidate can be considered to have received the necessary plurality. The general rule, supported by the great majority of the decisions throughout the United States, is: "that votes cast for a deceased, disqualified or ineligible person although ineffective to elect such person to office, are not to be treated as void or thrown away, but are to be counted in determining the result of the election as regards the other candidates." *Annotation*, "Result of election as affected by votes cast for deceased or disqualified person," 133 A.L.R. 319, 320 (1941). The same *Annotation* further states, "The cases have usually made no distinction on the basis of the nature of the disqualification, in applying the general rule—that votes cast for a deceased, disqualified, or ineligible person are not to be treated as void or thrown away, but are to be counted in determining the result of the election as regards the other candidates—so as to prevent the election of the person receiving the next highest number of votes, where the person receiving the highest number was disqualified." *Id.* at pp. 333-334.

This rule was adopted in New Jersey in *Chandler v. Wartman*, 6 N.J.L.J. 301 (Camden Cir. Ct. 1883) (not officially reported), a case involving a contested election for the office of chosen freeholder in the City of Camden. The petitioner in that case, Chandler, had received 379 votes; his opponent, Wartman, 418. The petitioner contended that Chandler did not have the necessary qualifications for office because he was not at the time of the election a "citizen of the United States, resident in the State of New Jersey and had not been resident in New Jersey one year immediately preceding the election." The petitioner argued that since he was the only qualified candidate who had received votes at the election, he was entitled to the office. The Court rejected petitioner's contention in the following terms *Id.* at pp. 302-303):

"\* \* \* Chandler received a minority of the votes cast for the office, and a minority candidate is not elected, whether his opponent be eligible or not. This is the general rule established by numerous decisions. The Supreme Court of Wisconsin, in several cases, has held that where the candidate who receives a majority of the votes cast for an office is proved not to be eligible, the candidate who received the next highest vote is not elected. *State v. Smith*, 14 Wis. 497. *State v. Giles*, 1 Chandler (Wis.) 112.

"The New York Court of Appeals, in *People v. Clute*, 50 New York (5 Sickles) p. 451, affirms this doctrine. Judge Folger, in delivering the opinion of the court, said: 'It is the theory and general practice of our government that the candidate who has but a minority of the legal votes cast does not become a duly elected officer.' In Missouri the same doctrine prevails. In one case in that State the Court remarked as follows: 'To declare a candidate for an elective office elected who has received but few votes, on the ground that his competitor, who received perhaps twice as many, was disqualified, would not accomplish the will of the electors, the object of an election being to ascertain the will of the majority. In *Commonwealth v. Charley*, 56 Pa. 270, the candidate who received the most votes for sheriff was disqualified, and the court held that the next highest candidate was not elected. The Judge, in delivering the opinion, said, 'The votes cast at an election for a person who is disqualified from holding an office are not nullities. They cannot be rejected by the inspector or thrown out of the account by the return Judges. The disqualified person is a person still, and every vote thrown for him is formal.'" (Emphasis added.)

The rule stated in the *Annotation* and exemplified by *Chandler v. Wartman, supra*, was recently approved by our Appellate Division in the case of *McCarthy v. Reichenstein*, 50 N.J. Super. 501 (1958). Plaintiff in the latter case had been a candidate for the office of councilman in the West Ward of the City of Newark. There had been seven candidates for that office, none of whom had received a majority. Plaintiff had received the third highest number of votes. The applicable statute (N.J.S.A. 40:69A-161), provides that if none of the candidates for councilman in a given ward receives a majority, a run-off election must be held between the two candidates receiving the highest number of votes. During the period between the election and the date set for the run-off, the candidate who had received the second highest number of votes died. Plaintiff contended that he was therefore the qualified candidate for office who had received the second highest number of votes and, consequently, should be permitted to enter the run-off election. But the Court denied plaintiff's contention, basing its decision on the rule previously quoted from the *Annotation* in 133 A.L.R. 319.

The rationale of the majority rule is that under our system of government, no person should be elected to office who has not been chosen by at least a plurality of the qualified electors actually voting. In a case such as that which you have described, the candidate receiving the second highest number of votes has not received such a plurality. There is no way to know for whom the persons who cast their ballots for the disqualified candidate would have voted if they had known he was ineligible for office.

Therefore, under the majority rule which has received the approval of the Courts of this State, the candidate who has received the highest number of votes in the school district election has not been elected because he is not qualified for the office; the other candidates were not elected because none of them received a plurality of the votes cast. Therefore, there has been a failure to elect the requisite number of members of the local board of education.

R.S. 18:4-7 provides:

"A county superintendent of schools may:

\* \* \*

"(d) Appoint members of the board of education for a new township, incorporated town, or borough school district and for any school district under his supervision which shall fail to elect members at the regular time or in case of a vacancy in the membership of the board of education which occurs by reason of the removal of a member for failure to have the qualifications required by section 18:7-11 of the Revised Statutes or as the result of a recount or contested election or which is not filed within sixty-five days of the occurrence of the vacancy. Such appointees shall serve only until the organization meeting of the board of education after the next election in the district for members of the board of education." (Emphasis added.)

The county superintendent should therefore appoint a qualified person to membership in the board of education.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: MURRY BROCHIN  
Deputy Attorney General

February 29, 1960.

HON. FLOYD R. HOFFMAN, Director  
Office of Milk Industry  
P. O. Box 1424  
Trenton, New Jersey

FORMAL OPINION 1960—No. 4

DEAR DIRECTOR:

You have asked whether you have power under the Milk Control Act to require machines vending milk to be licensed as stores and whether you have authority to fix minimum prices chargeable to purchasers from vending machines at levels different than those fixed for purchasers from conventional stores. You do have power to require ordinary vending machines to be licensed as stores. You have authority to fix prices chargeable out of vending machines at different levels than prices chargeable in conventional stores on condition that statutory standards are shown to be satisfied by evidence at a hearing justifying the difference in treatment.

Section 28 of the Milk Control Act now in effect, L. 1941, c. 274, N.J.S.A. 4:12A-28, provides that "no \* \* \* store, as defined in this act shall \* \* \* engage in the milk business within this State, unless duly licensed as in this act provided \* \* \*." Section 1 of the present act, N.J.S.A. 4:12A-1, defines the term "store" as follows:

"A grocery store, delicatessen, food market, hospital, institution, hotel, restaurant, soda fountain, dairy products store, any governmental agency, roadside stand and similar mercantile establishments."

To determine whether a vending machine was intended to be included within the statutory definition of "store" it is necessary to examine the purpose and history of the legislation. The original Milk Control Act, L. 1933, c. 169, granted the Milk Control Board the power to fix prices "to be paid to the producer and to be charged the consumer." Although the Board was thus given power to fix prices at every stage of the distribution process, licenses were required only of dealers. *Id.*, Art. V, § 1(a).

The 1933 act did not satisfy all the needs for milk control. It expired of its own force in 1935 and was succeeded by a more comprehensive act, L. 1935, c. 175. The preamble to the 1935 act stated that "demoralizing practices" (i.e., price cutting) threatened not only the production of milk but also its distribution, creating conditions inimical both to the agricultural interests of the State and to the consumers. In order more effectively to prevent destructive price cutting the 1935 act extended the licensing requirement to stores. *Id.* § 500. The act defined the term "store" as follows:

"A grocery store, delicatessen, hospital, institution, hotel, restaurant, soda fountain, dairy products store, roadside stand and similar mercantile establishments." *Id.* § 112.

The inclusion in the definition of the word "store" in the 1935 act of all the then known means of carry-away sales to the consumer plus a more general definition to include all "similar mercantile establishments," indicates a recognition that price cutting is just as harmful, regardless of the form of the outlet. You have recognized this potential for many years by prescribing in price-fixing orders the minimum price at which milk may be sold out of vending machines.

Because advancements in technology have introduced a new method of making carry-away sales to the consumer that was unknown at the time of the adoption of the 1935 act must not be allowed to frustrate the purpose of the law to require licenses of all means of carry-away sales to the consumer.

In every aspect that is important to the requirement of licenses, the usual roadside vending machine is identical with a "dairy products store" and a "roadside stand." Certainly vending machines are mercantile establishments similar to the more particularly enumerated stores. For all of these reasons it is our opinion that the usual roadside machine vending to consumers who carry the milk away must be licensed under the Milk Control Act. Section 36 of the present act, L. 1941, c. 274, N.J.S.A. 4:12A-36, provides further, however, "that a store selling milk exclusively for consumption on the premises shall not be required to obtain a license \* \* \*." Milk vending machines in factories and office buildings which are patronized by occupants of the building who drink the milk in the building, and outdoor machines which may be similarly patronized by people who drink the milk in the immediate area, may come within this exception. Whether or not the milk is consumed "on the premises" presents a question of fact in each case. You have power under section 21 of the Milk Control Act, N.J.S.A. 4:12A-21, to adopt regulations to establish prima facie tests of what is or is not on premises consumption. For example, you might by regulation provide that milk vended in quart containers is prima facie for off-premises consumption.

You also ask whether the prices fixed for vending machine sales may be different from those fixed for sales out of conventional stores. Section 21 of the Milk Control Act grants a number of general powers, including the power to "fix the price at which milk is to be sold or distributed \* \* \*." N.J.S.A. 4:12A-21. The grant of power in this section is given meaning by the purposes therein listed, to prevent destructive or demoralizing practices which would interfere with the interests of producers and consumers. Section 22 of the Milk Control Act more specifically grants you the power to fix "minimum prices to be charged the consumer \* \* \*." N.J.S.A. 4:12A-22. In exercising this power, this section provides that you are to take into consideration what will best insure a sufficient quantity of fresh, pure and wholesome milk to the inhabitants of this State, including the cost of transportation and marketing, and the amount necessary to yield a reasonable return to the dealer or subdealer who supplies stores. Prices may be fixed only after investigation and proof, N.J.S.A. 4:12A-22, *Abbotts Dairies, Inc. v. Armstrong*, 14 N.J. 319 (1954), and after an advertised public hearing and a finding of fact by you, N.J.S.A. 4:12A-23. Whether or not the prices fixed for sales out of vending machines may be different from that fixed for sales out of conventional stores depends upon whether an application of these statutes would warrant a finding of fact by you that the purposes of the Milk Control Act will be served by such a distinction.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: WILLIAM L. BOYAN  
*Deputy Attorney General*

March 17, 1960.

HON. EDWARD J. PATTEN  
*Secretary of State*  
State House  
Trenton, New Jersey

FORMAL OPINION 1960—No. 5

DEAR MR. PATTEN:

You have asked us whether it was lawful for you to reject a petition for electors of president and vice-president to represent a party whose candidates for president and vice-president are both inhabitants of the same state as the electors, New Jersey. In our opinion, your rejection of this petition was lawful and was required by the United States Constitution and the applicable laws of this state.

The petition in question was offered for filing in attempted compliance with R.S. 19:13-3 to 13. These statutes provide for the direct nomination by petition for candidates to be voted on at the general election. R.S. 19:13-4 provides that in the case of a petition nominating electors of president and vice-president of the United States, the names of the candidates for president and vice-president for whom such electors are to vote may be included in the petition. The petition in question does designate the names of the candidates for president and vice-president for whom the electors named in the petition are to vote. The petition reads in part as follows:

"PETITION OF NOMINATION FOR GENERAL ELECTION  
NOVEMBER 8, 1960  
FOR ELECTORS OF PRESIDENT AND VICE-PRESIDENT

\* \* \*

To the Honorable Secretary of State:

We, the undersigned, hereby certify that we reside in the State of New Jersey, and are legally qualified to vote for such candidates, and pledge ourselves to support and vote for the persons named in such petition, and that we have not signed any other petition of nomination for the primary or for the general election for such office. And we request that you cause to be printed upon the official general election ballot the names of the candidates and their designation of party or party principle.

We further certify the title of the party which the said Electors represent is the Poor Mans Party, and the candidates of the said party for whom the Electors are to vote are Henry Krajewski for President, and Anne Marie Yezo for Vice-President.

R.S. 19:13-7 provides that any petition for direct nomination for the general election to be received for filing must bear a verification by at least five of the voters signing the petition. The petition bears a verification with signatures as follows:

"STATE OF NEW JERSEY, }  
COUNTY OF HUDSON } ss.

Stephen Tichy, 8623 Durham Ave.  
Charles W. Krajewski, Sr., 176 Charles St., Secaucus, N. J.  
Anne Marie Yezo, 8617 Durham Ave., North Bergen, N. J.

Henry Krajewski, 201 Secaucus Rd., Secaucus, N. J.  
 Stephanie Krajewski, 201 Secaucus Rd., Secaucus, N. J.  
 Charles Sehoch, 235 Pen Horn Ave., Secaucus  
 Anne Tichy, 8623 Durham Ave., No. Bergen

being duly sworn, upon their oaths saith that they are the signers of the petition hereto annexed, and are legal voters of the State of New Jersey; that the said petition is made in good faith; that the affiants saw all the signatures made thereto, and verily believe that the signers are duly qualified voters."

The third and fourth of the above verifying signatures are those of the candidates for whom the electors are to vote for vice-president and president, respectively. The verification shows that both candidates are inhabitants of the State of New Jersey.

The first clause of the 12th Amendment to the Constitution of the United States provides that:

"The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; \* \* \*"

Thus, an elector from New Jersey may not cast his ballot for a candidate for president and a candidate for vice-president both of whom are inhabitants of New Jersey. This has always been a requirement of the federal constitution. See Article II, section 1, clause 3. Therefore, the electors nominated in the petition in question cannot lawfully vote for the candidates for whom they are required to vote according to the petition since both candidates are inhabitants of New Jersey.

L. 1944, c. 16, § 1, N.J.S.A. 19:14-8.1, provides that in lieu of the names of candidates for electors there shall be printed on the ballots the names of the candidates for president and vice-president printed together under the title "Presidential Electors For." For voters to express a preference for electors who are to vote for Henry Krajewski and Anne Marie Yezo, would be ineffectual since the electors cannot carry out the will of such voters. Even if these candidates received the greatest number of votes cast, the electors named in the petition could not cast their ballot for them as president and vice-president.

R.S. 19:13-22 directs that you certify to each county clerk the names only of such candidates "for whom the voters within such county may be by law entitled to vote \* \* \*." R.S. 19:13-10 and 11 authorize you to reject summarily petitions obviously not in conformity with the provisions of the election law.

Accordingly, your rejection of the petition in question was required by the United States Constitution and the applicable law of New Jersey.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: WILLIAM L. BOYAN  
*Deputy Attorney General*

April 5, 1960.

HONORABLE JOHN A. KERVICK  
*State Treasurer*  
 State House  
 Trenton, New Jersey

WILLIAM KINGSLEY, *Deputy Director*  
 Division of Taxation  
 State House Annex  
 Trenton, New Jersey

FORMAL OPINION 1960—No. 6

DEAR SIRS:

You have asked for our opinion as to what assessment valuation of Class II railroad property should be included in the computation of the apportionment of county taxes among the municipalities of each County. The same question arises in promulgating a table of equalized valuations to be used in the calculation and apportionment of State school aid funds under N.J.S.A. 54:1-35.1.

The basic formula for the apportionment of county taxes and for the distribution of school aid funds includes the use of aggregate valuations for each municipality based essentially upon the true value of all real property in the municipality (either assessed initially at true value or "equalized" to true value) plus the aggregate value, as assessed, of all personal property. See: R.S. 54:3-17 to 19; N.J.S.A. 54:1-35.2; N.J.S.A. 54:4-52; *City of Passaic v. Passaic County Board of Taxation*, 31 N.J. 413 (1960); *City of Passaic v. Passaic County Board of Taxation*, 18 N.J. 371 (1959); *Borough of Tolowa v. Passaic County Board of Taxation*, 5 N.J. 454 (1950).

In the most recent *Passaic* case, *supra*, 31 N.J. at 418, Chief Justice Weintraub, speaking for the Court, said:

"Additionally, it is pertinent to add that in directing the preparation of the equalization table for use in the distribution of state aid to schools, a subject kindred to the matter of taxation, *City of Passaic v. Passaic County Board of Taxation, supra*, (18 N.J., at page 385), the Legislature directed the inclusion of both real and personal property, requiring real property to be equalized at true value and personal property to be taken as assessed. L. 1954, c. 86; N.J.S.A. 54:1-35.1 et seq."

Class II railroad property valuations have not heretofore been involved in an "equalization" computation as has usually been the case with other real property under R.S. 54:3-17 and N.J.S.A. 54:1-35.3, since Class II railroad property is required to be assessed by the Director of the Division of Taxation at full value under N.J.S.A. 54:29A-17, and it is assumed that the Director does so to the best of his ability. Therefore, the Director's valuations of Class II railroad property are accepted as representing true value for the purposes of apportioning county taxes and State school aid funds. However, the question now raised arises out of the fact that the Director has reduced initial valuations of Class II railroad property in certain municipalities "to less than true value, when necessary to prevent discrimination" as required by the Supreme Court in *D. L. & W. R.R. Co. v. Neeld*, 23 N.J. 561, 575 (1957). See also: *Borough of Hasbrouck Heights v. Division of Tax Appeals*, 54 N.J. Super. 242 (App. Div. 1959). Where Class II railroad property valuations have been

reduced for these purposes they no longer represent true value. Such reduced valuations therefore, in our opinion, cannot be used for the apportionment purposes aforesaid. Instead, the initial valuations, taken to represent the corrected full true value of Class II railroad property, after review by the Director, should be used.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: THEODORE I. BOTTER  
*Deputy Attorney General*

April 7, 1960.

HONORABLE JOHN A. KERVICK  
*State Treasurer*  
State House  
Trenton, New Jersey

FORMAL OPINION, 1960—No. 7

DEAR MR. KERVICK:

You have asked our opinion whether a former widow of a war veteran who, upon remarriage, loses the exemption from taxation granted her by Art. VIII, Sec. 1, Par. 3 of the New Jersey Constitution and N.J.S.A. 54:4-3.12i et seq. is entitled to have such exemption restored upon the termination of her second marriage by divorce.

A tax exemption is granted to a "widow . . . during her widowhood." Const. Art. VIII, Sec. 1, Par. 3; N.J.S.A. 54:4-3.12j. Neither the statute nor the Constitution defines the phrase "widow . . . during her widowhood." Therefore, in the absence of any indication of a contrary legislative intent, the phrase must be construed to have its usual and generally accepted meaning.

The term "widow" has been defined by judicial decisions as "a woman who has lost her husband by death and is still unmarried." *Block v. P. & G. Realty Co.*, 96 N.J. Eq. 159, 160 (Chan. 1924). This legal definition of the term is in accordance with common usage. See *Montclair Trust Co. v. Reynolds*, 141 N.J. Eq. 276, 279 (Chan. 1948). Therefore, a taxpayer who would otherwise be entitled to a tax exemption as the widow of a war veteran loses her exemption upon remarriage, since she is no longer a widow. N.J.S.A. 54:4-3.12n expressly recognizes that the remarriage of a former widow terminates her widowhood and, therefore, also her tax exemption privilege.

If a former widow of a war veteran has terminated her widowhood by remarriage, her status as a widow is not revived when her second marriage ends in divorce. A divorce terminates a marriage (although not necessarily all the obligations thereof) as of the date of entry of final judgment. *Wigder v. Wigder*, 14 N.J. Misc. 880 (Chan. 1936). A judgment of divorce differs from a judgment of nullity in that the latter holds the marriage void *ab initio*. *Wigder v. Wigder*, *supra*. Cf. N.J.S. 2A:34-1. Consequently, if a former widow has remarried after her husband's death, termination of her second marriage by divorce does not obliterate either the fact of her remarriage as a legal event, or its effect of terminating her widowhood as of the date of remarriage.

We therefore wish to advise you that a former widow of a war veteran who has lost her exemption by remarriage does not regain the privilege of an exemption upon termination of her second marriage by divorce.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: MURRY BROCHTN  
*Deputy Attorney General*

April 11, 1960.

HON. EDWARD J. PATTEN  
*Secretary of State*  
State House  
Trenton, New Jersey

FORMAL OPINION 1960—No. 8

DEAR MR. PATTEN:

You have requested our opinion whether the Secretary of State should accept service of process on foreign corporations doing business in this State, but not authorized to do business here.

Supreme Court Revised Rule 4:4-4, relating to personal service upon corporations, provides that under conditions prescribed therein personal service may be made upon a corporation "by delivering a copy of the summons and complaint to any person authorized by appointment or by law to receive service of process on behalf of the corporation. . . ." (Emphasis added.) It should be noted that R.R. 4:4-4 does not state under what circumstances the Secretary of State is a "person authorized by appointment or by law to receive service of process," but merely provides that if he is such a person, service may be made upon him.

N.J.S. 2A:15-26 prescribes the circumstances under which the Secretary of State is authorized and directed to accept service of process on foreign corporations which are transacting business in New Jersey. That section relates only to "process in any action commenced in any of the courts of this State against a domestic corporation or a foreign corporation authorized to transact business in this State . . ." (Emphasis added.)

Our opinion, therefore, is that you do not have the authority to accept service of process on any foreign corporation which is not authorized to transact business in New Jersey.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: MURRY BROCHTN  
*Deputy Attorney General*

January 25, 1960.

MR. JOSEPH E. CLAYTON  
 Assistant Commissioner of Education  
 Department of Education  
 175 West State Street  
 Trenton, New Jersey

## FORMAL OPINION 1960—No. 9

DEAR MR. CLAYTON:

You have asked for our legal opinion on the following questions:

1. May a board of trustees of a public library established under R.S. 40:54-1 et seq., or a county library commission established under R.S. 40:33-1 et seq., enter into contracts authorized by Chapter 108, P.L. 1956, or must such contracts be made by the governing bodies of the governmental units involved?
2. May such a board of trustees or county library commission make contracts for the free public library services specified in R.S. 40:33-1 et seq., and 40:54-1 et seq., or must such contracts be made by the governing bodies of the county and municipalities, respectively?

The contracts referred to in your request for an opinion are those which counties and municipalities are authorized to enter into for the exchange and reciprocal use of library services and facilities.

R.S. 40:54-29.1 states that "The governing body of any municipality may, by resolution, contract with any other municipality which maintains a free public library, for the furnishing of library service to the inhabitants of the first municipality. . . ." R.S. 40:54-29.2 states that "The governing body of such other municipality may, by resolution, enter into contract as provided in this act. . . ." The contracts referred to in R.S. 40:54-29.1 and R.S. 40:54-29.2 must be made between the governing bodies of the two municipalities.

R.S. 40:33-13.1 and R.S. 40:33-13.2 are similar to R.S. 40:54-29.1 and R.S. 40:54-29.2 except that the former statute refers to "The governing body of any municipality which forms part of a county library system. . . ." and authorizes any such municipal governing body to contract with the "governing body" of any other municipality which maintains a free library system. (Emphasis added.)

R.S. 40:33-6 provides that "Upon the adoption of the provisions of this article the board of chosen freeholders [of the county] may contract with an existing library, or library board, within the county or the library commission of a county library . . . in another county. . . ." Thus a county which desires to use the existing facilities of another library must contract by its board of freeholders; the existing library, which is the other party to the contract, by its "library board," "library commission," etc., and not by the governing body of the governmental unit which operates the existing library.

Chapter 108, P.L. 1956, N.J.S.A. 40:9A-1 to 9A-4, reads in pertinent part as follows:

"The board of chosen freeholders of any county operating a library pursuant to chapter 33 of Title 40 of the Revised Statutes and any one or more municipalities, situate within such county, operating jointly or severally a library or libraries pursuant to chapter 54 of Title 40 of the Revised Statutes or any 2 or more such municipalities, situate within the same county, may contract or agree with each other to establish a federation of their libraries for the purpose of providing such forms of cooperative library service as the contracting parties shall agree upon."

R.S. 40:9A-1 thus provides that the contracts therein referred to shall be made by "board of chosen freeholders of any county" and "any one or more municipalities, situate within such county" or "2 or more such municipalities, situate within the same county." It is evident from the quoted statute that a county library may enter into a contract specified therein only by action of its board of chosen freeholders. However, R.S. 40:9A-1 does not expressly specify whether municipalities desiring to enter into the specified contracts may do so by their governing bodies or by the board of trustees of the municipal library.

Chapter 108, P.L. 1956 must be construed as being *in pari materia* with the other statutes governing cooperation between public libraries. When the other statutes refer to "municipalities" as contracting parties to agreements authorized therein, they clearly mean that the contracts are to be made by the governing bodies of the two municipalities. See R.S. 40:54-29.1, 29.2; R.S. 40:33-13.1, 13.2. It is therefore our opinion that the word "municipality" in R.S. 40:9A-1 also refers to the governing body of the municipality.

Very truly yours,

DAVID D. FURMAN  
 Attorney General

By: MURRY BROCHIN  
 Deputy Attorney General

April 18, 1960.

NED J. PARSEKIAN, Acting Director  
 Division of Motor Vehicles  
 State House  
 Trenton, New Jersey

## FORMAL OPINION 1960—No. 10

DEAR DIRECTOR PARSEKIAN:

You have requested our opinion as to the proper interpretation of the phrase "exhibitions of motor vehicle driving skill" as contained in and regulated by chapter 174, L. 1953 (N.J.S.A. 5:7-8 to 19). You have made specific reference to the problem of whether or not this term would embrace contests in the operation by children of undersized vehicles through various obstacle arrangements. The sport of driving small motor-powered "carts" on parking lots, race tracks and other off-street locations for the amusement of the children, their parents and other spectators has become popular in recent years.

N.J.S.A. 5:7-8 provides as follows:

"No person shall operate or conduct any motor vehicle races or exhibitions of motor vehicle driving skill, or any track or other place for the holding of such races or exhibitions, unless a license to operate and conduct the same shall be first obtained from the Department of Law and Public Safety, which license said department may, in its discretion, issue to any applicant therefor upon compliance with the provisions of this act and the rules and regulations issued pursuant thereto, and the payment of a fee of one hundred dollars (\$100.00) in the manner hereinafter provided."

The underlying motive of the legislation is to provide protection to spectators and participants in races and exhibitions since the requirements outlined by the legislature for licensees primarily concern safety and liability insurance provisions (N.J.S.A. 5:7-10 to 15).

The term "motor vehicle" is commonly used and understood. It is defined in N.J.S.A. 39:1-1 as including "all vehicles propelled otherwise than by muscular power, excepting such vehicles as run only upon rails or tracks." "Carts" are motor-powered and come within this broad definition.

The carts serve a single purpose. They are operated at off-street locations where spectators can gather to observe the driving skill of the operator. They are not used for ordinary driving on the public street, nor are they licensed for such use. N.J.S.A. 39:3-5. In the cited circumstances the driving becomes an "exhibition" and is within the regulated conduct embraced by the above quoted statute.

The meaning of the phrase in question, "exhibitions of motor vehicle driving skill," is thus, in paraphrase: a public display or showing of competence in operating and controlling motor-powered vehicles. This definition is such as to apply the statute to the exhibition of driving of any size vehicle. It applies to all competitive driving and also to a public show of ordinary driving. The statute governs regardless of the age of the driver or the type of display involved. As to racing, under N.J.S.A. 5:7-8 there is no requirement of an exhibition—all racing is regulated.

This definition is reasonable and seems appropriate to the "cart" driving already discussed. While N.J.S.A. 5:7-10(a)(1) requires post and rail safety protections intended for larger vehicles, N.J.S.A. 5:7-10(a)(2) allows the Department of Law and Public Safety to substitute other devices. The absolute requirements of guards (N.J.S.A. 5:7-12) and insurance (N.J.S.A. 5:7-13) are appropriate to racing and exhibitions regardless of the size of the vehicles involved. Speed is an important factor in the danger to participants and spectators, and speed is not related to the size of the vehicles.

It is our opinion that the statutory language in question applies to all public shows of motor vehicle operation of any nature, regardless of the age of the drivers or the size of the vehicles involved, and specifically those contests you have described. Persons conducting such exhibitions or contests must be licensed.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: EDWIN C. LANDIS, JR.  
*Deputy Attorney General*

April 18, 1960.

NED J. PARSEKIAN, *Acting Director*  
*Division of Motor Vehicles*  
State House  
Trenton, New Jersey

FORMAL OPINION 1960—No. 11

DEAR MR. PARSEKIAN:

You have requested our advice as to whether, under R.S. 48:4-20 et seq., owners or operators of autobuses, transporting passengers for hire interstate over the streets and highways of this state must pay the excise tax.

R.S. 48:4-20 imposes an excise tax upon "every person owning or operating an autobus which is operated over *any highway in this state* for the purpose of carrying passengers from a point outside the state to another point outside the state, or from a point outside the state to a point within the state, or from a point within the state to a point outside the state . . ." (Emphasis added.) The tax is imposed "for the use of such highway" at the rate of "½ cent for each mile or fraction thereof such autobus shall have been operated over the highways of this state except that no excise shall be payable for the mileage traversed in any municipality to which such owner or operator has paid a municipal franchise tax for the use of its streets under the provisions of R.S. 48:4-12." R.S. 48:4-23, a subsequent section of the same statute, directs that the moneys collected from the excise on interstate buses shall be appropriated to the state highway commission "for use by it for the construction and maintenance of highways."

The applicability of the excise tax provided for by R.S. 48:4-20 to autobuses traveling the New Jersey Turnpike depends on whether or not the phrase "any highway in the state" includes the New Jersey Turnpike.

Although the Turnpike Authority was created only in 1948, turnpike companies existed in New Jersey long before that date. These were private corporations which owned, constructed, operated and maintained public toll roads under state franchise. The roads operated by the New Jersey Turnpike Authority and other turnpike authorities throughout the country bear a relationship to state-financed highways which in many respects is similar to that of the old turnpike roads.

Decisions of the New Jersey courts which have considered the roads constructed and operated by the old turnpike companies have determined that turnpikes are "public highways" within the meaning of the latter phrase as it is customarily used in the statutes of this state.

For example, in *Miller v. Penna.-Reading Seashore Lines, Inc.*, 117 N.J.L. 152 (E. & A. 1936), the former Court of Errors and Appeals, considering the question of whether a railroad might acquire title to a portion of a turnpike road through adverse possession, held that: "It is well settled that turnpikes constitute public highways."

In *Atlantic & Sub. Ry. Co. v. State B'd Assessors*, 80 N.J.L. 83 (Sup. Ct. 1910) the former Supreme Court considered a factual situation which is closely analogous to that presented by the issue of the applicability of R.S. 48:4-20 to interstate autobuses using the New Jersey Turnpike. The court in that case construed L. 1906, c. 290, p. 645, § 4 which reads:

"Every street railroad corporation subject to taxation under the provisions of this act shall, on or before the first Tuesday in May in each year, return to the State Board of Assessors a statement showing the gross receipts from its business in this State for the year ending December 31st, next preceding, and any such corporation having part of its road in this State and part thereof in another State or States, or having part of its road on private property and part on any public street, highway, road, lane or other public place, shall make a report showing the gross receipts on the whole line, together with a statement of the length of the whole line and the length of the line in this State upon any street, highway, road, lane or other public place, and the franchise tax of such corporation for the business done in this State shall be levied by the State Board of Assessors upon such proportion of its gross receipts as the length of the line in this State upon any street, highway, road, lane or other public place bears to the length of the whole line; . . ." (Emphasis added.)

Part of the street and railway line involved in the *Atlantic & Sub. Ry. Co.* case had been laid on a road constructed and operated by a turnpike company. The court stated the issue presented and its holding as follows:

"The question propounded is whether this turnpike, a part of which the prosecutor is occupying, is a highway or a public place within the meaning of the statute of 1906. For most purposes a turnpike is regarded as a highway; and it may be said to be generally so regarded when the term highway is used in a statute, unless the words and purposes of the act display a different legislative intent." (Emphasis added.)

In *State, Parker, v. City of New Brunswick*, 32 N.J.L. 548 (E. & A. 1867) the former Court of Errors and Appeals, speaking through Mr. Chief Justice Mercer Beasley, considered whether the authority of the City of New Brunswick extended to requiring the grading and paving of one of its streets which was also part of the turnpike road of the New Jersey Turnpike Company. The court said:

"Such roads are public highways. They are established by the sovereign authority of the state for the common benefit, and although the road-bed, and the franchise to take tolls are private property, the easement itself is altogether of a public character." (Emphasis added.)

To the same effect, see *Fenton v. Margate Bridge Co.*, 24 N.J. Super. 450, 456 (App. Div. 1953).

R.S. 48:4-20 was adopted in its present form in 1934, long before the creation of the New Jersey Turnpike Authority. Consequently, the Legislature could not have actually considered the problem of taxation of interstate buses using the turnpike when the taxing statute was enacted. It is highly significant however, that in the Turnpike Authority statute the turnpike itself is defined as a highway. R.S. 27:23-1 states that:

"In order to facilitate vehicular traffic and remove the present handicaps and hazards on the congested highways in the State, and to provide for the construction of modern express highways . . . the New Jersey Turnpike Authority (hereinafter created) is hereby authorized and empowered to construct, maintain, repair and operate turnpike projects (as hereinafter defined) . . ."

R.S. 27:23-4 specifically defines "project" and "turnpike project" as "any express highway, superhighway, or motorway at such locations and between such termini as may hereafter be established by law, and constructed or to be constructed under the provisions of this act by the Authority. . . ." In other words the statute specifically defines the turnpike as a highway. By so doing, the Legislature presumably intended to subject the turnpike to all previously enacted statutes which refer to and regulate "highways" except such prior statutes as are clearly inconsistent with the purposes of the Turnpike Authority Act.

To construe the phrase "any highway in the state" in R.S. 48:4-20 to include the New Jersey Turnpike would not be inconsistent with the purposes of the Turnpike Act. The assumption underlying the operation of a toll road such as the New Jersey Turnpike is that the saving of time and money and the additional convenience resulting from traversing the turnpike rather than an alternate highway provides the user with benefits at least equivalent to the amount of tolls which he must pay. To hold that interstate buses traversing a toll-free highway are subject to taxes but those using the New Jersey Turnpike are exempt therefrom would be in effect to subsidize the New Jersey Turnpike by according tax exemptions to users thereof. Such a subsidy by tax exemption would be contrary to a fundamental principle of the New Jersey Turnpike Act which prohibits the devotion of any state revenues to the construction or maintenance of the turnpike. In other words, when deciding whether to use a turnpike or an alternate highway, a carrier should be in the position of having to weigh the advantages provided by the turnpike facilities against the cost of tolls; there should not be any tax advantages to influence the carrier's choice; and, therefore, a carrier should be required to pay the same tax to the state whether it uses the turnpike or an alternate free highway.

Despite these considerations, an Attorney General's Formal Opinion 1950—No. 78 reached the conclusion that the turnpike was not a "public highway" within the meaning of R.S. 48:4-20 and that interstate autobuses traveling the turnpike were therefore not subject to the tax.

Although this opinion cited no authorities, it is probable that the conclusion which it reached was influenced by decisions of the United States Supreme Court which, at that time, were generally interpreted as precluding taxation of interstate carriers except for the specific purpose of compensating the state for the carriers' use of state supported highways and in an amount proportionate to the expense presumably incurred by the state as a result of that use. See, for example, *Sprout v. South Bend*, 277 U.S. 163 (1928); *Interstate Transit v. Lindsey*, 283 U.S. 183 (1931). Under this interpretation of Supreme Court doctrine, it was undoubtedly thought that since the State of New Jersey made no direct financial contribution to the cost of constructing or maintaining the Turnpike, it could not exact a fee from interstate carriers for its use.

However, later cases, and notably *Capital Greyhound Lines v. Brice*, 339 U.S. 542 (1950), abandoned any suggestion that the tax must be a contribution to the cost of the highway, or that in amount it must be a fair share exacted from the users of the highway for the expense of providing them with road facilities. Under this later doctrine a tax on interstate carriers will be sustained if it is in some broad sense a fair compensation to the state for the use of its highways. Cf. *Fannin v. Public Utilities Comm.*, 147 Ohio State 354, 71 N.E. 2d 480 (1947) upholding the constitutionality of a tax on buses for the maintenance and repair of the highways of the state, the amount of which the appellant contended had no relation to his use of the roads. Cf. *Northwestern States Portland Cement Co. v. Minnesota*, U.S. 13 L.Ed. 2d 421 (1959).

Furthermore, the constitutional right of a state to impose an excise tax on interstate common carriers for the use of state highways measured in part by mileage traveled on a toll highway was passed upon and upheld by the United States Supreme Court in *Shirks Motor Exp. Corp. v. Messner*, 375 Pa. 450, 100 Atl. 2d 913 (Pa. Sup. Ct. 1953) appeal dismissed for lack of a substantial federal question *sub. nom. Interstate Motor Freight System v. Messner*, 347, U.S. 941 (1954). One of the taxpayers in that case contended that the excise tax in question was unconstitutional because among other reasons, ". . . a carrier who uses the Turnpike for a given number of miles of its operation must pay a toll in addition to the tax, whereas another carrier who operates for an equal number of miles but does not use the Turnpike pays only the tax, and therefore there is lack of uniformity in the operation of the tax." The Pennsylvania Supreme Court rejected this argument upon the following grounds:

"The Turnpike Commission holds the legal title to the Turnpike, but only in its capacity as an instrumentality of the Commonwealth. Act of May 21, 1937, P. L. 774, sec. 4, 36 P.S. sec. 652d. The Turnpike is one of the public highways which cross the State of Pennsylvania in the same general locality. Two others are the William Penn Highway and the Lincoln Highway. No motor carrier is restricted to the use of the Turnpike to the exclusion of either of such other two routes. If a motor carrier voluntarily chooses to use the Turnpike because of more economic and efficient operation, such voluntary choice cannot provide the foundation for a constitutional argument. The choice is obviously made because the amount of the toll is less than savings in operations resulting from a shorter route, few and very slight grades which make it possible to carry loads up to the legal limit, absence of intersections and savings in fuel and time. Appellant Interstate has not shown that the tax plus the toll exceeds fair compensation for its use of the Turnpike. A taxpayer can not voluntarily assume a burden and then be heard to say that it is unconstitutional. There is no merit in this contention." 100 Atl. 2d at 918.

To the same effect see *Transamerican Freight Lines, Inc. v. Commonwealth*, 396 Pa. 64, 151 Atl. 2d 630 (Pa. Sup. Ct. 1939) cert. denied 361 U.S. 882 (1959).

In summary, therefore, the line of New Jersey cases previously cited have construed the term "highways" as used in the statutes of this State to include turnpikes; this construction of the term is supported and confirmed by the Turnpike Act itself, R.S. 27:23-1 and R.S. 27:23-4; and presently authoritative doctrine of the United States Supreme Court does not require exemption from taxation of interstate buses using the Turnpike.

You are accordingly advised that R.S. 48:4-20 does apply to interstate buses using the New Jersey Turnpike.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: MURRY BROCHIN  
Deputy Attorney General

MAY 18, 1960

MR. NED J. PARSEKIAN, Acting Director  
Division of Motor Vehicles  
State House  
Trenton, New Jersey

FORMAL OPINION 1960—No. 12

DEAR DIRECTOR:

We have been asked whether the Director of the Division of Motor Vehicles can revoke the driver's license or registration of a person who fails to answer a summons charging a violation of a local parking ordinance.

The responsibility for enforcing local parking ordinances rests primarily on local officials. Normally, the summons (sheet 4 of Local Criminal Court Form 12) is completed by a local police officer. See R.R. 8:10-1. It is to be served on the defendant in the manner provided by R.R. 8:3-2(c)(3)(ii). In addition to personal service on the defendant, this rule authorizes service by ordinary mail to the defendant's "last known address." The last known address is obtained through the "look-up" service of the Division of Motor Vehicles. See R.S. 39:3-36, 10 and 37. Thus, means for due service of summonses are available to local officials.

Frequently, when the violation of a local parking ordinance is discovered, the officer fills in on the summons the registration number and description of the vehicle and leaves the summons on the vehicle. This, by itself, is not due service. See *Report, New Jersey Supreme Court's Municipal Court Committee, March 17, 1960*, pages 3 and 5.

Procedures are available to local officials to assure the appearance for trial of a person duly served with a summons. In the case of a resident who fails to answer a summons duly served the local court may issue a warrant for his arrest. R.R. 8:10-3(a). Such a warrant may be executed at any place within the state. R.R. 8:3-2(c)(2). Bail may be required from a non-resident personally served with a summons. N.J.S. 2A:8-27, 28; see *Roesch v. Ferber*, 48 N.J. Super. 231, 233 (App. Div. 1957). If a non-resident who has posted bail fails to appear for trial, the bail is forfeit. R.R. 8:10-3(b).

R.S. 39:5-30 gives the director discretionary power to revoke licenses and registrations for violation of the provisions of Title 39 "or any other reasonable grounds." The adoption of ordinances by municipalities regulating parking is authorized by R.S. 39:4-197(1)(f). However, although a local parking ordinance is authorized by Title 39, the violation of an ordinance is not a violation of Title 39 itself. The "other reasonable grounds" must be related to a person's fitness to own or operate a motor vehicle.

Where proof shows that a person has been duly served with one or more summonses which he has not answered, the director has power to conclude that under all the circumstances revocation is justified because of the person's disregard for the law. However, if it is not shown by proof that the summonses have been duly served in accordance with R.R. 8:3-2(c)(3)(ii), such a conclusion is not justified. Action by the director in these cases would be governed by the procedure set out in R.S. 39:5-30.

It is our opinion that the director may revoke a license or registration of a person failing to answer one or more duly served summonses where, under all the circumstances, the proof shows that the action is justified because of the person's disregard for laws relating to motor vehicles.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: WILLIAM L. BOYAN  
Deputy Attorney General

MAY 25, 1960

HONORABLE NED J. PARSEKIAN  
Acting Director  
Division of Motor Vehicles  
State House  
Trenton, New Jersey

FORMAL OPINION 1960—No. 13

DEAR DIRECTOR PARSEKIAN:

You have asked whether certain interstate authorities, county, bi-municipal and municipal sewerage authorities or municipal housing authorities are entitled to "no fee" registrations for their vehicles under terms of *N.J.S.A.* 39:3-27. For example, the following instrumentalities, Bergen Co. Sewerage Authority; Delaware River Port Authority; Dover Sewerage Authority; Ewing Lawrence Sewerage Authority; Housing Authority of A.P. Washington Village; Housing Authority of Elizabeth; Housing Authority of Hoboken; Housing Authority of Jersey City; Housing Authority of Phillipsburg; Jersey City Incinerator Authority; Mt. Holly Sewerage Authority; Port of New York Authority; and Riverside Sewerage Authority have made application for such registrations.

The statute which requires interpretation, *N.J.S.A.* 39:3-27, reads in part as follows:

"No fee shall be charged for the registration of motor vehicles not used for pleasure or hire, owned by the United States, the State of New Jersey, a municipality, county, Passaic Valley Sewerage Commissioners, North Jersey District Water Supply Commission, duly authorized volunteer fire department, any duly recognized auxiliary or reserve police organization of any municipality, hospital, humane society, an anti-cruelty society in this State, New Jersey wing of the Civil Air Patrol incorporated by the Act of July 1, 1946 (Public Law 476-79th Congress), the American Red Cross or ambulances owned by nationally organized recognized veterans organizations. \* \* \*

This statute creates an exception to the general requirement that fees be paid for the registration of motor vehicles. *N.J.S.A.* 39:3-10, *N.J.S.A.* 39:3-20, et als. The exception provided by *N.J.S.A.* 39:3-27 runs to the United States, the State of

New Jersey, a municipality, or a county as well as to the Passaic Valley Sewerage Commissioners, the North Jersey District Water Supply Commission and charitable organizations of specified types. None of the authorities or instrumentalities you mention are named in the statute.

Although various "authorities" may be considered public or governmental instrumentalities and are closely associated with the State, or a county, or a municipality, such authorities are normally considered independent of these governmental units. For example, in considering the nature of the New Jersey Turnpike Authority and similar public corporations, our Supreme Court in *New Jersey Turnpike Authority v. Parsons*, 3 N.J. 235, 243, 244 (1949) said:

"Though created by the State and subject to dissolution by the State, they are in the eyes of the law independent entities and the State is not responsible for their debts and liabilities, whether they be municipal corporations or counties or such specialized bodies as the Port of New York Authority; Cf. *California Toll Bridge Authority v. Wentworth*, 212 Cal. 298, 298 Pac. 485 (1931). The fact that the members of the Turnpike Authority are appointed by the Governor with the advice and consent of the Senate rather than elected by the voters in nowise alters the status of the Turnpike Authority as an independent corporate entity any more than does the similar appointment of the members of the Port of New York Authority, R.S. 32:2-3, or the members of the Interstate Sanitation Commission, R.S. 32:19-1. \* \* \* It is also objected that the Turnpike Authority is the alter ego of the State and not a self-sufficient public corporation because it is a body corporate and politic 'in the State Highway Department,' R.S. 27:23-3. This statutory provision is manifestly intended to be a compliance with the constitutional provision requiring that 'all executive and administrative offices, departments, and instrumentalities of the State government, including the offices of Secretary of State and Attorney General, and their respective functions, powers and duties, shall be allocated by law among and within not more than twenty principal departments,' Article V, Section IV, paragraph 1. But the State Highway Commissioner is given no authority whatsoever over the Turnpike Authority. The Turnpike Authority is in but not of the State Highway Department and that fact does not make it any the less an independent entity, as the language of the entire Act clearly demonstrates."

The statute in question uses descriptive terms when enumerating certain types of charitable organizations but when the statute departs from the governmental units of State, county and municipality, it does so by naming only two authorities of the type we are considering, the Passaic Valley Sewerage Commissioners and the North Jersey District Water Supply Commission. If all authorities of like nature were to be exempt from registration fees because of their close relation to the named governmental units, there would have been no need for the Legislature to specify these two authorities. In fact, we deem it to be the legislative intent that other authorities not specifically named, which are related to but are somewhat independent of the governmental units of State, county and municipality, are not excused from the payment of registration fees. These authorities are not, strictly speaking, the State, county or municipality. There is no general clause in the statute by which their exemption is expressed.

Accordingly, we conclude that the authorities or instrumentalities not specifically named in *N.J.S.A.* 39:3-27 are not entitled to the benefits of that statute.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: PETER L. HUGHES, III  
*Deputy Attorney General*

MAY 26, 1960

RAYMOND F. MALE, *Commissioner*  
*Department of Labor and Industry*  
20 West Front Street  
Trenton, New Jersey

FORMAL OPINION 1960—No. 14

DEAR COMMISSIONER MALE:

You have asked whether the exemption of hotel employment from the Minimum Wage Standards law, as provided in *R.S.* 34:11-34, applies to a hotel dining room that is operated not by the hotel itself but by a concessionaire. If the exemption does apply, you further ask whether the concessionaire is exempt where he operates a "coffee shop" type of establishment with an entrance directly from the street (as well as from within the hotel) so that patrons need not enter the hotel to enter the establishment. *R.S.* 34:11-34 provides:

"As used in this article:

\* \* \*

'Occupation' means an industry, trade or business or branch thereof or class of work therein in which women or minors are gainfully employed but shall not include domestic service in the home of the employer or labor on a farm or employment in a hotel;

\* \* \*." (Emphasis supplied.)

The answer to your second question is found in *Hotel Suburban System v. Holderman*, 42 N.J. Super. 84 (App. Div. 1956). There the court held, in part, that Mandatory Wage Order No. 9, concerning the employment of women or minors at restaurant occupations, did not apply to women and minors employed in hotel restaurants regardless of the fact that nonresidents were served in the eating facilities of the hotel. Referring to the definition of "occupation" the Court, at page 91, stated that the Minimum Wage Act

"\* \* \* so unequivocally and unqualifiedly exempts 'employment in a hotel,' that there is no basis for interpretation or construction of the statute by the Commissioner. The duty of the administrative agency, therefore, is to exclude all employment in a hotel from inclusion under the minimum wage standards, at least to the extent of operations not beyond what may be regarded as customary or reasonably incidental to the conduct of the hotel business."

Assuming that the purpose of the outside entrance is only to encourage patronage by nonresidents of the hotel, it would have no bearing on the applicability of the exemption. It is also immaterial whether the type of operation is classified as a "restaurant," "dining room" or "coffee shop." The court's opinion is so definite as to the exclusion of employment in a hotel that the only pertinent inquiry is whether the operation of a coffee shop is "customary or reasonably incidental to the conduct of the hotel business." Clearly, it is. See *Hotel Suburban System v. Holderman*, *supra*, at page 94.

The precise point raised by your first question is whether employment in a hotel dining room operated by a concessionaire rather than by the hotel itself comes within the statutory language setting forth the exemption, "employment in a hotel." (Emphasis supplied.) Although the plaintiffs in *Hotel Suburban System*, *supra*, were owners of hotels, the court's decision applies equally as well to the situation where a concessionaire operates the dining room. Exclusion of hotel employment by *R.S.* 34:11-34 encompasses all employment on the premises of a hotel that is customary and reasonably incidental to the conduct of the hotel business. If the Legislature had intended an agency connotation, i.e., to restrict the scope of the exemption to employees actually employed by the hotel, it would have couched the exemption in those terms. The common sense meaning of the language used by the Legislature indicates primary emphasis on the location of the employment. In holding that the Legislature was not unreasonable, arbitrary or capricious in providing an exemption for hotel employment, the court, in *Hotel Suburban*, at page 94, said:

"Conceding the validity of the defendants' argument that the character of a modern hotel is vastly different from that of an old-time inn, that the hotel of today often carries on operations in addition to lodging and feeding of guests, such as coffee shops, supper clubs, health clubs, swimming pools, garages, etc., and that the employees of those departments should be covered by the Minimum Wage Act, the authority to classify and exempt lies with the Legislature; it is not an administrative or judicial function."

The various activities described above without distinctions as to the type of employment, together with the possible reasons why the Legislature provided for this exemption as discussed by the Appellate Division in *Hotel Suburban* and by the New Jersey Supreme Court in *New Jersey Restaurant Association v. Holderman*, 24 N.J. 295, 302-303 (1957), permit no other conclusion than the one just stated.

A distinction between restaurants or coffee shops owned and operated by the hotel and those owned and operated by a concessionaire would be difficult to enforce and subject to easy abuse. Large hotel corporations frequently enter into concession agreements wherein they grant or lease commercial enterprises conducted on the premises of a modern hotel. These agreements come in a variety of forms with diverse terms and arrangements. A concessionaire may pay a flat rental fee or he may pay a certain percentage of the net profits to the hotel. The hotel may retain the right to supervise and control the operation of the concession. In fact the hotel itself may be run as a concession. A difficult legal question thus may arise as to who is the actual employer. Presumably, the Legislature did not intend the exemption from the Minimum Wage Standards law to depend upon the form of agreement existing between the hotel owner and the restaurant concessionaire. There appear no inherent reasons for working conditions in a hotel restaurant operated under a concession to be different from working conditions in a restaurant operated by the hotel itself. The

reasons that the Legislature had for exempting the latter necessarily would apply to the former type of operation.

You are therefore advised that the hotel employment exemption contained in R.S. 34:11-34 applies where the hotel dining room is operated by a concessionaire as where it is operated by the hotel itself.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: STEPHEN F. LICHTENSTEIN  
Deputy Attorney General

JUNE 2, 1960

HONORABLE NED J. PARSEKIAN  
Acting Director  
Division of Motor Vehicles  
State House  
Trenton 25, New Jersey

FORMAL OPINION 1960--No. 15

DEAR DIRECTOR PARSEKIAN:

You have requested an opinion concerning the use of "dealer" plates issued to manufacturers and dealers pursuant to N.J.S.A. 39:3-18. This section permits the Director, Division of Motor Vehicles, to issue special registrations and registration plates bearing the word "dealer" to manufacturers of and dealers in motor vehicles. These registrations are issued for separate fees to any manufacturer of motor vehicles and to bona fide dealers licensed as such by the Director under the terms of this section. *Metropolitan Motors, Inc. v. State*, 39 N.J. Super. 208 (App. Div. 1956).

You have asked whether manufacturers of trucks or bona fide dealers can permit the use of vehicles so registered by prospective purchasers on a trial basis prior to sale. During this period, ownership would remain in the manufacturer or dealer; the vehicle would continue to display "dealer" plates.

You have indicated that in the course of business, especially when trucks or other commercial vehicles are involved, it is necessary for manufacturers and dealers to authorize the use of a truck on trial in order for the purchaser to learn whether the vehicle performs the work satisfactorily. Under such circumstances, trucks with dummy loads or payloads perform tests under operating conditions. At no time is any compensation paid for use of the vehicles.

N.J.S.A. 39:3-18 authorizes the use of "dealer" plates by manufacturers so long as the vehicle is " \* \* \* owned or controlled by such manufacturer \* \* \*," and " \* \* \* only if it is operated only for shop, demonstration or delivery purposes. \* \* \*." The same section permits dealers to use such plates on any vehicle " \* \* \* owned by such dealer; and provided such vehicle is not used for hire. \* \* \*."

It is our opinion that, subject to reasonable regulations you may promulgate under N.J.S.A. 39:3-3, the use of "dealer" plates by vehicles under the control of a purchaser on trial but before sale would not violate the terms of this section.

Clearly, the terms of N.J.S.A. 39:3-18 authorize such use of "dealer" plates issued to a manufacturer. Express language in the section permits use for demonstration purposes so long as ownership remains in the manufacturer. There is no express statutory time limitation as to such use. However, the duration as to such use could not be prolonged beyond a reasonable period for demonstration purposes to avoid the obtaining of commercial plates by the user. N.J.S.A. 39:3-20; *State v. Tucker*, 61 N. J. Super. 161 (App. Div. 1960); cf. *N.Y. Vehicle and Traffic Law*, par. 63, 62 *A. McKinney's Laws, Vehicle and Traffic*, § 63; *N.Y. Laws 1959*, c. 775, effective October 1, 1960.

As to the use of "dealer" plates issued to a dealer, as distinguished from a manufacturer, during a demonstration or trial period, it is our opinion that such use is sanctioned under N.J.S.A. 39:3-18. Demonstration use was originally specifically authorized as to dealers in L. 1921, c. 208. In 1926 an amendment occurred permitting dealer plates on any vehicle "owned by such dealer" and, although demonstration use was not expressly authorized, it was not prohibited. L. 1926, c. 192. The only limitation was that a dealer could not lend his plates to any person for use on any vehicle not owned by the dealer. Thus, under the 1926 law, demonstration use could be permitted providing the vehicle remained the property of the dealer.

The next amendment, by L. 1934, c. 123, imposed the condition that the vehicle bearing "dealer" plates must be operated "exclusively for his business and not for hire." The present statute results from an amendment in 1951, L. 1951, c. 4, which removed the prohibition against the personal use of the vehicle by dealers.

Never has there been a prohibition against use of "dealer" plates on vehicles during demonstration or trial periods.

While there is a difference in the specific language regulating use by a manufacturer as compared to use by a dealer, the entire section must be read as a whole and a sensible interpretation given to its terms which is "consonant to reason and good discretion." *Schierstead v. Brigantine*, 29 N.J. 220, 230 (1959). Certainly, permitting use during ownership by a dealer of a vehicle for demonstration purposes does not derogate the purpose of the section and the limitations contained therein. The prospective purchaser is not hiring the vehicle or otherwise paying for its use.

That the express authorization of demonstration use as to vehicles owned by manufacturers does not imply the prohibition of such use as to vehicles owned by dealers can be ascribed to the difference in their operations. Manufacturers in the normal course of business sell vehicles to dealers and not directly to users. Specific authorization to manufacturers for the use by occasional purchasers of their vehicles for test or demonstration purposes was therefore necessary to remove any doubt of its legality. On the other hand, such activity is a normal incident of a bona fide dealer's operation, and is clearly lawful even without specific authorization. Cf. *Metropolitan Motors, Inc. v. State*, *supra*; *State v. Tucker*, *supra*.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: DAVID M. SATZ, JR.  
Assistant Attorney General

JUNE 2, 1960

HONORABLE JOHN A. KERVICK  
 State Treasurer of New Jersey  
 State House  
 Trenton, New Jersey

## FORMAL OPINION 1960—No. 16

DEAR MR. KERVICK:

We have been asked for an opinion as to when an exemption from taxation becomes effective for property which was taxable on October 1st of the pre-tax year and is then declared exempt by statute enacted during the tax year. An example of this problem is shown by Laws of 1959, Chap. 3, an Act that amended R.S. 54:4-3.24 to include the Boy Scouts and Girl Scouts of America among those associations whose property is exempt from taxation. This Act was approved on February 3, 1959. Section 2 thereof provided that: "This act shall take effect immediately."

The question presented under these circumstances is whether an exemption for part or all of the tax year in which the Act was passed may be allowed. There are related variations of this problem. Its understanding will be found in a general examination of the tax statutes and cases.

R.S. 54:4-1 provides in part, that "all property shall be assessed to the owner thereof with reference to the amount owned on October first in each year \* \* \*." It is generally held that, "Property is assessable or exempt with reference to its ownership and use on October 1 preceding the calendar year." *Jabert Operating Corp. v. City of Newark*, 16 N.J. Super. 505, 508 (App. Div. 1951); *Jersey City v. Montville*, 84 N.J.L. 43 (Sup. Ct. 1913), aff'd. on op. below, 85 N.J.L. 372 (E. & A. 1913); *Shelton College v. Ringwood*, 48 N.J. Super. 10 (App. Div. 1957); 16 McQuillan, *Municipal Corporations* 279, Taxation § 44.105.

In *Jersey City v. Montville*, *supra*, privately held property used for water supply purposes was conveyed to the City of Jersey City on October 10, 1911. The City then claimed an exemption for all or a portion of the tax for the year in question. The court held that exemptions from taxation are determined by the status of the property on the assessment date and that "land is not exempt because subsequently it passes to an owner who is exempt," (at 44) notwithstanding that the transfer occurs before the tax payment is due.

The authority of *Jersey City v. Montville* has been expressly reaffirmed in recent decisions. *Jabert*, *supra*, and *Shelton College*, *supra*. In *Jabert*, property which was owned and used for charitable purposes by The Salvation Army had been exempt for many years prior to 1949, under R.S. 54:4-3.6. Such ownership and use obtained on October 1, 1948. Soon thereafter, in November, 1958, title to the property was conveyed to the Jabert Operating Corporation, a non-exempt corporation. Jabert sued to set aside the assessment imposed for the year 1949. The Appellate Division held that the statutory requisites for exempt status were satisfied as of October 1, 1948 and "that fact established the status of the property as exempt for the entire year 1949." 16 N.J. Super., at 509. Thereafter, by L. 1949, c. 144 (N.J.S.A. 54:4-63.26 *et seq.*) the Legislature afforded relief to allow a municipality to tax property which was exempt on October 1st and later passes into the hands of a non-exempt owner.

In *Shelton College*, *supra*, property was acquired by a tax exempt college on February 26, 1954. The court held that the property was taxable for the entire year

of 1954, since it was taxable on October 1st in the pre-tax year. No exemption was allowed for the period of the tax year following acquisition by the non-exempt owner. The court noted that the Legislature, by L. 1949, c. 144, (N.J.S.A. 54:4-63.26 *et seq.*) authorized a municipality to tax property which was exempt on October 1st of the pre-tax year but is transferred thereafter to a non-exempt owner. The court found that the Legislature's failure to afford relief in the converse situation—a transfer from a taxable to an exempt owner—was a reaffirmation of the rule of *Montville*, a rule which has been followed for many years.

While there are a number of statutory provisions which permit changes in assessments after the October 1st date, these do not concern changes in exempt status, except for N.J.S.A. 54:4-63.26 *et seq.*, noted above. Improvements constructed after October 1st of the pre-tax year are taxable under the Added Assessment Law, N.J.S.A. 54:4-63.1 to 63.11. Assessments not made on October 1st may also be added under the Omitted Assessment Law (N.J.S.A. 54:4-63.12 *et seq.*) See: *Appeal of N.Y. State Realty Terminal Co.*, 21 N.J. 90, 96 (1956). Where improvements to real property have been destroyed, demolished or otherwise materially depreciated between October 1st and January 1st of the following year, a reduction in the assessment can be made by the assessor. N.J.S.A. 54:4-35.1. Significantly, however, no change in assessment is authorized if the depreciation in value occurs after January 1st of the tax year.

But there is no general statutory provision which allows a change from non-exempt to exempt status for non-governmental property owners after the October 1st assessing date. This is contrasted with the provisions of N.J.S.A. 54:4-63.26, *et seq.* It is also contrasted with the allowance of an exemption upon the acquisition of property through condemnation by the State or the United States Government. See: *Edgewater v. Corn Products Refining Co.*, 136 N.J.L. 220 (Sup. Ct. 1947), modified and affirmed, 136 N.J.L. 664 (E. & A. 1948); *New Jersey Highway Authority v. Henry A. Raemsch Coal Co.*, 40 N.J. Super. 355 (Law Div. 1956); *Mihnar Estate v. Borough of Fort Lee*, 36 N.J. Super. 241 (App. Div. 1955); Atty. Gen'l. Opinion of June 27, 1957, P-23, 1956-1957 *Opinions of the Attorney General of N. J.* 163.

Taxes validly assessed on real property become a lien on January 1 of the tax year. N.J.S.A. 54:5-6. Procedurally, N.J.S.A. 54:4-4.4 provides that the time for filing statements of exemption is on or before November 1 of the pre-tax year and that a copy of exemption statements shall be filed by the assessor with the county board of taxation "on or before January 10 following." To allow an exemption for all or part of the tax year in which the exemption is created would require a legislative intent to overcome the pre-existing statutes and case law on the subject. This legislative intent cannot be found simply in the provision that "This act shall take effect immediately." The provision normally does not mean that the exemption shall take effect immediately but that the act shall take effect immediately, particularly where the act does not waive the requirement for filing exemption statements on or before November 1st of the pre-tax year. A statute normally has a prospective effect only, unless a clear intention to the contrary is therein expressed. *Wittes v. Repko*, 107 N.J. Eq. 132 (E. & A. 1930); *Neel v. Ball*, 6 N.J. 546, 551 (1951); *Harrington Co. v. Chopke*, 110 N.J. Eq. 574 (E. & A. 1932).

In *Lakewood Judean Lodge v. Township of Lakewood*, 25 N.J. Misc. 421 (Div. of Tax Appeals 1947), cited with approval in *Jabert*, *supra*, 16 N.J. Super. at 509, an analogous act was construed. There, a municipality had assessed property which had been owned by a municipality on October 1, 1944 and was thereafter, on October 25,

1944, transferred to a non-exempt individual. The municipality contended that the property became taxable under L. 1945, c. 137 (N.J.S.A. 54:4-63.2). This law provided, in part, that property sold by a municipality after October 1st in the pre-tax year can be included in an "added assessment list." The act was approved on April 10, 1945 and provided: "This act shall take effect immediately." Nevertheless, it was there held that since the act became effective on April 10, 1945, it was prospective only and could not affect an assessment made as of October 1st, 1944.

Accordingly, it is our opinion that a statute which grants an exemption from taxation following October 1st of the pre-tax year will not effectively grant such exemption for the ensuing tax year, or part thereof, unless the Legislature clearly expresses its intent to make such exemption effective notwithstanding the prior taxable status of the property.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: THEODORE I. BOTTER  
Deputy Attorney General

JUNE 3, 1960

CHRISTOPHER H. RILEY, Director  
Division of Shell Fisheries  
Department of Conservation  
and Economic Development  
230 West State Street  
Trenton, New Jersey

FORMAL OPINION 1960—No. 17

DEAR DIRECTOR RILEY:

You have requested an opinion defining the circumstances under which the State acting through the successors to the former riparian commissioners may make a riparian grant or lease to lands under tidewaters on which are found natural oyster beds.

The power to lease lands of the State beneath tidal waters for the planting and cultivation of oysters and clams was formerly exercised by the Board of Shell Fisheries. R.S. 50:1-23. With reference to the Board, R.S. 50:1-24 provided:

"The power granted by this title to the board to lease lands under the tidal waters of this state for the planting and culture of shellfish is exclusive, and no other state agency may, in the name of the state or otherwise, give, grant or convey to any person the exclusive right to plant or take shellfish from any of such waters; and no grant or lease of lands under tidewater, whereon there are natural oyster beds, shall be made by any other state agency except for the purpose of building wharves, bulkheads or piers."

This power was transferred by Laws of 1945, c. 22, § 19, N.J.S.A. 13:1A-19 to the Division of Shell Fisheries in the former State Department of Conservation and in

the reorganization following adoption of the Constitution of 1947 was assigned to the Division of Shell Fisheries in the Department of Conservation and Economic Development. Laws of 1948, c. 448, § 93, N.J.S.A. 13:1B-42. Other riparian grants and leases of the State's lands beneath tidewaters were issued by the riparian commissioners and are now made by their statutory successors, the Planning and Development Council in the same Department, pursuant to R.S. 12:3-1 et seq. and N.J.S.A. 13:1B-13.

Proper resolution of your question requires historical analysis. Our courts from the earliest times have recognized that although the State owned all lands flowed by tidewater at ordinary high tide an adjacent upland owner had a license, revocable by the Legislature until exercised, to reclaim the riparian lands of the State between the high and low water marks. *Stevens v. Paterson and Newark R.R. Co.*, 34 N.J.L. 532 (E. & A. 1870). While this right did not exist at English common law, in this State it was affirmed as a matter of local custom. Though it was recognized that improvements of any nature might be placed between the high and low water marks by the abutting upland owner, his privilege to reclaim was ordinarily exercised in order that he might reach water navigable in fact. Thus this license became known as the privilege to "wharf out." *New Jersey Zinc and Iron Co. v. Morris Canal and Banking Co.*, 44 N.J. Eq. 398, 401 (Ch. 1888), *aff'd per curiam*, 47 N.J. Eq. 598 (E. & A. 1890); 56 *Am. Jur.*, *Wharves* 1068 (1947). The Wharf Act, Laws of 1851, p. 335, which codified the privilege, with reference to the land between the high and low water marks declared:

"That it shall be lawful for the owner of lands, situate along or upon tidewaters, to build docks or wharves upon the shore in front of his lands, and in any other way to improve the same, and, when so built upon or improved, to appropriate the same to his own exclusive use."

Therefore, between the high and low water marks the Legislature permitted any improvements, though recognizing that the principal improvements would be in aid of navigation. By section 2 of the Wharf Act it was provided "That it shall be lawful for the owner of lands situate along or upon tidewaters to build docks, wharves, and piers in front of his lands, beyond the limits of ordinary low water" upon the obtaining of a license as provided in the Act. Thus the Legislature conceived that all improvements below the low water mark would be made to enable the abutting upland owner to reach water navigable in fact. By the General Riparian Act, Laws of 1869, c. 383, the Wharf Act was repealed for the Hudson River, New York Bay and Kill Von Kull, it being made unlawful for any improvements to be made upon the State's land under the three enumerated bodies of water unless a license to do so were obtained. Though by Laws of 1871, c. 256 it was provided that grants of land beneath tidewaters could be made anywhere in the State, the Wharf Act was not finally repealed until 1891. Laws of 1891, c. 124. Since 1891 no abutting upland owner has been able to exercise the former local privilege to reclaim any of the State's lands between the high and low water marks. Rather, he must apply for a riparian grant to the appropriate State authority. In *Bailey v. Driscoll*, 19 N.J. 363 (1955), the Supreme Court, consistent with the foregoing statutory history, ruled that the principal purpose of a riparian grant given under the general statutes remains to aid the abutting upland owner to reach water navigable in fact.

Traditionally, riparian grants have been given solely to abutting owners. Such persons are deemed to have a "natural equity" to secure the grant. *Keyport and*

*Middletown Point Steamboat Co. v. Farmers Transportation Co.*, 18 N.J. Eq. 511, 516 (E. & A. 1866). Under both our local common law and the Wharf Act only abutting upland owners had the privilege to wharf out or fill in. *New Jersey Zinc and Iron Co. v. Morris Canal and Banking Co.*, *supra*. But by section 8 of the General Riparian Act the riparian commissioners were authorized to make grants and leases of lands under the Hudson River, New York Bay and Kill Von Kull to persons other than abutting owners provided that the applicant had first given the abutting owner six months' notice of his application and the latter had neglected to apply for the grant during this period. Laws of 1869, c. 383, § 8, R.S. 12:3-7. Similar power was extended for other tidelands by Laws of 1891, c. 123, § 3, R.S. 12:3-23. See Memorandum Opinion dated April 18, 1960.

Grants to persons other than abutting owners are not usually made to facilitate access to waters navigable in fact. Such a grant normally forecloses the upland owner from the water. See *River Development Corp. v. Liberty Corp.*, 51 N.J. Super. 447, 479-81 (App. Div. 1958), *aff'd per curiam*, 29 N.J. 239 (1959). The Legislature recognized this in 1869 since by the General Riparian Act it provided that a non-abutting grantee could not improve the granted lands until the abutting owner had been compensated for his rights and interests in them. Laws of 1869, c. 383, § 13, R.S. 12:3-9. By rights and interests the Legislature had reference to the claim of the upland owner "to reach tide water from his land," *American Dock and Improvement Co. v. Trustees for the Support of Public Schools*, 39 N.J. Eq. 409, 445 (Ch. 1885). But, in a subsequent decision, *Stevens v. Paterson and Newark R.R. Co.*, *supra*, the Court of Errors and Appeals definitively declared that this claim was not a property right.

The immediate source of R.S. 50:1-23 and 50:1-24 is Laws of 1931, c. 187, §§ 24, 25. But by Laws of 1888, c. 108 it was provided:

"That no grant or lease of lands under tide-water whereon there are natural oyster beds, shall hereafter be made by the riparian commissioners of this state, except for the purpose of building wharves, bulkheads or piers."

The foregoing language is for our purposes indistinguishable from the proviso in R.S. 50:1-24 and is clearly its antecedent since Laws of 1888, c. 108 was repealed by Laws of 1931, c. 187, § 96. Thus from 1888 to the present it has been unlawful to issue a riparian grant or lease, except for wharves, bulkheads and piers, pursuant to the sections now comprising Chapter 3 of Title 12 of the Revised Statutes of 1937 when the lands to be granted house natural oyster beds. *McCarter v. Sooy Oyster Co.*, 78 N.J.L. 394 (E. & A. 1910). Laws of 1888, c. 108 in seeking to protect oyster beds is not reflective of a new policy but rather was another in an ancient series of statutes. Indeed "An Act for the Preserving of Oysters in the Province of New Jersey" had been passed on March 27, 1719 and in its preamble it was declared that the preservation of oysters "will tend to the great benefit of the poor People, and others inhabiting this Province." Bradford's Laws of New Jersey, 1703-19, p. 112. See also "An Act for the Preservation of Oysters," January 26, 1798; Laws of 1846, p. 179. Thus the Legislature in 1888 was dealing with two venerable and favored uses of the tidelands, development of the oyster industry and facilitation of efforts to reach navigable waters from the uplands. The new and less well established policy was the issuance of riparian grants for purposes other than the reaching of navigable waters whether or not given to abutting owners.

We therefore conclude that by Laws of 1888, c. 108 and by R.S. 50:1-24 the Legislature intended to reconcile the major policies and thus foreclosed riparian grants of lands housing natural oyster beds for purposes other than to facilitate the applicant or those entering upon the tidelands by virtue of his grant to reach navigable waters. Our conclusion is reinforced by the fact that wharfs, bulkheads and piers are in fact constructed to provide for the docking of vessels. Further "wharves" and "piers" were expressly authorized under the first and second sections of the Wharf Act. Hence, ordinarily a riparian grant of lands housing natural oyster beds should not be made to persons other than abutting owners. In this regard it should be noted that the Legislature by Laws of 1916, c. 98, R.S. 12:3-33 et seq., provided that whenever any municipal corporation or other subdivision of the State desires to place a public park, place, street or highway on any tidelands of the State, it can do so upon the securing of a riparian grant notwithstanding the fact that it is not an abutting upland owner. *Leonard v. State Highway Dept.*, 29 N.J. Super. 188 (App. Div. 1954). Grants so issued ordinarily are not made to aid any person to reach water navigable in fact and thus are forbidden if the granted lands house natural oyster beds. Finally, riparian grants to abutting owners may not be made for lands housing natural oyster beds except to facilitate the applicant's efforts to reach navigable water from his upland.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: MORTON I. GREENBERG  
Deputy Attorney General

JULY 26, 1960

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

FORMAL OPINION 1960—No. 18

DEAR COMMISSIONER BONTEMPO:

You ask whether R.S. 12:3-33 et seq. authorizes the issuance of a riparian grant to a school district for a site of a school building and whether that section permits a grant to be made to a municipality for an athletic field, particularly when the municipality will charge admission for entrance to its athletic programs. In addition, you inquire whether any riparian grant may be made to a municipality for a consideration less than the fair market value of the property conveyed.

We deal first with the power of the State to make riparian grants for the specified purposes. Ordinarily, riparian grants may be made only to the owner of the upland abutting the riparian lands. R.S. 12:3-9; R.S. 12:3-23. An upland owner may use his granted premises for any lawful purpose consistent with applicable zoning ordinances upon the securing of a permit for the purpose from the Department of

Conservation and Economic Development. R.S. 12:5-3. But R.S. 12:3-33 to 36 permits the conveyance of riparian lands to public bodies even though they do not own the abutting upland. The aim of these sections is the limited one of providing a supplemental basis to the general authority to make grants otherwise contained in Chapter 3 of Title 12 of the Revised Statutes. Without regard for R.S. 12:3-33, Chapter 3 of Title 12 of the Revised Statutes allows a public body in common with other owners to secure a riparian grant if it owns the abutting upland, or if it has served six months' notice of the application with the abutting owner who neglects to apply within the six months for the grant. In addition, your Department properly permits an abutting upland owner to waive his pre-emptive right, thereby authorizing a riparian grant to be made to some other person without six months' notice.

Though a principal purpose of a riparian grant is to permit an upland owner to reach navigable water, there is no doubt but that a riparian grant may be issued to a municipality under the sections other than R.S. 12:3-33 to 36 for school or athletic field sites. Laws of 1889, c. 199 is the earliest discovered statute permitting public bodies to secure riparian grants without regard for abutting ownership. That act authorized municipalities owning easements for public squares or parks fronting on the riparian lands to receive grants of the adjacent riparian lands if a written assent to the grant were secured from the person owning the fee interest in the uplands. See also Laws of 1901, c. 28. By Laws of 1903, c. 202 the Legislature went further than it had in Laws of 1889, c. 199 in that it authorized a municipality owning an easement for a park to receive a grant without the consent of the upland owner, and it provided that when streets or highways extend to the riparian lands, the municipality may secure a grant of the abutting riparian lands without consent of the owner of the fee in the upland. By Laws of 1914, c. 228, another step was taken toward limitation of pre-emptive rights of upland owners when it was provided that a riparian grant could be made to a municipality for use as a highway or street when the proposed right of way ran along the riparian lands. Finally, two years later, Laws of 1916, c. 98, the source for R.S. 12:3-33 to 36, was enacted. R.S. 12:3-33 and 34 in substantially the language of Laws of 1916, c. 98 provide as follows:

"Whenever a public park, place, street or highway has been or shall hereafter be laid out or provided for, either by or on behalf of the state or any municipal or other subdivision thereof, along, over, including or fronting upon any of the lands of the state now or formerly under tidewater, or whenever a public park, place, street or highway shall extend to such lands, the board of commerce and navigation, upon application of the proper authority of the state, or the municipal or other subdivision thereof, may grant to such proper authority the lands of the state now or formerly under tidewater, within the limits of or in front of said public park, place, street or highway." (R.S. 12:3-33.) (Emphasis added.)

"The grant shall contain a provision that any land so granted shall be maintained as a public park, place, street or highway, or dock for public use, resort and recreation, and that no structures shall be erected on the lands so granted inconsistent with such public use." (R.S. 12:3-34.)

This statute, applicable to all public bodies, went still further in abrogating the pre-emptive right of the upland owner; the categories of parks, streets and highways were expanded by the addition of "place." The Legislature broadened the prior statutes to permit grants to municipalities and other public bodies that would have

not been previously allowed unless the applicant owned the upland or gave six months' notice of his application to the upland owner. Any other construction would render superfluous the inclusion of the word "place." Accordingly the rule of *ejusdem generis* does not apply to R.S. 12:3-33.

The meaning of "public place" may change depending upon the context of its use. Within R.S. 12:3-33, a "public place" includes a school or place which the general public may frequent and enjoy. This result is reached for two reasons. First, the line of statutes above cited demonstrates a consistent legislative purpose to make the riparian lands available for entry to ever widening sections of the public. Second, R.S. 12:3-34 requires that a grant under R.S. 12:3-33 carry a proviso that the lands be held "for public use, resort and recreation." Therefore, a school may be constructed on lands granted pursuant to R.S. 12:3-33. *City of Passaic v. State of New Jersey*, 33 N.J. Super. 37 (App. Div. 1954), *affirming*, 30 N.J. Super. 32 (L. Div. 1954) is not to the contrary. There the Court held that a restrictive grant given under authority of Laws of 1914, c. 228 could not be used for a housing development. Inasmuch as the case concerns a grant under a more restrictive statute than the statute now in force, it is not controlling. It might be noted that Laws of 1916, c. 66, approved one day before Laws of 1916, c. 98, declared that within the section of the school law dealing with the posting of notices for school elections a schoolhouse is a public place. While, of course, the two statutes dealt with different subjects, nonetheless Chapter 66 evidences a legislative recognition that for at least some purpose a school is a public place.

The question raised by the construction of an athletic field is not troublesome for such a facility qualifies as a park and public place for public use, resort or recreation within R.S. 12:3-33. *Cf. Hill v. Collingswood*, 9 N.J. 369 (1952); *Aquansic Land Co. v. City of Cape Girardeau*, 346 Mo. 524, 142 S.W. 2d 332 (Sup. Ct. 1940). Charging admission fees to an athletic program on the granted lands does not destroy the character of the use. *Baird v. Board of Recreation of Commissioners of South Orange*, 110 N.J. Eq. 603 (E. & A. 1932).

Your final question is whether a riparian instrument may be given a municipality or State agency for a price less than its fair market value under R.S. 12:3-33 et seq. or under any other statute. Article VIII, § 4, par. 2 of the Constitution of 1947 provides in language substantially similar to Article IV, § 7, par. 6 of the Constitution of 1844 that the fund for the support of the free public schools shall be forever inviolate. By Laws of 1894, c. 71, and Laws of 1903, c. 1, § 168, codified as R.S. 18:10-5, the riparian lands were placed in the fund, *In re Camden*, 1 N.J. Misc. 623 (Sup. Ct. 1923), or at least made a source of it, *River Development Corp. v. Liberty Corp.*, 51 N.J. Super. 447, 475 (App. Div. 1958), *aff'd per curiam*, 29 N.J. 239 (1959). Under either construction the lands are irrevocably devoted to aggrandizement of the fund. Therefore, it has long been held that a grant of riparian lands even to a municipality or other public body for a governmental purpose for other than a full consideration is void. *Henderson v. Atlantic City*, 64 N.J. Eq. 583 (Ch. 1903); see *In re Camden*, *supra*. Insofar as it is inconsistent herewith *Formal Opinion No. 39*, 1953, holding to the contrary, is overruled. Although not controlling, the analogous trend in our law requires the State to pay a full consideration when taking municipally owned lands held in trust for a public purpose. *State v. Cooper*, 24 N.J. 261 (1957), *cert. denied*, 355 U.S. 829 (1955).

As indicated in *Henderson v. Atlantic City*, *supra*, the devotion of the riparian lands to the school fund did not deprive the appropriate State officers of "discretion

when and how to transmute this property into money and to make all reasonable regulations for the use of the property until it was sold. It could probably grant a perpetual right to lay out its streets or highways through it, regarding the presence of such streets as likely to enhance the value of this property. So, too, perhaps, a privilege could be granted to a municipality to use it 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. Apparently mindful of the above language the Legislature in the Laws of 1916, c. 98 provided as follows:

"If said board, commission, officers, body or authority shall be unable or unwilling for any reason to pay the price fixed for such lands now or formerly under tidewater by the said Board of Commerce and Navigation, the said board is authorized to grant to such board, commission, officers, body or other proper authority, a revocable lease of or permit to use the said lands now or formerly under tidewater for such park, place, street or highway, or dock use and purpose for a nominal consideration until such time as the said Board of Commerce and Navigation shall decide to make a grant in fee of said lands under tidewater to such board, commission, officers, body or other proper authority, or to other grantees, for such consideration as the said Board of Commerce and Navigation may determine to be *adequate compensation* for such lands. Such revocable lease or permit may contain a provision that if the same shall be revoked and the lands in question granted to a grantee other than said board, commission, officers, body or other proper authority, that said new grantee shall be required to pay as a condition of such new grant, the cost of any improvements that may have been constructed upon said lands under water which were the subject of the said revocable lease or permit." (Emphasis added.)

This provision is now R.S. 12:3-36. Inasmuch as this statute was passed after *Henderson v. Atlantic City*, it is clear that the Legislature by the use of the term "adequate compensation" did not intend that a grant could be made for less than the fair market value but more than a nominal price. Quite to the contrary, by "adequate" the Legislature intended that the consideration be constitutionally sufficient. Thus R.S. 12:3-36 cannot permit a different result than that reached.

Further, R.S. 12:3-36 may not be used as a means of indirectly depriving the school fund of the benefits of a sale of riparian lands. The statute authorizes the issuance of a revocable lease at "nominal" consideration with the right to require the ultimate grantee for "adequate" consideration to pay for improvements on the property. However, this authority would violate the constitution if exercised in a manner that would prevent or greatly discourage an irrevocable conveyance for full consideration at a later date. Ordinarily a revocable lease or permit should not require a subsequent grantee or lessee to reimburse the municipality for its improvements. Such a requirement could well impede the granting or leasing of the premises, particularly if the improvements were of limited use. Thus a lease or permit revocable in law would be perpetual in fact.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: MORTON I. GREENBERG  
Deputy Attorney General

JULY 28, 1960

MR. SAMUEL A. NAPLES, *Secretary*  
*Commissioner of Registration*  
Mercer County Board of Elections  
Court House  
Trenton, New Jersey

FORMAL OPINION 1960—No. 19

DEAR MR. NAPLES:

We have been asked whether persons in military service may vote in person at the polls. The impression that they may not, but may only vote by military service absentee ballot, has arisen from a reading of certain language in the Absentee Ballot Law, including R.S. 19:57-2, 3, 7, 9, 11, 22 and 29. Without analyzing here the argument to this effect in detail, it will become apparent from a consideration of the general purpose of the Absentee Ballot Law and the constitutional provisions it was adopted to implement, that military voters who are qualified may exercise the right to vote in person at the polls if they have not applied for an absentee ballot for that election.

Both the 1844 N. J. Constitution (as amended in 1875) Art. II, Par. 1, and the New Jersey Constitution of 1947, Art. II, Par. 4, provide that "in time of war no elector in the military service \* \* \* shall be deprived of his vote by reason of absence from his election district." The constitutional provisions were adopted to grant persons in military service in time of war "an imperative right" to absentee voting. *Gangemi v. Berry*, 25 N.J. 1, 11 (1957). The right to vote by absentee ballot was not intended to diminish the right of military personnel to vote, but to assure it. To read the Absentee Ballot Law as providing the exclusive method by which persons in military service must vote would deny the right of franchise to all military personnel who are present in their election districts on election day. This is so because R.S. 19:57-3 makes the absentee ballot available to a person in military service only if he "may be absent on the day on which \* \* \* [an] election is held from the district in which he resides."

That the Absentee Ballot Law intends to facilitate the exercise of the franchise by military personnel is further illustrated by the provision for the case where the military voter returns home within 10 days before the election after requesting an absentee ballot but without receiving it. In that case the statute provides that he may vote by obtaining a new absentee ballot form from the county clerk and may vote by delivering the ballot, properly filled in, to the county board of elections "in person." R.S. 19:57-29. Once a military voter has requested an absentee ballot, he will not, however, be permitted to vote at the polls. His permanent registration form, if any, will have been removed from the permanent registration binders and put in a special "military file." R.S. 19:57-22.

These provisions are in contrast with the case of a civilian absentee voter. When a civilian absentee voter's request for an absentee ballot is approved, a red "A" is placed on his voting record in the space where the number of his ballot would be entered and if he does not receive the absentee ballot for any reason, he cannot vote either in person or by a new absentee ballot. R.S. 19:57-22; R.S. 19:57-32.

It is to be noted that R.S. 19:57-22 provides only that the registration form is to be removed after an application for a military service absentee ballot is made. It does not provide that the registration form is to be removed at any time that the county board is informed that the voter has entered military service. This strongly implies that an option to take advantage of the Absentee Ballot Law or to comply with the general law on registration and voting is afforded the military service voter.

A person in military service voting in person at the polls is not excused from satisfying the conditions for voting to which all persons voting in person at the polls are subject. He must be registered. Cf. R.S. 19:57-25 (excusing registration only in the case of a military service voter voting by absentee ballot). He must meet the residence requirements, R.S. 19:4-1. The rule that a voting residence is not established solely by virtue of residence at or near a military installation by a member of the military service continues unchanged.

For all of the above reasons, a citizen of New Jersey in military service who is qualified to vote, who has registered, and who has not applied for an absentee ballot, may vote at the polls in person.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: WILLIAM L. BOYAN  
*Deputy Attorney General*

JULY 27, 1960

ANTHONY J. PANARO, *Secretary*  
*Mercer County Board of Taxation*  
Room 309—Court House Annex  
Trenton 10, New Jersey

FORMAL OPINION 1960—No. 20

DEAR SECRETARY PANARO:

You have asked our opinion whether a bank organized under the laws of the State of New Jersey is entitled to compute its tax under the Bank Stock Tax Law (N.J.S.A. 54:9-1 et seq.) by deducting from its capital surplus and undivided profits the assessed value of real estate which it owns but which is located in a county other than the county within which its principal place of business is located.

The bank stock tax is collected by the county for the county and municipal benefit, N.J.S.A. 54:9-13. It is assessed against the common capital stock of "all banks and banking associations organized under the authority of this state or the United States, and trust companies organized under the laws of this state, whose principal place of business is within this state." N.J.S.A. 54:9-1; *City of Passaic v. City of Clifton*, 23 N.J. Super. 333 (App. Div. 1952) aff'd. 12 N.J. 466 (1953). See *Morris & Essex Investment Co., Inc., v. Director of Division of Taxation*, 33 N.J. 24 (1960). The bank stock tax is expressly declared to be "in lieu of all other state, county or local taxation upon such shares or upon any personal property held or owned

by banks, the value of which enters into the taxing value of the shares of common stock." N.J.S.A. 54:9-7. By implication, taxation of the real property of banks is not prohibited. See *Lippincott v. Lippincott*, 75 N.J.L. 795 (E. & A. 1908).

The bank stock tax states expressly how the "true value" of the common shares of bank stock is to be determined. N.J.S.A. 54:9-4 states:

"The value of each share of common stock of each bank shall be ascertained and determined by adding the amount of its capital, surplus and undivided profits and deducting therefrom the assessed value of its real property, including in such deduction the assessed value of all real property owned by a corporation all the stock of which corporation is owned by such bank, and also deducting therefrom an amount equal to the aggregate sum of the par value of all classes of the issued and outstanding preferred stock of such bank and such additional sum in excess of par value as the holders of such preferred stock are entitled to receive upon the retirement of such preferred stock (irrespective of whether the bank has created a reserve for the retirement of such preferred stock or any class thereof, or the amount of any such reserve), and by dividing the result by the number of its shares of common stock outstanding, it being the intention that the shares of preferred stock and the capital represented thereby plus such additional sum in excess of the aggregate par value of such preferred stock as the holders of such stock are entitled to receive upon the retirement of such preferred stock shall not be assessed or taxed; nor shall there be assessed or taxed any stock issued to former unpaid depositors of the bank while held to evidence their right to repayment under any plan of reopening or rehabilitation approved by the Commissioner of Banking and Insurance. No deduction or exemption shall be allowed or made from the value determined as provided in this section."

To facilitate the determination of the "true value" of the bank's income shares, the chief fiscal officer of every bank must file an annual statement setting forth certain specific information called for by N.J.S.A. 54:9-5. From these statements and "from any other sources of information which may be open to it" (N.J.S.A. 54:9-9) each county board of taxation must annually ascertain the amount of tax to be levied upon the common capital stock of each bank having its principal place of business within the county. And, in order to compute this tax, the county board must also ascertain the number of issued and outstanding shares of common and preferred capital stock of each bank; the aggregate amount of the capital, surplus and undivided profits of each; all the assessed value of its real property and the assessed value of all real property owned by a corporation, all the stock of which is owned by such bank, etc.

The express provisions of the Bank Stock Tax Act indicate that the assessed value of all real property of a bank, in whatever county of the State that property may be located, should be deducted from the capital, surplus and undivided profits of the bank in order to compute the "true value" of its common stock. Thus the statute requires the statement filed by each bank to set forth "the assessed value of its real property" including "the assessed value of all real property owned by a corporation all the stock of which is owned by such bank," N.J.S.A. 54:9-5(e); 54:9-9(e). The county board's obligation to make an independent determination of the same fact is stated in identical terms. It should be noted that there are two classes of real property the assessed value of which must be deducted from the bank's net worth

for purposes of computing the tax. In the language of the statute the first such class consists of "its real property"; that is, the real property owned by the bank directly. *Hackensack Trust Co. v. City of Hackensack*, 116 N.J.L. 343 (Sup. Ct. 1936). The second class consists of "all real property" owned by a wholly owned subsidiary of the bank. (Emphasis added.) The use of the word "all" in the quoted phrase clearly requires that the assessed valuation of all real property of wholly owned subsidiary corporations, in whatever county such property may be located, should be deducted from the "net worth" of the parent bank. It is most unlikely that the Legislature intended that banks should deduct the assessed valuation of all real property owned by their subsidiaries, but only that part of the assessed valuation of their own real property which happens to be located in the same county as the principal office of the bank. The statute should not be construed to reach such an anomalous result unless its express terms so require.

There is no express language in the Bank Stock Tax Act which requires that a bank subject to the tax be permitted to deduct from its net worth only the assessed valuation of its real property located in the same county as its principal office. It is true, as previously stated, that the tax is a county tax and that it is to be administered by the county tax board. Real property assessments are matter of public record. N.J.S.A. 54:4-38; N.J.S.A. 54:4-55. The necessary information is, in any event, required to be supplied to the county board by the bank. N.J.S.A. 54:9-5.

There is an additional consideration which conclusively requires that banks subject to the Bank Stock Tax Act be permitted to deduct from their net worth the assessed valuation of all real property wherever located within the State. Both state and national banks are subject to the Bank Stock Tax Act. N.J.S.A. 54:9-1. Therefore, the incidence of the tax must be the same in the case both of state and national banks. However, the authority of a state to tax the stock of national banks is limited by 12 U.S.C.A. § 548 (formerly § 5219 of the United States Revised Statutes). A condition for the imposition of such a tax is that it "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks." 12 U.S.C.A. § 548(1)(b). Taxation of national bank stock in violation of this condition would invalidate the Bank Stock Tax Act. *Mercantile National Bank v. City of New York*, 121 U.S. 138, 7 S. Ct. 826 (1887). The New Jersey Bank Stock Tax Act has always been construed to avoid such discrimination against national banks. *Lippincott v. Lippincott supra*; *Com. Trust Co. v. Hudson Bd. of Taxation*, 86 N.J.L. 424 (Sup. Ct. 1914) *aff'd* 87 N.J.L. 179 (E. & A. 1914). The Financial Business Tax Law, N.J.S.A. 54:10B-1 et seq. was adopted in 1946 to avoid discrimination against national banks. *Morris and Essex Investment Co., Inc. v. Director, Division of Taxation, supra*, at 33 N.J. 34. Consequently, the Bank Stock Tax Act must be construed so as not to impose any greater tax upon national banks than is imposed by the Financial Business Tax Law upon competing financial businesses. The latter statute directs that in computing the tax basis "there may also be deducted from net worth the assessed value of real estate taxable in this State." N.J.S.A. 54:10B-6. The quoted language of the Financial Business Tax Law clearly requires that all real property of taxpayers subject thereto in whatever county such realty may be located may be deducted from net worth in computing the tax. Unless the Bank Stock Tax Act were construed to permit national banks to take an identical deduction, such banks would be taxed at a higher rate than competing financial businesses. Such a construction of

the law would violate 12 U.S.C.A. § 548 and would therefore, render the Bank Stock Tax Act invalid as against national banks.

We therefore wish to advise you that in computing the tax due under the Bank Stock Tax Act a bank subject thereto may deduct from its net worth the assessed valuation of its real property in New Jersey and of the real property in New Jersey of its wholly owned subsidiaries, regardless of the county within which such real property may be located.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: MURRY BROCHIN  
*Deputy Attorney General*

JULY 26, 1960

MR. JOHN WYACK, *Secretary*  
*Water Policy and Supply Council*  
Division of Water Policy and Supply  
520 E. State Street  
Trenton 25, New Jersey

FORMAL OPINION 1960—No. 21

DEAR MR. WYACK:

You ask the effect of a reduction in the area serviced by the Hackensack Water Company (hereinafter called "Hackensack") on its "free allowance" determined under Laws of 1907, c. 252, codified as R.S. 58:2-1.

Hackensack was chartered by Laws of 1869, c. 80. Its charter did not enfranchise it to divert any waters, surface or subterranean, without charge by the State. But in common with other water companies it did not, prior to 1907, make a payment to the State for its diversion of waters for public supply, no statute having required it to do so. See *State v. Trenton*, 97 N.J.L. 241 (E. & A. 1922), *appeal dismissed*, 262 U.S. 182 (1923). By the Laws of 1907, c. 252 the Legislature created the former State Water-Supply Commission which was charged with general supervision over all the sources of public and potable water supply in the State. Section 8 of the act provided as follows:

"8. Every municipality, corporation or private person now diverting the waters of streams or lakes with outlets for the purpose of a public water-supply shall make annual payments on the first day of May to the State Treasurer for such water hereafter diverted in excess of the amount now being legally diverted; *provided, however*, no payment shall be required until such legal diversion shall exceed a total amount equal to one hundred (100) gallons daily, per capita for each inhabitant of the municipality or municipalities supplied, as shown by the census of one thousand nine hundred and five."

Pursuant to the proviso in the foregoing section a free allowance was determined for Hackensack. In 1907 the city of Hoboken was being served by Hackensack and

accordingly the allowance included diversions for its inhabitants. In 1926, however, Hoboken as a water consumption unit was transferred to the municipal system operated by Jersey City. Thus in 1927 the free allowance allotted to Hackensack was reduced by a sum approximately equal to the amount of water diverted for consumption in Hoboken in 1907. Hackensack was given notice of this reduction and acquiesced in it. Simultaneously the Jersey City free allowance was increased by a like amount. Hackensack now suggests that this shifting was erroneous and that its free allowance should be redetermined on the basis of the territory it served in 1907, including Hoboken. You have advised that the reduction in 1927 was in accordance with long standing practice. Free allowances have been regularly transferred in the other instances of realignment of the territory served by privately and municipally owned water companies.

It is our opinion that the benefit of the free allowance was intended to accrue to the consumers of each municipality and not to their suppliers and that the transfer in 1927 was accordingly proper. In *North Jersey District Water Supply Comm'n v. State Water Policy Comm'n*, 129 N.J.L. 326 (Sup. Ct. 1943) the prosecutors on certiorari (The North Jersey District Water Supply Commission, the Passaic Valley Water Supply Commission and the City of Newark) challenged a rule of the former State Water Policy Commission, a predecessor to the Department of Conservation and Economic Development, promulgated under the act of 1907 providing:

"Whereas, the method of computing the free allowance for excess diversion of surface waters, under the provisions of chapter 252, Laws of 1907, are [sic] not clearly set forth in said law in cases where a municipality receives surface water from more than one diverter; Therefore,

"Be It Resolved, That the following rule be adopted for the calculation of said free allowance for the calendar year 1932 and subsequent years:

"The Free Allowance for excess diversion of surface water, under the provisions of Section 8, Chapter 252, Laws of 1907, in cases where a municipality receives surface water from more than one diverter, shall be credited to each diverter in proportion to the amount of surface water supplied." 129 N.J.L. at 329-30.

The court summarized the prosecutors' contention as follows:

"(1) The defendant commission erred in refusing to grant to each prosecutor a full free allowance for each municipality served by it, regardless of whether a free allowance for that municipality had been granted to one or more of the other prosecutors; (2) the rate applicable to each prosecutor under the statute was the minimum rate of \$1 per million gallons for excess water diverted; (3) the statute, 58:2-1, is discriminatory and unconstitutional in that it does not provide a uniform rate for the diversion of surface and of subsurface waters; (4) the Passaic Valley Water Commission is entitled to a full allowance for the Borough of Lodi." 129 N.J.L. at 330.

In rejecting these arguments and sustaining the challenged rule, the court held that the municipality was the benefited unit and that even though there apparently had been no municipalities with a divided supply in 1907, the statute required allocation in the event of a subsequent schism. The court's theory clearly controls this case. If

a partial transfer of service effects a *pro tanto* shift in the allowance then a total transfer must lead to a total shift.

This result is reinforced by the existence of the consistent long standing executive usage. Practical administrative interpretations should not be overturned, *Lane v. Holderman*, 23 N.J. 304 (1957); *In re Glen Rock*, 25 N.J. 241 (1957), particularly on the challenge of a previously complying person. A contrary result would lead to inequities to consumers in the area from which the free allowance is withdrawn.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: MORTON I. GREENBERG  
*Deputy Attorney General*

JULY 28, 1960

HON. JOHN A. KERVICK  
*State Treasurer*  
State House  
Trenton, New Jersey

FORMAL OPINION 1960—No. 22

DEAR MR. KERVICK:

You have informed us of the following facts:

Between August 28, 1882 and October 7, 1897 six New Jersey corporations, known as New Jersey Telephone Company, Metropolitan Telephone and Telegraph Company, Domestic Telegraph and Telephone Company of Newark, New Jersey, Northeastern Telephone and Telegraph Company, Sea Shore Telephone Company and Hudson River Telephone Company were organized under the 1877 Revision of the Statutes of New Jersey, p. 1174, § 1, Telegraph Companies. Although this statute was enacted to provide for the formation of telegraph companies, it was construed to authorize the incorporation of telephone companies as well. See *Duke v. Central New Jersey Tel. Co.*, 53 N.J.L. 341 (Sup. Ct. 1891).

Thereafter, each of these companies, acting pursuant to New Jersey Compiled Statutes of 1910, p. 5319, § 11 (now superseded by R.S. 48:3-7) connected and consolidated with a telephone company organized under the laws of New York, i.e., either the New York and New Jersey Telephone Company or its successor by consolidation, the New York Telephone Company. The statute under which these actions were taken reads:

"That any telegraph company chartered under the provisions of any act of this state, may connect and consolidate with any other incorporated telegraph company, whether chartered by or existing under a law of this state, or of any other state; and may upon such consolidation, by resolution of its board of directors, change its name, which change of name shall take effect on filing a copy of such resolution, certified under its corporate seal, in the office of the secretary of state of this state; provided, that neither such connection, consolidation or change of name shall affect the obligations

or debts of said company, or the process for their enforcement or lien upon its property."

In the course of making these consolidations and connections, the New Jersey corporations conveyed to the New York company all of their property, rights, privileges and franchises whatsoever and wheresoever situated, and all of the stockholders of each of the New Jersey corporations surrendered their shares of stock in these corporations and received instead stock of the New York corporation. The stock of the New Jersey corporations was cancelled on the records of those corporations and no stock has been issued by any of them since the consolidations and no stock is now outstanding. No action has ever been taken to dissolve any of the New Jersey corporations pursuant to R.S. 48:17-15 or any similar statute. However, the charters of several of the New Jersey corporations have expired by their own terms. Neither the New York Telephone Company nor any of the New Jersey companies referred to herein does any business in New Jersey.

In 1932 the former New Jersey Supreme Court decided the case of *N. Y. Telephone Co. v. State Board Taxes*, 10 N.J. Misc. 592 (Sup. Ct. 1932) involving the taxability of these various corporations. The court held in that case that the connections and consolidations of the various New Jersey corporations with the New York company had not dissolved the New Jersey corporations and that the New York Telephone Co. was liable to pay a New Jersey corporation franchise tax measured by its issued and outstanding capital stock. Pending an appeal from this decision, the State and the New York Telephone Co. entered into a consent judgment which provided that that company would pay a capital stock tax measured by the par value of that part of its capital stock which equalled the par value of the capital stock which had been issued by the New Jersey corporations before their connection and consolidation with the New York company. The New York Telephone Company paid the capital stock tax in accordance with this judgment until L. 1945, c. 132, p. 496, § 11 repealed the statute under which the capital stock tax had been imposed. For several years thereafter the New York Telephone Company paid \$25.00 per year as the minimum amount due from a domestic corporation pursuant to the Corporation Franchise Tax Act, N.J.S.A. 54:10A-1 et seq. It has now ceased paying any New Jersey corporation taxes.

On the basis of these facts, you have asked us to advise you whether the New York Telephone Company or any of the six New Jersey corporations mentioned above are taxable in New Jersey and if so, under what statute and to what extent.

The decision of the former Supreme Court in *N. Y. Telephone Co. v. State Board Taxes*, *supra*, holds that any of the six New Jersey telephone corporations whose charters have not expired and which have not been formally dissolved continue to exist as domestic corporations and remain obligated to pay New Jersey corporation taxes to the same extent as if they had never connected and consolidated with the New York company. It is also possible to interpret the court's opinion to mean that the New York Telephone Company itself became a corporation of this State because of its consolidations and connections with the various New Jersey companies. In our view, however, such a holding would be without legal justification. The New Jersey statute (Compiled Statutes of 1910, p. 5319, § 11), pursuant to which the New Jersey companies connected and consolidated with the New York company, expressly provides that a domestic corporation "may connect and consolidate with any other incorporated telegraph company whether chartered by or existing under a law of

this State or of any other state;" the statute contains no provision which would make the New York company a corporation of this State. (Emphasis added.) Presumably, the New York Telephone Company derived its legal authority to participate in the various connections and consolidations from the statutes of the State of New York. We note that in entering into the consent judgment which terminated the appeal from the judgment which had been entered by the former Supreme Court against the New York Telephone Company, the New Jersey Board of Taxes and Assessments in effect conceded that the court had been in error in treating the New York Telephone Company as if it were a domestic corporation. The decision of the court held that the taxpayer was liable for a tax measured by all of its issued and outstanding common shares of capital stock as if it were a New Jersey corporation; the consent judgment provided that the New York Telephone Company would be taxable only on the portion of its issued and outstanding common stock equivalent to the stock which had been issued by the New Jersey telephone companies prior to their connection and consolidation. Accordingly, since the New York Telephone Company does no business and owns no property in this State, there would appear to be no basis upon which it could be subject to any New Jersey corporation tax.

As previously stated, the New Jersey corporations referred to herein were organized as telephone or telegraph companies under a New Jersey statute specifically designed only for such companies. Telephone companies in New Jersey which use or occupy public streets, highways, roads or other public places by virtue of a franchise or authority or permission from the State pay a tax pursuant to N.J.S.A. 54:31-15.15 et seq. (L. 1941, c. 20, p. 39, § 1 et seq.). None of these companies uses the public streets, highways, roads or other places of this State and they are, therefore, not subject to pay a tax under that statute. All other telephone companies "not subject to tax under chapter 31" of Title 54 are liable to pay a tax under R.S. 54:13-11 et seq. R.S. 54:13-15 imposes a license fee or franchise tax on each telephone company subject thereto computed at the rate of one-half of one per cent upon its gross receipts "from business done in this State." Since the New Jersey companies do no business in this State, they owe no tax under that statute. However, unless they are exempted from the Corporation Business Tax Act, N.J.S.A. 54:10A-1 et seq., they would be liable as domestic corporations for at least the minimum tax thereunder.

The former Supreme Court in *N. Y. Telephone Co. v. State Board Taxes*, *supra*, expressly held that R.S. 54:13-11 et seq. was not applicable to the six New Jersey telephone companies because that statute measured the tax in part by gross receipts and was therefore not intended to apply to corporations which did not have gross receipts because they were inactive. However, this holding would appear to have been overruled by the present Supreme Court *sub silentio* in the case of *In re Application of Pennsylvania and Newark R.R. Co.*, 31 N.J. 146 (1959). In the latter case the question was whether a corporation which had been incorporated under an act specifically designed for the establishment of railroad companies continued to be taxable as a railroad rather than under the General Corporation Act although it never constructed or operated a railroad line. The court held that a corporation incorporated under a special statute for the purpose of establishing railroads remained taxable only as a railroad and not under the general corporation tax despite its failure to operate as a railroad. Under the principle of that case the six New Jersey telephone companies continue to be taxable as telephone companies so long as they retain a corporate existence under Rev. of 1877, p. 1174, § 1 et seq. (now R.S. 48:17-1 et seq.) and regardless of whether or not they are active. The Corporation Business Tax

Act expressly exempts "corporations subject to a tax under the provisions of article two of chapter thirteen of Title 54 of the Revised Statutes, or to a tax assessed on the basis of gross receipts, other than the tax levied by the veterans bonus tax law, or insurance premiums collected." (N.J.S.A. 54:10-3(a)). Since the New Jersey companies continue to be "subject" to article two of chapter thirteen of Title 54, they are expressly exempt from the Corporation Business Tax Act.

You are therefore advised that on the basis of the facts which you have stated, the New York Telephone Company is not subject to taxation by New Jersey; the surviving New Jersey corporations are taxable as domestic telephone companies under R.S. 54:13-11 et seq.; but since none of the latter corporations derives gross receipts from business done in New Jersey, they do not owe any tax to the State.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: MURRY BROCHIN  
Deputy Attorney General

JULY 26, 1960

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

FORMAL OPINION 1960—No. 23

DEAR COMMISSIONER BONTEMPO:

We have been asked to interpret the terms "source" and "rated capacity of the equipment" as used in N.J.S.A. 58:4A-4. By Laws of 1947, c. 375, N.J.S.A. 58:4A-1, the Division of Water Policy and Supply in the Department of Conservation was empowered to delineate areas of the State in which the diversion of subsurface and percolating waters exceeded or threatened to exceed, or otherwise threatened or impaired the natural replenishment of such waters. This power is now exercised by the Water Policy and Supply Council in the Department of Conservation and Economic Development. Laws of 1948, c. 448, § 101, N.J.S.A. 13:1B-50. In a delineated area no person may withdraw from any subsurface or percolating source more than 100,000 gallons of water in any day without a permit from the Water Policy and Supply Council. But N.J.S.A. 58:4A-4 provides as follows:

"Any person, corporation, or agency of the public diverting or obtaining water at the time of the passage of this act, or at the time an area is delineated as provided in section one of this act, in excess of one hundred thousand gallons per day from subsurface or percolating water sources, shall have the privilege of continuing to take from the same source, the quantity of water which is the *rated capacity of the equipment* at that time used for

such water diversion without securing a permit as provided above." (Emphasis added.)

Particularly you ask whether "source" refers to the well in use or to all or a part of the aquifer from which its water is drawn and whether "rated capacity of the equipment" means the potential capacity of the well using the most advanced equipment or its capacity with the equipment actually in use at the time of the delineation of its area.

Laws of 1947, c. 375, N.J.S.A. 58:4A-1 et seq. introduced the doctrine of prior appropriation into New Jersey water law. Many western states have established that the first person to make use of surface waters may continue to withdraw a constant amount notwithstanding the needs of later putative appropriators. 93 C.J.S., *Waters*, § 167 (1956). These states have thus modified or rejected the common law that riparian owners have a right to insist upon a reasonable use of the water by upper riparian owners. *Ibid.* See *Borough of Westfield v. Whitney Home Builders, Inc.*, 40 N.J. Super. 62 (App. Div. 1956). As noted in the *Westfield* case the doctrine of prior appropriation is founded on a theory that first in time makes first in right. Inasmuch as N.J.S.A. 58:4A-4 rests on a similar policy the decisions in prior appropriation states announcing the scope of the right of appropriation are useful in defining "source" within our statute. The pertinent holdings have been thus summarized:

"If the rights of others will not be materially injured or prejudiced, an appropriator may, without losing his priority, change the point of diversion for all, or part, of the water to which he is entitled, the means or method of diversion, the place of use or storage, the nature or purpose of the use, or the manner or means of use. This right of change is a property right; but it is a qualified one, for no such change can be made in point of diversion, means of diversion, place of use, nature or purpose of use, or means of use, if the change will be injurious or detrimental to the vested rights of others." 93 C.J.S., *Waters*, § 188 (1956).

See also *Pouchoulou v. Heath*, 137 Colo. 462, 326 P.2d 656 (Sup. Ct. 1958). Therefore the legislative policy underlying N.J.S.A. 58:4A-4 may be satisfied only by a construction of that section to authorize the drilling of a replacement well drawing on the same aquifer as the existing well, provided that the replacement well does not materially change the flow or distribution of the water in the aquifer. *Utah Power & Light Co. v. Richmond Irrigation Co.*, 115 Utah 352, 204 P.2d 818 (Sup. Ct. 1949) supports this interpretation of the term "source." There the court held:

"\* \* \* We do not believe the legislature intended to make the words 'water source' so inclusive that every person using surface water, percolating water, spring water or artesian water should all be charged with the costs and expenses of a commissioner because some part of their flow could be traced to a common source. We believe that the words were used in their generally accepted meaning and that 'source' was intended to be restricted to one origin such as a stream, a rise from the ground, a fountain, a spring, an artesian basin or some similar body; and that it was not the intention of the legislature to combine a river system with springs and artesian basins for purposes of distribution and administration. \* \* \*" 204 P.2d at 825.

The statute does not define rated capacity of equipment. In *Polliak v. Smith*, 19 N.J. Super. 365 (Ch. Div. 1952), the court interpreted "equipment" as used in a will bequeathing property as follows:

"*Funk & Wagnalls' New Standard Dictionary of the English Language* (1937) defines 'equipment' as the act or process of equipping with all needful supplies for any special service; 'equip' is defined: to provide with all that is necessary for a successful undertaking. In *Eastern Penn. Power Co. v. State Bd., &c.*, 100 N.J.L. 255, 126 A. 216 (Sup. Ct. 1924), our former Supreme Court defined equipment as: 'Equipment means that which is needful, that which is necessary.'" 19 N.J. Super. at 369-70.

Within the above interpretation, the pump and well are equipment, both being an integral part of the undertaking, the withdrawal of water from the earth. The Legislature intended to protect wells in use at the capacity at which they could be used at the time of delineation. Thus if a well with a yield potential of 1,000,000 gallons daily had a pump capable of only 500,000 gallons daily at the time of delineation, the rated capacity of equipment is 500,000 gallons. In any similar example the smallest capacity of any part of the diversion equipment is its "rated capacity."

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: MORTON I. GREENBERG  
*Deputy Attorney General*

July 29, 1960.

HONORABLE DWIGHT R. G. PALMER  
*Commissioner*  
State Highway Department  
Trenton, New Jersey

FORMAL OPINION 1960—No. 24

DEAR COMMISSIONER:

You have raised the question as to whether municipalities along the route of the proposed East-West Freeway in Essex County may contribute to the cost of construction by contract with the Federal and State governments. The statutes specifically authorize such participation by municipalities as well as counties. R.S. 27:8-1 provides:

"The commissioner may apply to and contract with the United States government or any official thereof for aid in road work, and with the governing bodies of counties and other subdivisions of the state for doing such work with the aid of the state and federal governments. Such governing bodies may enter into such contracts and raise funds to meet their share of the cost in the manner provided by law for raising money for the construction, improvement and maintenance of roads."

R.S. 27:8-3 provides that where the federal, state and local governing bodies all contribute to the construction of highways, the contribution of the state is limited to fifty per cent of the balance of the cost remaining after deducting the amounts paid by the federal government. As noted in the context of the quoted statute, the local governing bodies are authorized to raise the funds for their share of the cost as already provided in R.S. 40:1-1 et seq. This includes the power to borrow money and issue bonds.

The statutes were enacted in 1916, L. 1916, c. 236. (Assembly Bill No. 170). The Statement following the bill stated that the bill was passed to authorize the State to accept federal aid for road work in accordance with the bill then pending in the United States Congress.

Federal law also anticipates contributions of local governing bodies to the costs of construction of the interstate highway system. The definition of state funds in 23 U.S.C.A. section 101(a) includes funds raised by the state or subdivisions thereof and made available for expenditure under the direct control of the state highway department. In 23 U.S.C.A. section 110(a) it is provided that after all the plans for the route and construction are approved an agreement is to be executed by the state highway department and the Secretary of Commerce for the construction and maintenance of the roads. Subsection (b) of section 110 provides that the Secretary of Commerce in executing the agreement may rely upon the representations of the state highway department with regard to the arrangements or agreements made by the state highway department and the appropriate local governing bodies to share in the construction cost.

The municipalities through which the East-West Freeway in Essex County will pass undoubtedly anticipate benefits from the construction of the highway as a depressed highway. The factor that the highway would not be owned or controlled by the municipalities is immaterial in view of the express authority granted to municipalities under the statute to contribute and the accruing benefit to them regardless of the ownership or control.

Sincerely,

DAVID D. FURMAN  
*Attorney General*

July 27, 1960.

HONORABLE EDWARD J. PATTEN  
*Secretary of State*  
State House  
Trenton, New Jersey

FORMAL OPINION 1960—No. 25

DEAR SECRETARY PATTEN:

You have requested our opinion whether the Secretary of State should accept for filing a Certificate of Corporate Dissolution prepared and submitted pursuant to R.S. 14:13-1 or R.S. 14:13-3 if such Certificate of Dissolution is not accompanied by a certificate signed by the Director of the Division of Taxation certifying that all corporate taxes have been paid.

R.S. 14:13-1 and R.S. 14:13-3 provide two distinct methods for the voluntary dissolution of domestic corporations organized under Title 14 of the Revised Statutes. Resort may be had to R.S. 14:13-3 only if no part of the authorized capital of the corporation has been paid in and if the corporation has not yet begun the business for which it was created. In all other cases a voluntary dissolution may be effected only by complying with the procedure prescribed by R.S. 14:13-1. Under R.S. 14:13-1 the corporation must make a certificate of dissolution, reciting that two-thirds in interest of its stockholders have voted in favor of such dissolution and have consented thereto at a meeting called upon proper notice, or that all of the stockholders have consented in writing to the dissolution without a meeting; the dissolution then takes effect upon the issuance of a dissolution certificate by the Secretary of State. Under R.S. 14:13-3 the incorporators of the dissolving corporation must file in the office of the Secretary of State a certificate reciting that no part of the capital has been paid in and that the business of the corporation has not been begun, and surrendering all rights and franchises; the dissolution takes effect upon the filing of the incorporators' certificate, without the Secretary of State having to issue a certificate of dissolution like that which is a prerequisite to dissolution under R.S. 14:13-1.

R.S. 14:13-2 expressly prohibits the dissolution of any New Jersey corporation unless "all taxes levied upon or assessed against the corporation by this State in accordance with the provisions of chapter 13 of the title Taxation (§ 54:13-1 et seq.) shall have been fully paid, and a certificate to that effect, signed by the state tax commissioner shall have been annexed to and filed with the certificate of dissolution." (By N.J.S.A. 52:27B-51, the director of the Division of Taxation is to perform the duties formerly imposed on the State Tax Commissioner.) It may be noted that R.S. 14:13-2 requires proof of payment only of taxes levied or assessed in accordance with "chapter 13 of the Title Taxation (§ 54:13-1 et seq.)." The most important taxes formerly imposed by chapter 13 of Title 54 were repealed by L. 1945, c. 162, p. 575, § 27, effective January 1, 1946, the same statute which enacted the Corporation Business Tax Act (L. 1945, c. 162, p. 563, § 1 et seq., N.J.S.A. 54:10A-1). However, the form of L. 1931, c. 341, p. 836, § 1, the statutory antecedent of the provision which is now R.S. 14:13-2 differed in a material respect from the form in which it was re-enacted as part of the Revised Statutes (1937). Prior to its inclusion in the Revision, the statute (L. 1931, c. 341, p. 836, § 1) required proof of payment of all taxes "levied upon or assessed against such corporation . . . in accordance with the provisions of an act entitled 'An act to provide for the imposition of State taxes upon certain corporations and for the collection thereof,' . . . approved April eighteenth, one thousand eight hundred and eighty-four and all acts amendatory thereof or supplementary thereto. . ." (Emphasis added.) L. 1931, c. 341, p. 836, § 1; L. 1900, c. 126, p. 316, § 1. The Act of 1884 was the first corporation tax law enacted in New Jersey except for franchise taxes on certain railroads, and all later corporation tax laws are amendatory thereof or supplementary thereto. See Black, *Taxation in New Jersey* (fifth ed. 1940), § 103a et seq. Consequently, L. 1931, c. 341, p. 836, § 1, prior to its incorporation in the Revised Statutes of 1937, expressly required payment of all corporation taxes as a prerequisite to dissolution. The courts have frequently held, "There is a presumption against a legislative intent to effect a change in substance by a revision of the general laws. Mere changes in phraseology, and even the omission of words, do not necessarily overcome the presumption. The intention to effect a change in substance must be expressed in language excluding a reasonable doubt." (Emphasis added.) *Hartman v. City of Brigantine*, 42 N.J. Super. 247, 255 (App. Div.

1956), aff'd. 23 N.J. 530 (1957); *Murphy v. Zink*, 136 N.J.L. 235, 245 (Sup. Ct. 1947), aff'd. 136 N.J.L. 635 (E. & A. 1948); *In re Hudson County Elections*, 125 N.J.L. 246, 254 (Sup. Ct. 1940). Therefore, R.S. 14:13-2 in its present form must be construed to require that every domestic corporation submit a tax clearance certificate as proof of payment of all corporation taxes levied or assessed against it as a prerequisite to dissolution "by its stockholders." See *American Woolen Co. v. Edwards*, 90 N.J.L. 69 (Sup. Ct. 1916), aff'd. 90 N.J.L. 293 (E. & A. 1917). See also N.J.S.A. 54:50-11, 54:10A-12 and 54:10B-12.

However, the question remains whether the Secretary of State may accept for filing a Certificate of Dissolution prepared and submitted by incorporators pursuant to R.S. 14:13-3 (rather than R.S. 14:13-1) if it is not accompanied by a Tax Clearance Certificate. In determining this question it should be noted that a corporation eligible to dissolve under that provision of the statute, that is, a corporation none of whose authorized capital has yet been paid in and which has not yet begun business, may be liable for corporation taxes. Most New Jersey corporations are subject to the taxes imposed by the Corporation Business Tax Act, N.J.S.A. 54:10A-1 et seq. That act imposes an annual franchise tax upon every domestic corporation for the "privilege of having or exercising its corporate franchise in this State." N.J.S.A. 54:10A-2. A domestic corporation organized under Title 14 of the Revised Statutes acquires that privilege, and thus becomes liable for a tax, from the date of the filing and recording of its certificate of incorporation since R.S. 14:2-4 provides that the incorporators, their "successors and assigns, shall, from the date of filing and recording with the Secretary of State, be a body corporate by the name set forth in the certificate subject to dissolution as hereinafter provided," regardless of whether capital has been paid in or whether the corporation commences the business for which it was created. See *Vanneman v. Young*, 52 N.J.L. 403 (E. & A. 1899); *Dill on N. J. Corporations*, Section 10, page 46 (5th Edition, 1911). Moreover, there is now an increased likelihood that a corporation seeking to dissolve pursuant to R.S. 14:13-3 will owe a tax. The Corporation Business Tax Act, as originally adopted, provided expressly that, "in the case of any corporation which organizes or qualifies on or after January 1 in any year, no tax shall be payable in such privilege year." L. 1945, c. 162, p. 571, § 13. But when the Act was amended by L. 1958, c. 63, p. 185 to include an additional tax measured by income, the quoted provision was omitted. L. 1958, c. 63, p. 195, § 6. Consequently a corporation subject to the Business Corporation Tax Act becomes liable for taxes thereunder as soon as its certificate of incorporation is filed. See N.J.S.A. 54:10A-17; Cf. *Culkin v. Hillside Restaurant, Inc.*, 126 N.J. Eq. 96 (Ch. 1939).

Despite the possibility that a corporation seeking to dissolve pursuant to R.S. 14:13-3 may owe unpaid taxes, two reasons have been suggested why that section, unlike R.S. 14:13-1, does not require submission of a tax clearance certificate for dissolution thereunder. First, it is argued that R.S. 14:13-2 refers to "the certificate of dissolution" to which the tax clearance certificate shall be annexed and that, since R.S. 14:13-1, unlike R.S. 14:13-3, also expressly refers to a "certificate of dissolution," R.S. 14:13-2 was intended to apply to cases of dissolution pursuant to the former statute, but not to the latter. However, although R.S. 14:13-3 does not expressly refer to the phrase "certificate of dissolution," it does require the incorporators to file a certificate which has the effect of dissolving the corporation; certainly this can aptly be described as a certificate of dissolution. Parenthetically, it may be noted that the numerical arrangement of the three sections referred to in the Revised Statutes

is of no significance since R.S. 14:13-2 was enacted as a separate statute and was therefore presumably intended to apply to all dissolutions which may reasonably be comprehended within its terms. R.S. 1:1-5; *Asbury Park Press v. City of Asbury Park*, 19 N.J. 183 (1955); *In re J.W.*, 44 N.J. Super. 216, 224 (App. Div. 1957).

The second objection is that R.S. 14:13-2, like R.S. 54:50-11, N.J.S.A. 54:10A-12 and N.J.S.A. 54:10B-12, make the obtaining of a tax clearance certificate a prerequisite for dissolution of a corporation by its *stockholders*, but not, expressly at least, by its incorporators. It should be noted, however, that R.S. 54:50-11, N.J.S.A. 54:10A-12 and N.J.S.A. 54:10B-12 supplement R. S. 14:13-2 and prohibit any dissolutions "by the action of the stockholders or by the decree of any court" unless all taxes are paid. These statutes are clearly intended to comprehend all types of dissolutions by referring specifically to the two generic subclasses, i.e., voluntary dissolution by act of the corporation itself and dissolution through court action. Similarly, the reference in R.S. 14:13-2 to dissolutions by "stockholders" should be construed to apply to all voluntary dissolutions. There is no reason why a corporation dissolved by its incorporators should be exempt from the requirement of obtaining a tax clearance certificate when that requirement is imposed on all other voluntary dissolutions. Consequently, the term "stockholders" in R.S. 14:13-3, R.S. 54:50-11 and N.J.S.A. 54:10A-12 and 54:10B-12 must be construed to include "incorporators" within the meaning of R.S. 14:13-3. In *Storage Co. v. Assessors*, 56 N.J.L. 389, 392 (Sup. Ct. 1894), a case construing the former capital stock tax, the court said, "The General Corporation Act, under which this company was organized, treats the persons named in the certificate as the stockholders who hold the shares of the company's capital stock, and throughout the act persons who have become subscribers for stock are regarded as stockholders." To the same effect, see *Burke v. Walker*, 124 N.J. Eq. 141, 145 (Ch. 1938), cf. *Biechowski v. Motarese*, 54 N.J. Super. 333, 343 (App. Div. 1959).

The cited statutes expressly direct that "no certificate of dissolution or withdrawal shall be issued by the Secretary of State and no Certificate of Merger shall be filed with him" unless a tax clearance certificate is filed. The statutes do not, however, expressly prohibit the Secretary of State from filing a certificate of dissolution prepared by the incorporators pursuant to R.S. 14:13-3. But such a prohibition is the necessary implication of the statutes previously referred to. Since no corporation may be dissolved unless all of its taxes have been paid, the Secretary of State should not permit a corporation to effect a dissolution by filing its certificate unless he is satisfied that the taxes have been paid. See *Texas Co. v. Dickinson*, 79 N.J.L. 292 (Sup. Ct. 1910). Since a tax clearance certificate is the most satisfactory proof that taxes have been paid, the Secretary should not accept a certificate of dissolution for filing unless it has annexed thereto such a tax clearance certificate.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: MURRY BROCHIN  
Deputy Attorney General

August 23, 1960.

JOSEPH SOLIMINE, Secretary  
Essex County Board of Taxation  
Hall of Records, Room 201  
Newark 2, New Jersey

FORMAL OPINION 1960—No. 26

DEAR MR. SOLIMINE:

We have the request of the Essex County Board of Taxation for an opinion as to its power and authority to entertain a petition filed on August 15, 1960 by a taxpayer of the Township of Maplewood concerning assessments in that municipality. The petition was filed by the taxpayer individually and "on Behalf of a Group of Taxpayers." We are also asked what procedure should be followed if the board of taxation has jurisdiction to entertain the petition.

The petition makes the following general charges:

1. That the "re-appraisal and assessment" of properties in Maplewood was improperly conducted; and
2. That the resulting assessments are improper, many properties being over-assessed and other properties under-assessed:

Petitioner asserts that "specific instances of inequalities are legion, and have been admitted as such by officials of Maplewood"; "that business properties in the Township are under-assessed, and that the burden of taxation is being borne by residential properties"; that a taxpayer was "told" not to advise "Trenton" (state tax authorities) of the true selling price of a certain property; and that hundreds of taxpayers have signed a petition to the municipal authorities and the county board of taxation seeking a reassessment.

The petitioner asks the county board of taxation to make an investigation and to reassess the properties in Maplewood or to "cause a reassessment of all the real property in the Township of Maplewood" in accordance with applicable laws.

Reference to numerous provisions in our tax laws relating to assessments is necessary in order to answer the questions you have posed. At the outset, notwithstanding the filing of the petition on August 15, 1960, we question whether the petition as presently drawn is of a nature that comes within the appeal sections under Article 4, Chapter 3 of Title 54, particularly N.J.S.A. 54:3-21. N.J.S.A. 54:3-21 permits the filing of a petition of appeal on or before August 15th in any tax year by a taxpayer "feeling aggrieved by the assessed valuation of his property, or feeling that he is discriminated against by the assessed valuation of other property in the county \* \* \*." A taxing district also has the right to appeal under that section if it feels "discriminated against by the assessed valuation of property in the taxing district, or by the assessed valuation of property in another taxing district in the county \* \* \*." This section relates to an appeal directed at individual items of taxable property. Such appeals seek to alter a specific assessment on a specific piece of property for the tax year in question. This statute requires that a copy of the petition of appeal shall be filed with the county board of taxation and also with the assessor, clerk or attorney of the taxing district, "setting forth the cause of complaint, the nature and location of the assessed property and the relief sought.

The petition shall \* \* \* contain such further information as may be from time to time prescribed by rule of the board \* \* \*." Where a municipality seeks to alter by this appeal the individual assessment of a property, notice must be given to the property owner, although such notice is not provided for in the statute. *Jersey City v. Division of Tax Appeals*, 5 N.J. Super. 375, 385 (App. Div. 1949), *aff'd*, 5 N.J. 433 (1950). The latter case recites that the City of Jersey City in one year filed 34,341 separate appeals.

The petition at hand may be regarded as failing to sufficiently specify the location of each parcel of property according to rules and regulations of your board for the purposes of treating this petition as an appeal from the assessment of each such property. In any case, the lack of notice to a property owner whose assessment might be changed by such an appeal would prevent the acceptance of this petition as an individual assessment appeal, as contemplated by N.J.S.A. 54:3-21. Thus, we view the appeal as a general complaint seeking an investigation, review and reassessment of all real property assessments in the Township of Maplewood.

The power to investigate and to order reassessments is expressly given to the (State) Director of the Division of Taxation. *See*: Articles 3 and 4, Chapter 1 of Title 54, specifically, R.S. 54:1-16 and 17; R.S. 54:1-18 to 32, inclusive. We do not consider the express grant of authority to the Director of the Division of Taxation to conduct investigations under circumstances specified in the statutes as exclusive or as a prohibition upon the power of county boards of taxation concurrently to investigate and review assessments and assessing practices for appropriate purposes.

Assessments are made with reference to their ownership and value on October 1st of a pre-tax year. N.J.S.A. 54:4-1. Each item of taxable property is listed by the assessor on a tax list and duplicate which is thereafter filed with the county board of taxation on January 10th in each tax year. N.J.S.A. 54:4-35. This latter statute provides that:

"The assessor shall begin the work of making assessments upon real and personal property on October first in each year and shall complete the work by January tenth following, on which date he shall attend before the county board of taxation and file with the board his complete assessment list, and a true copy thereof, to be called the assessor's duplicate, properly made up and legibly written in ink, to be examined, revised and corrected by the board as hereinafter provided." (Emphasis added.)

Among the provisions for examination and revision of the tax lists is N.J.S.A. 54:4-47. This section refers to the process of equalizing, reviewing and correcting, "after investigation," individual property assessments. *City of Passaic v. Passaic County Board of Taxation*, 18 N.J. 371, 379 (1955). But these activities of the county board of taxation must be complete on or before May 1st in each year, when the tax duplicate is finally returned to the tax collectors of each taxing district. N.J.S.A. 54:4-55. Thereafter, changes in individual assessments can be made by the county board of taxation only as the result of appeals filed pursuant to N.J.S.A. 54:3-21.

Because of the numerous duties to be performed by the county board of taxation between January 10th and May 1st of each tax year, it is difficult, if not impossible, for the county board of taxation to engage in a broad program of investigating, revising and reassessing numerous individual assessments in any one taxing district, let alone the county as a whole. Thus, the courts have emphasized time and again that the

responsibility for accurate and fair assessments falls primarily upon the assessor of each taxing district. *See: Village of Ridgefield Park v. Bergen County Board of Taxation, et al.*, 31 N.J. 420, 432 (1960), where Chief Justice Weintraub stated that the county board of taxation "cannot be expected to assume the primary role of the assessors" and that the county board "had neither the time nor the funds for so massive an effort" as is required to correct assessment rolls through municipal-wide revaluations.

It is our view that all county boards of taxation have the power and authority at all times, in their discretion, to investigate and examine assessments in any municipality of the county in which the board has jurisdiction. Although such review cannot alter individual assessments except under N.J.S.A. 54:4-47 or where jurisdiction is conveyed to the county board by an appeal pursuant to N.J.S.A. 54:3-21, the board may well conclude that an investigation is warranted to perform its functions under R.S. 54:3-16, or to prepare for the functions it may perform in a subsequent year under N.J.S.A. 54:4-47.

R.S. 54:3-16 provides as follows:

"Each county board of taxation shall have supervision and control over all officers charged with the duty of making assessments for taxes in every taxing district in the county. Such officers shall be subject to, and shall, in making assessments, be governed by such rules, orders or directions as may be issued by the county board, in the enforcement of the objects of this title. Before making any such rules, orders or directions, the county board shall submit them to the state tax commissioner, and no rule, order or direction shall be considered adopted by the county board until approved by him."

It is implicit in the above statute that the county boards of taxation have the power to investigate assessing practices in order to promulgate or revise its rules and directions for the supervision of assessors. Likewise, the Director of the Division of Taxation has the power to investigate and examine assessing practices in order to pass upon rules and directions of the county boards. The power and authority to investigate assessing practices is also an incident to the authority given to the county boards of taxation and the Director of the Division of Taxation regarding removal of assessors for improper conduct. *See*: Article 6, Chapter 1, Title 54 (R.S. 54:1-36 et seq.).

The power to investigate and review assessments and assessing practices is as much in the interest of assessors and municipal officials as it is in the interest of numerous complaining taxpayers. Under appropriate circumstances it may be as desirable to know that assessments have been properly made as to know that they have been improperly made. The power to examine and review assessments and to make rules to govern the conduct of assessors is directed toward the cure and improvement of assessing practices and not necessarily toward the condemnation or revision of specific assessments.

You are therefore advised that a county board of taxation has jurisdiction, within its discretion, to entertain the petition in question for the purposes indicated above. Having authority to review assessments and assessing practices, the board may employ a procedure which it deems reasonably appropriate to develop all pertinent facts for its study. The procedure should afford notice to all interested parties and the opportunity to be heard. The authority for review and the procedure to be followed

relates to the needs and concerns of the assessor as well as individual taxpayers and your board.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: THEODORE I. BOTTER  
*Deputy Attorney General*

October 17, 1960.

HONORABLE JOHN A. KERVICK  
*State Treasurer*  
State House  
Trenton, New Jersey

FORMAL OPINION 1960—No. 27

DEAR MR. KERVICK:

You have requested our interpretation of N.J.S.A. 18:13-112.70(e) of the Teachers' Pension and Annuity Fund-Social Security Integration Act (P. L. 1955, c. 37) in applying the Social Security offset ceiling of December 31, 1959. See also N.J.S.A. 43:15A-59(d).

N.J.S.A. 18:13-112.70 provides:

"When a member who retires reaches age 65 or upon retirement of a member after the attainment of age 65, the board of trustees shall reduce the retirement allowance by the amount of the old age insurance benefit under Title II of the Social Security Act paid or payable to him whether received or not. Membership in the retirement system shall presume the member's acceptance of and consent to such reduction. However, such reduction shall be subject to the following limitations:

\* \* \*

"(e) Any increase in the amount of the old age insurance benefit under Title II of the Social Security Act to take effect after December 31, 1959, shall be disregarded in determining the amount of such reduction from the retirement allowance." (Emphasis supplied.)

We are concerned in this opinion with the maximum offset to be made from state employees' retirement allowances by reason of the 1958 increase in federal Social Security benefits. The act of August 28, 1958; P.L. 85-840; 72 Stat. 1013, 1020. This federal legislation provided for an across-the-board increase in Social Security benefits and in addition thereto, it also increased the maximum eligible average monthly salary of all insured individuals from \$350 per month to \$400 per month, as of January 1, 1959.

It is clear that the new federal benefits provided in the 1958 table took effect in January of 1959. Section 101(g) of P.L. 85-840.

There is no question that by December 31, 1959 the 1958 schedule of benefits was fully effective, both legally and factually, as to all employees with an average monthly

earning of \$350 or less. It is also clear that the 1958 schedule of benefits was fully effective by reason of federal law in January of 1959. But by December 31, 1959, because the new maximum eligible monthly salary, \$400, had only been in effect for a year, the highest amount of monthly primary insurance payable to an insured individual who became eligible as of that date was \$119. Such a person had not had sufficient time since the passage of the increase to earn a \$400 average for the total salary period considered by the federal government. 42 U.S.C.A. § 415b.

The essence of the question asked in interpreting N.J.S.A. 18:13-112.70(e) is whether the offset freeze concerned increases in the schedule of federal benefits legislated after December 31, 1959 or whether it concerned increases in eligibility for benefits to an employee based upon his salary experience comparatively, before and after December 31, 1959. For the reasons hereinafter stated, it is our opinion that the Legislature intended the offset ceiling to be determined by the federal table of benefits in effect prior to December 31, 1959 and not the maximum benefits as of that date because of salary experience.

To assure that Social Security integration was equitable to all public employees in view of the possibility of increased federal benefits at a later date, the Legislature imposed a limitation upon the state offset of federal benefits from retirement allowances, to the effect that increases in the amount of old age benefits after 1959 are disregarded in determining the offset, N.J.S.A. 18:13-112.70(e).

We must determine whether the benefit increases corresponding to that portion of the \$50 increase in eligible monthly salary are to be disregarded insofar as they could not have been earned prior to December 31, 1959. Because the increase was not in effect long enough for employees to aggregate sufficient months at such higher rate, they could not earn the full average by that date. We have a situation where the schedule of benefits is most definitely in effect but the maximum amount of increases thereunder cannot be earned until a date subsequent to January 1, 1959.

An employee who was making over \$400 a month for many years prior to 1958 only received credit for \$350. He cannot take advantage of the maximum \$127 primary insurance benefit unless he works sufficient years after 1958 at the new eligible salary maximum to reach a maximum average. Thus, as his salary average increases, and benefits, accordingly, he argues that all benefits for which he became eligible after December 31, 1959, are truly an "increase." Accordingly, for an employee who begins service after January 1, 1960, or for an employee whose salary is far below the \$400 per month average until after December 31, 1959, Social Security benefits are based upon the 1958 table and upon his total earning experience, even if it be zero, from the date of January 1, 1951 or his twenty-first birthday. Since these employees were either not entitled to any benefits on December 31, 1959, or, a small benefit based upon prior earnings, they, too, can argue that the benefits received at Social Security age based upon salary after December 31, 1959 are an "increase" over the insurance benefit payable prior thereto. It can thus be seen that if the Legislature were intending to exclude increases as determined by an individual's eligibility, as opposed to legislative increases in the table of benefits in effect, virtually every employee retiring in the future could seek to avoid a major portion of the Social Security offset by this argument. The mere fact that certain, or all, employees do not earn the maximum benefit by the cutoff date, December 31, 1959, does not make the federal increase ineffective.

There is no question that the intent of this law was not to disregard all offset merely because Social Security benefits had not become effective or capable of com-

putation prior to December 31, 1959. Such would be an unreasonable result that would nullify the law virtually to all public employees. *Cf. Dvorkin v. Dover Tp.*, 29 N.J. 303, 315 (1959); *Schierstead v. City of Brigantine*, 29 N.J. 220, 230 (1959). It is more reasonable to construe the law in a manner that gives it reason, and consistency in its application to all employees. *Robson v. Rodriguez*, 26 N.J. 517, 528 (1958). In 1958 the schedule became completely effective to all employees with an average earning of \$350 or less. It further became effective, prior to December 31, 1959, for that class of employees with an average eligible salary of \$400. The federal law, in creating a new class of benefits, i.e., for those with an average eligible monthly salary of between \$350 and \$400, increased such benefits at that time. The benefits of this class have not been increased or changed since the cutoff date. There were persons eligible for benefits in that new class prior to December 31, 1959, and even though none in the class had attained the full maximum average, the class nevertheless existed.

There is no legislative reason to discriminate between employees with an average salary of \$350 or less and those with a higher eligible average salary. The 1958 table became fully effective as to both. Such obvious difference of treatment would have to be spelled out by the Legislature in order to view the federal table as effective as to some but not as to others.

Legislative interpretation and logic support the conclusion we have reached independently of an historical analysis of this statutory formula. However, the consistent administrative interpretation and practice under N.J.S.A. 18:13-112.70(e) and N.J.S.A. 43:15A-59(d) are also a supporting aid in construing the legislative intent with the conclusion we have reached. *Lane v. Holderman*, 23 N.J. 304, 322 (1957). The State Treasurer as general administrator of the Social Security provisions and the integrated retirement laws, N.J.S.A. 43:15A-1, N.J.S.A. 43:22-2(e), 8, and the actuary for the respective boards of trustees, N.J.S.A. 43:15A-18, 19, N.J.S.A. 18:13-112.59, .60, have both interpreted this legislation to include all increased benefits pursuant to the 1958 federal table as subject to offset. The actuary has actually projected the cost for maintaining the retirement systems on an actuarially sound basis by treating the 1958 schedule of benefits as fully effective prior to December 31, 1959. Any change would result in a severe impact on the retirement system threatening its actuarial soundness. The strong administrative interpretation thus supports the legal analysis hereinabove set forth.

Therefore, we advise you that N.J.S.A. 18:13-112.70(e) and N.J.S.A. 43:15A-59(d) should be construed to compute the offset from retirement allowance on the basis of the federal benefit table in effect prior to December 31, 1959 based upon the eligible monthly earning experience of an employee at the time of Social Security eligibility even though such experience includes an average monthly salary increase after December 31, 1959. In view of the identity of language and purpose, the same result follows as to N.J.S.A. 43:15A-59(d).

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: LEE A. HOLLEY  
Deputy Attorney General

OCTOBER 21, 1960

HONORABLE JOHN A. KERVICK  
State Treasurer of New Jersey  
State House  
Trenton, New Jersey

FORMAL OPINION 1960—No. 28

DEAR MR. KERVICK:

You have asked whether shares of common or preferred stock of private corporations which are purchased as investments for certain retirement funds can legally be registered in the name of a nominee instead of in the name of Boards of Trustees of the respective retirement systems. The Division of Investment is now purchasing approved stocks under regulations adopted by the State Investment Council. Investment in stocks of private corporations has been expressly authorized by the Legislature. Laws 1959, c. 17; N.J.S.A. 52:18A-88.1. It will facilitate the administration of the stock investment program to register the certificates of stock in the name of the nominee of a "custodian" bank. Various banks now act as custodians of state funds and securities under custodial agreements authorized by N.J.S.A. 52:18A-8.1 *et seq.*

*Nominee Registration by Trustees Generally*

The problem presented has commonly confronted banks and other corporate fiduciaries as well as individual trustees in the investment in stocks and other securities. The problem arises from the common law rule that a trustee is under a duty to separate trust property from all other property, to "earmark" property as belonging to the trust, and, hence, to register securities in his name as trustee and not in the name of his nominee. Under the common law rule, a trustee commits a breach of trust when he takes title to trust property in his individual name, even though he does not mingle the property with property of his own. II *Scott on Trusts* 1321, § 179.3 (2d Ed., 1956); 27 N.Y.U. Law Rev. 687 (1952); *Bogert, Trusts and Trustees* (2d Ed., 1960) 297, § 596. Without authorization by statute or in the trust instrument itself, the duty to earmark was considered absolute. *Bogert, "Trust Investments: Earmarking or Nominees?"*, 24 Tex. L. Rev. 418 (1946). The trustee, therefore, is guilty of a breach of trust if he invests trust funds in shares of stock or other securities which are registered in his individual name or that of a third person, rather than in his name as trustee. *Scott on Trusts, supra*, § 179.3. See: *In re Buckelov*, 128 N.J. Eq. 81, 82, 87 (Prerog. Ct. 1940), *aff'd*, 129 N.J. Eq. 383 (E. & A. 1941) where a corporate trustee was charged with the depreciation of a municipal negotiable bond for failing to register the bond in its name as trustee. (Note, however, the exception which permits bearer bonds to be held without being so "earmarked." 24 Tex. L. Rev. 417 (1946); 27 N.Y.U. Law Rev. 688 (1952).)

One reason for the rule is stated as follows: (*Bogert, Trusts and Trustees*, 298 § 596):

"If a trustee is permitted to hold the trust res just as he holds his individual property, he may be subjected to a strong temptation to take the trust property for himself and allocate to the trust one of his own less advantageous pieces of property. \* \* \* If he owns the bonds of different corpo-

rations, part of which are trust property and part privately owned by him, the trust bonds are not marked as such, and some of the bonds advance in value while others depreciate, there is a temptation to assert that the inferior bonds were those which he held in trust and the superior ones were his own property. If the trust property is clearly identified as such when it is first taken over by the trustee and continuously held in this way, the trust will inevitably take the losses or gains coming from the property, and the trustee can have no option to claim it as his own."

See also: *Liberty Title & Trust Co. v. Plews*, 6 N.J. Super. 196, 207-210 (App. Div. 1950) where the court condemned the practice of not promptly earmarking trust investments, saying:

"When the plaintiff bank took mortgages in its individual capacity with a view towards ultimately distributing them amongst its customers, its trusts and itself, it placed itself in a position of divided loyalty and subjected itself to improper temptation. Thus, in each instance of selection, arose the possibility of a conflict between the interests of the trust on the one hand and the interests of the bank's commercial department on the other hand."

Notwithstanding these rules of law, it is reported that "many trust institutions held mortgages, stocks, and other investments either in their own names, or in the name of a nominee of the trust institution, without reference to any trust, during the generation immediately preceding the depression of 1929." *Dogert* in 24 Tex. L. Rev. 419, 421 (1946). This practice was inspired in part by the difficulties in transferring stock certificates held in the name of trustees.

Under the rules of the New York Stock Exchange and the New York Curb Exchange, "the tender of securities registered in the name of a fiduciary is not good delivery." 27 N.Y.U. Law Rev. 691 (1952). There is a duty upon corporations to ascertain, where a transfer of stock is demanded, whether or not the transfer is duly authorized. A corporate transfer agent is put on notice to discover the extent of the trustee's authority to make the transfer. 27 N.Y.U. Law Rev. 691 (1952). A change in this rule has been brought about by the Uniform Fiduciaries Act, § 3, adopted in New Jersey by L. 1927, c. 30, § 3, N.J.S. 3A:41-3, which provides that inquiry need not be made by a corporation or its transfer agent as to the authority of a fiduciary to transfer shares of stock or other securities. Liability will not attach without actual knowledge of a breach of trust. Nevertheless, proof of authority is still required by many transfer agents as a matter of precaution. Thus, it can readily be seen how costly and slow is the process of transferring stock in the name of a trustee. It is particularly cumbersome when the fiduciaries are trustees of a public employees' retirement fund, whose investments are made by state officers under statutory controls and regulations of an investment council, and not pursuant to a single trust document.

The stock market crash of 1929 and the depression of the 1930's hastened two changes in the law. One change was made by the enactment of statutes which legalized the practice of certain fiduciaries of registering securities in the name of its nominee. See: N.J.S. 3A:15-7, enacted by L. 1944, c. 114, authorizing banks and trust companies acting as fiduciaries in New Jersey to register shares of stock and other securities in the name of a nominee, without disclosing the fiduciary capacity, providing certain safeguards are maintained. The second change in the law exonerated from

liability a trustee who in good faith takes title to trust property in his individual name and no loss results therefrom. This rule was incorporated in Comment d, § 179, Restatement of Trusts (1935). Section 179 restates the common law rule requiring the separation and earmarking of trust property. But Comment d, while repeating the earmarking rule, changed the rule of damages. Part of this comment is as follows:

"If the trustee takes title to the trust property in his individual name in good faith, and no loss results from his so doing, he is not liable for breach of trust. \* \* \* The breach of trust in such a case is merely a technical breach of trust, and no loss has resulted therefrom. \* \* \* Even if he acted in good faith, if a loss resulted from the fact that he took title in his own name, as for example if his personal creditors were thereby enabled to reach the property free of trust, he would be liable for the loss."

The Restatement rule as to losses was expressly adopted in New Jersey and numerous other states. *Cox v. Camden Safe Deposit & Trust Co.*, 124 N.J. Eq. 490, 502 (Chan. 1938). Nevertheless, it is apparent that unless authorized by statute or the terms of the trust instrument, a trustee is guilty of a technical breach of trust for failing to register shares of stock in his own name, as trustee, even though there would be no liability without loss.

#### *The Retirement Funds in Question*

N.J.S.A. 18:13-112.4 provides as to the Teachers' Pension Annuity Fund, "By that name all its business shall be transacted, its funds invested, warrants for money drawn, and payments made and all of its cash and securities and other property held." An identical provision applies to the Public Employees' Retirement System of New Jersey. N.J.S.A. 43:15A-6i. Under N.J.S.A. 43:16A-2, in the system known as The Police and Firemen's Retirement System of New Jersey, it is provided that "by such name all of its business shall be transacted, all of its funds invested, and all of its cash and securities and property held in trust for the purpose for which received." The moneys in these retirement systems are trust funds; benefits are exempt from attachment, levy and garnishment (N.J.S.A. 18:13-112.53; N.J.S.A. 43:15A-53; N.J.S.A. 43:16A-17); and each fund is administered by a board of trustees (N.J.S.A. 18:13-112.58; N.J.S.A. 43:15A-17; N.J.S.A. 43:16A-13).

However, the transacting of business and the "holding" of assets of the retirement systems is largely a matter of recording transactions and bookkeeping. The State Treasurer is the legal custodian of the funds. N.J.S.A. 18:13-112.64; N.J.S.A. 43:15A-35; N.J.S.A. 43:16A-14. N.J.S.A. 18:13-112.64 (Teachers') and N.J.S.A. 43:15A-35 (Public Employees') are identical provisions as follows:

"The State Treasurer shall be the custodian of the funds created by this act, shall select all depositories and custodians and shall negotiate and execute custody agreements in connection with the assets or investments of any of said funds.

"All payments from the funds shall be made by him only upon voucher signed by the chairman and countersigned by the secretary of the board of trustees. No voucher shall be drawn, except upon the authority of the board duly entered in the record of its proceedings."

N.J.S.A. 43:16A-14 (Police and Firemen's) is similar to the above sections. In practice, then, the moneys and other securities are in the custody of the State Treas-

urer and custodian banks under agreement with the State Treasurer. As indicated below, most investments are in non-registered or bearer bonds which are not in the name of any pension system except as designated on the books in the Department of the Treasury, the pension systems and the custodian banks.

The use of custodian banks to facilitate the investment program in the handling of securities was approved by L. 1954, c. 22; N.J.S.A. 52:18A-8.1 *et seq.* This act authorizes and empowers the State Treasurer to enter into agreements with national banks and banks authorized to conduct business in New Jersey, pursuant to which the banks may act as fiscal agents or as custodians for funds and securities of the state as well as of any pension system maintained in whole or in part by the state. In fact, the practice of using custodial banks under agreement with the Treasurer had preceded this legislation. The statement attached to the bill which was enacted as L. 1954, c. 22, is as follows:

"For some years past the Department of the Treasury has entered into agreements with certain banks located in the State whereby these institutions have acted as custodians for funds and securities of the State, and those of certain pension agencies and funds, and have performed certain fiscal duties under these custody agreements.

"This practice has been regarded as advantageous to the State, as these duties, if performed by the State, would require additional personnel and facilities, at a considerable cost to the State.

"It is deemed advisable in the public interest to secure statutory authority for this present practice, in order that the subject of custodial arrangements between the State and banks be placed on a uniform basis, greater efficiency in certain fiscal operations be achieved, and contractual and legal obligations under said agreements be defined."

Although shares of stock were not purchased for investment at the time of the enactment of the custodian bank legislation, some funds had been invested in registered securities. Section 2 of the act, N.J.S.A. 52:18A-8.2, permits the custodian agreements to provide for the performance of the following services by the bank acting as fiscal agent or custodian:

"make or accept delivery of securities; exchange securities, collect interest or dividends thereon and principal thereof; surrender securities for exchange, redemption or payment; hold securities, cash or other assets of the State or of any such pension agency, system or fund, as aforementioned, in safekeeping; deposit in such account or accounts as the State Treasurer shall designate, the proceeds of the sale, exchange, redemption or payment of securities and of interest or dividends thereon, and such other related services as the State Treasurer may determine."

It will facilitate the performance of these services to have shares of stock registered in the name of a nominee of a custodian bank. The legislation authorizing agreements with custodian banks neither expressly permits nor expressly prohibits the use of nominee registrations. The terms of the custodian agreement are left to the discretion of the State Treasurer, N.J.S.A. 52:18A-8.2, except that certain provisions for indemnification against losses must be contained therein. N.J.S.A. 52:18A-8.3. As noted above, the use of nominee registrations by banks is a widespread practice in the investment field and is expressly authorized under N.J.S. 3A:15-7

where a bank acts as the sole beneficiary or as a co-beneficiary and has the consent of its co-beneficiaries.

In general, investment functions are performed by the Division of Investment under authority of L. 1950, c. 270, as amended. N.J.S.A. 52:18A-79 *et seq.* See in particular, N.J.S.A. 52:18A-88.1, enacted by L. 1959, c. 17, § 1. See also: N.J.S.A. 52:18A-100 and N.J.S.A. 18A:13-112.63. The practice followed in the purchase of common stocks is as follows: The Director of the Division of Investment sends a recommendation form to the retirement system prior to making a purchase. Unless disapproval is received within 48 hours (N.J.S.A. 52:18A-85), the Director makes the stock purchase by telephone and exchanges with the broker written confirmations of the purchase. The confirmations of the Director and of the broker both indicate the pension fund for whose account the stock was purchased. There is, therefore, an immediate record of the account for which the stock was purchased, the name of the stock, the quantity and the purchase price. Through a New York bank and various transfer agents, the certificates of stock are ultimately delivered to the New Jersey custodian bank. A letter is also sent to the custodian bank by the Director transmitting to the bank a copy of the purchase confirmation sent to the broker as well as a check to cover the purchase cost. The letter instructs the bank to pay for and receive the securities from the broker and to hold said securities for the pension fund on whose behalf the investment is made. Dividends received by the bank are credited to the pension account and statements are furnished by the bank to the Director and the boards of trustees of the respective pension systems.

The relationship of the custodian bank to the state and the pension systems is that of an agent and custodian under contract. For some purposes, an agent or custodian bears a fiduciary relationship to its principal, and owes the principal an obligation of loyalty not unlike that of a trustee. See: *Porter v. Woodruff*, 36 N.J. Eq. 174, 179-181 (Chan. 1882). Undoubtedly, an agreement reciting that the obligations imposed upon the custodian bank shall be deemed to be trust obligations and the bank shall be deemed to be a trustee of the securities and assets deposited pursuant to the agreement would establish the fiduciary character of the relationship. In this sense, the custodian bank would be a co-fiduciary with the board of trustees of each retirement system as to the funds and securities subject to the agreement. As such, the Treasurer may provide by agreement, with the consent of the boards of trustees of the respective retirement systems, that securities held by a custodian bank may be registered and held in the name of a nominee of the bank without disclosing the fiduciary capacity. The authority lies in the power of the Treasurer to determine the terms of the custodial agreement under N.J.S.A. 52:18A-8.1 *et seq.* and the provisions of N.J.S. 3A:15-7 which permit banks acting as fiduciaries to register securities in the names of their nominees.

The conditions imposed by this latter statute when securities are registered in the name of a nominee are as follows:

- "(1) the records of the fiduciary or fiduciaries and all accounts rendered by it or them shall at all times clearly show the ownership of the securities so registered,
- (2) such securities shall at all times be kept separate and apart from the assets of such bank, trust company, savings bank or national bank and
- (3) the nominee shall not have possession of or access to the securities."

The statute further provides that "The corporate fiduciary shall be liable for any loss occasioned by the acts of the nominee with respect to securities so registered."

The State Investment Council has authorized the investment in common stocks for the three pension systems mentioned above, the Teachers, Public Employees and Police and Firemen's. The statute authorizing such investments limits the investment in common stock to not more than 10% of the book value of any such fund. N.J.S.A. 52:18A-88.1. As a practical matter, we note that the sums invested at the present time in non-registered bonds greatly exceed the maximum investment in common stock authorized for the three funds in question. These non-registered bonds are in the possession of custodian banks. Their ownership by the respective funds is reflected solely in the books and records relating to each transaction. Non-registered or bearer bonds may be transferred to a holder in due course by delivery alone. The Legislature has required that custodial agreements impose liability upon the bank for loss that may occur from the improper conduct of the bank, its officers, employees and agents. N.J.S.A. 52:18A-8.3. The agreement under which stock certificates would be registered in the name of the nominee should contain a similar provision. No greater risk is entailed by the use of nominee registration.

You are therefore advised that under appropriate agreement between the State Treasurer and custodian banks, for the handling of securities by such banks in trust for the specific purposes of such agreement, and with the consent of the boards of trustees of the respective retirement systems, shares of common and preferred stock of private corporations may be legally registered in the name of a nominee of such banks.

Very truly yours,

THEODORE I. BOTTER  
*Assistant Attorney General*

NOVEMBER 7, 1960

HONORABLE DWIGHT R. G. PALMER  
*Commissioner, State Highway Department*  
1035 Parkway Avenue  
Trenton, New Jersey

FORMAL OPINION 1960—No. 29

DEAR COMMISSIONER:

You have requested an opinion whether the State Highway Commissioner may sell air rights over State highways or State highway rights of way. You have indicated that where State highways cut through land located in densely populated areas, requests have been made to purchase air rights over such highways so as to make available for use such locations for suitable development which will not interfere with the highway.

It is our opinion that you have the power to sell such air rights. N.J.S.A. 27:12-1 authorizes the Commissioner to dispose of property not needed for public use. In part, this section states that:

"When real estate or any right or interest therein has or shall have come into the possession or control of the commissioner, or when he has or shall

have taken real estate or any right or interest therein in the name of the state for the use of the state in the improvement, betterment, reconstruction or maintenance of a state highway, and the commissioner has or shall have determined that the property so acquired is no longer required for such use, he may \* \* \*

sell, lease or exchange such real estate or interest therein according to other conditions that do not need examination for the purpose of answering this question.

New Jersey, by statute, has codified the common law doctrine that the owner of the lands has exclusive control over the immediate reaches of the enveloping atmosphere. *Hyde v. Somerset Air Service*, 1 N.J. Super. 346 (App. Div. 1948); *United States v. Gausby*, 328 U.S. 256 (1946).

N.J.S.A. 46:3-19 states that:

"Estates, rights and interests in areas above the surface of the ground whether or not contiguous may be validly created in persons or corporations other than the owner or owners of the land below such areas and shall be deemed to be estates, rights and interests in lands."

Air rights pass by descent and distribution as do other estates, N.J.S.A. 46:3-20, and are subject to the same rights, privileges, incidents, powers and restrictions pertaining to other estates, N.J.S.A. 46:3-21. Laws pertaining to regular estates and land also apply to areas above the surface of the ground, N.J.S.A. 46:3-22.

Therefore, subject to the terms of N.J.S.A. 27:12-1 relating to the procedure to be followed regulating the manner of the sale or exchange of such lands, you are authorized by statute to convey air rights above highways and highway rights of way which are owned by the State.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: DAVID M. SATZ, JR.  
*Assistant Attorney General*

NOVEMBER 7, 1960

HONORABLE JOHN A. KERVICK  
*State Treasurer*  
State House  
Trenton, New Jersey

FORMAL OPINION 1960—No. 30

DEAR MR. KERVICK:

You have asked whether certain taxes, penalties and interest which are owed to the State pursuant to R.S. 54:43-6 and R.S. 54:44-1 et seq. may be written off for accounting purposes when they have proved to be uncollectible.

Attorney General's Formal Opinion, 1959—No. 9 considered the question whether taxed costs owing to the Department of Labor and Industry pursuant to R.S. 34:11-67

may be written off for accounting purposes when they have proved uncollectible. That opinion pointed out that writing off an uncollectible debt was a recognized accounting practice, that it would not cancel the debtor's legal liability to the State and that it would, therefore, not contravene Art. VIII, § 3, par. 3 of the New Jersey Constitution which prohibits an "appropriation of money . . . by the State . . . to or for the use of any society, association or corporation whatever." See *In re Voorhees*, 123 N.J. Eq. 142 (Prerog. Ct. 1938); *Wilentz v. Hendrickson*, 133 N.J. Eq. 447 (Ch. 1943), aff'd 135 N.J. Eq. 244 (E. & A. 1944); *In re Wellhofer*, 137 N.J.L. 165 (S. Ct. 1948); *State v. Erie Railroad Co.*, 23 N.J. Misc. 203 (Sup. Ct. 1945). The opinion held that, subject to the uniform system of accounting authorized by the Treasurer pursuant to R.S. 52:27B-33, the Commissioner of Labor and Industry could write off for accounting purposes taxed costs due under R.S. 34:11-67 which in his judgment were uncollectible.

The principles stated in Attorney General's Formal Opinion, 1959—No. 9 are applicable to your present inquiry as well as to the general problem of how debts owed to the State may be written off as uncollectible. The Director of the Division of Budget and Accounting is authorized by law to "provide and maintain a uniform system of accounting for the State, its departments, institutions, courts and other State agencies. . . ." N.J.S.A. 52:27B-33. The Director, therefore, has the discretion to establish accounting procedures for reflecting the fact that items previously carried as receivables are no longer collectible.

The factual question of whether a particular receivable is collectible is a matter to be determined by the State Auditor upon recommendation of the department or agency directly concerned, subject to procedures established by the Director of the Division of Budget and Accounting. The State Auditor is directed by statute to "examine and post-audit all the accounts, reports and statements and make independent verifications of all assets, liabilities, revenues and expenditures of the State, its departments, institutions, boards, commissions, officers and any and all other State agencies now in existence or hereafter created. . . ." N.J.S.A. 52:24-4. The quoted statement of the duties of the State Auditor implies that if his independent verification indicates that certain receivables are no longer collectible—and therefore no longer assets in any meaningful sense—the Auditor should direct that the receivables be written off in accordance with the procedures established by the Director of the Division of Budget and Accounting.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: MURRY BROCHIN  
Deputy Attorney General

JANUARY 25, 1960

HONORABLE JOHN A. KERVICK  
State Treasurer  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-1

DEAR SIR:

You have requested our opinion as to whether an individual who is presently employed by the County of Mercer and who, a number of years prior to his county employment, was employed by the City of Trenton is entitled to prior service credit under the Public Employees' Retirement System for this service with the City of Trenton.

The prior service for which credit is sought was rendered between February 1, 1941 and June 30, 1943. You advise that this individual's service with the County of Mercer did not begin until approximately seven years thereafter, February 1, 1950. The Public Employees' Retirement System became effective in Mercer County on July 1, 1955. At that time pursuant to N.J.S.A. 43:15A-75, he exercised his option and joined the system. He was given a prior service certificate covering service rendered to the county prior to the date the act became effective as required by N.J.S.A. 43:15A-75.

The employee in question now takes the position that he is also entitled to prior service credit for his service with the City of Trenton. He cites in support of his position R.S. 40:11-5 which reads in pertinent part as follows:

"Whenever heretofore there has been or hereafter there may be effected by appointment, transfer, assignment or promotion, of a municipal *employee*, to any other department or position in the municipal employ, or to a position or department of the county government; . . . in counties of the first or second class, the period of such prior service in said county or municipal employment, for any purpose, whatsoever, shall be computed as if the whole period of employment of such employee had been in the service of the department, or in the position, to which the said employee had been appointed, transferred, assigned or promoted." (Emphasis supplied.)

It is our opinion that said employee's request for prior service credit for service with the municipality should be denied. At the time of his appointment to a position in county government, he was not a municipal employee and, in fact, had not been for a number of years, hence he does not come within the class of persons protected by R.S. 40:11-5. Had the service been continuous, he would be entitled to prior service credit for his service with the municipality. See Memorandum Opinion, January 6, 1956 by Charles S. Joelson, Deputy Attorney General, addressed to George Borden, holding that an individual who had resigned from his position with a municipality to take a county position and who entered into the service of the county the day following the termination of his municipal employment was entitled to prior service credit for his municipal service. In so holding, it was specifically noted that "there was no hiatus in time between his municipal employment . . . and his county employment . . ." Further, where the Legislature sought to provide service credit

for all service regardless of whether continuous or intermittent, it so stated. See R.S. 43:15A-61 which provides service credit for veterans based on years of public employment "in the aggregate."

You are accordingly advised that no prior service credit should be given for the service rendered by this individual to the City of Trenton prior to his employment by the County of Mercer.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: JUNE STRELECKI  
*Deputy Attorney General*

JANUARY 29, 1960

HONORABLE JOHN A. KERVICK  
*State Treasurer*  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-2

DEAR MR. KERVICK:

You have requested our opinion as to whether the estate of a deceased member of the Public Employees' Retirement System who transferred from the Consolidated Police and Firemen's Retirement System to the Public Employees' Retirement System, and who died while in service would be entitled to a return of contributions made while he was a member of the Consolidated Police and Fireman's Retirement System in view of the language of N.J.S.A. 43:15A-41c(1) which provides for a return of the accumulated deductions of a member who dies while in service. This question must be answered in the negative.

N.J.S.A. 43:15A-41c(1) reads as follows:

"Upon the receipt of proper proof of the death of a member in service on account of which no accidental death benefit is payable under section 49 there shall be paid to such person, if living, as he shall have nominated by written designation duly executed and filed with the board of trustees, otherwise to the executor or administrator of the member's estate:

"(1) His accumulated deductions at the time of death together with regular interest; . . ."

Accumulated deductions are defined in N.J.S.A. 43:15A-6a as the "sum of all the amounts, deducted from the compensation of a member or contributed by him, standing to the credit of his individual account in the annuity savings fund." You have advised that the amount standing to the credit of this individual's account at the time of his death consisted of deductions from his compensation while he was a member of the Public Employees' Retirement System. This amount has been paid to the executor of said member's estate. It is contended, however, on behalf of said

member's estate that there should also have been credited to the member's individual account the contributions made by him when he was a member of the Consolidated Police and Firemen's Retirement System.

At the time of transfer the Actuary stated that the reserve necessary to transfer full credit from the Consolidated Fund to the Public Employees' Retirement Fund was \$6,202.00 which would establish 21 years, 6 months and 15 days of service credit. In keeping with your regular administrative practice this entire amount was transferred to the Contingent Reserve Fund in which Fund are credited contributions made by the employer. N.J.S.A. 43:15A-24. This procedure of crediting the entire amount transferred to the employer's account with no credit to the individual's account is followed because the Consolidated Police and Fireman's Retirement System has no provision for the return of contributions to a member upon his withdrawal from that fund. Thus, if this member had resigned from public employment, he would have been entitled to no benefits. However, since he transferred to other public employment he was permitted to transfer his retirement credits pursuant to R.S. 43:2-1 et seq.

R.S. 43:2-2 deals with pension credits upon transfer and reads in pertinent part as follows:

" . . . Upon his entry into the other system or fund he shall be admitted with the credit for prior service to which he was entitled in the system or fund from which he shall have withdrawn and he shall be permitted to deposit in the second retirement system or pension fund the total amount of his contributions so withdrawn from the first retirement system, and the board or administrative head of the first retirement system may transfer to the second retirement system or fund the funds or credit to which the withdrawing member was entitled. He shall, thereupon, as a member of the second retirement system, be entitled to such credit in the way of pension and annuity as is provided by law in the second retirement system or fund, with the prior service credit to which he was originally entitled in the first retirement system."

Thus it is clearly indicated that upon transfer from one fund to another, a member is to receive credit as an individual for only the funds which he was entitled to withdraw. Here he was not entitled to withdraw any funds, so no credit could be given to him in his individual account. The \$6,202.00 transferred from the Consolidated Police and Fireman's Retirement System to the Public Employees' Retirement System was merely the actuarial computation of the value at that time of all payments to be made on account of any pension or benefit.

It should be noted that Assembly Bill No. 539 of 1959, which would have allowed members of the Consolidated Police and Fireman's Retirement System to withdraw all of the accumulated deductions credited to their individual accounts in case of withdrawal, was vetoed by the Governor on January 12, 1960. The Governor stated in his Veto Message:

" . . . this fund had become so hopelessly insolvent that from 1944 no new members have been allowed to join it, and since 1952 a very expensive salvage program has been under way, calling for payments by municipalities and the state for 30 years to get this fund out of the red.

"The reason for the fund's insolvency is that annual contributions were too small to accumulate the reserves needed to pay benefits. It is these in-

adequate contributions which this bill would allow a member to withdraw. The proposal is unsound. The best simple analogy would be a bill to allow a policy holder to obtain repayment of his fire insurance premiums because his house did not burn down. No pension or insurance system can operate on that basis unless the right of withdrawal were taken into account in computing the premium, which would have to be higher.

"The fact that the law does not allow withdrawal was one of the factors entering into the computation of the deficit now being made up, and this bill would destroy the validity of that computation. Besides, the records of contributions were hopelessly incomplete when the fund was salvaged in 1952, and it would probably be impossible to establish the facts for individual members."

When the individual in question was a member of the Consolidated Police and Firemen's Retirement System he had no right to a withdrawal of his contributions. His transfer to the Public Employees' Retirement System did not give him any greater rights in the System from which he transferred. You are accordingly advised that the estate of the deceased member is not entitled to a return of any contributions made by him while he was a member of the Consolidated Police and Firemen's Retirement System.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: JUNE STRELECKI  
*Deputy Attorney General*

FEBRUARY 29, 1960

HONORABLE JOHN A. KERVICK  
*State Treasurer*  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-3

DEAR MR. KERVICK:

You have requested our opinion as to the taxability under the Corporation Business Tax Act of the Farmers' Cooperative Association of New Jersey, Inc. No. 3821-2750.

In your request for an opinion, you have stated the facts as follows: The above named corporation was incorporated in New Jersey in 1915 under an act to incorporate associations not for pecuniary profit. In 1936 the corporation by resolution of its members became subject to the 1924 Act entitled "An act to Provide for the Incorporation and Regulation of Cooperative Agricultural Associations, either with or without Capital Stock" (R.S. 4:13-1 et seq.) and it incorporated thereunder (R.S. 4:13-13). Until 1952 the corporation operated without capital stock; thereafter, it issued capital stock which is now outstanding. The Cooperative claims that it is not

legally obligated to pay taxes from 1946, the date upon which the statute by virtue of which it claims an exemption became effective, through 1952, the date of the Cooperative's issuance of capital stock. The Corporation Tax Bureau has contended that during the period in question, the corporation has regularly earned income and made a profit which it has distributed to stockholders and patrons and that it is, therefore, liable for taxes under the Corporation Business Tax Act.

The claimed exemption of the subject corporation from taxability under the New Jersey Corporation Franchise Tax Act depends on the applicability of R.S. 54:10A-3, the pertinent portion of which reads as follows:

"The following corporations shall be exempt from the tax imposed by this act:

\* \* \*

"(d) Non-profit corporations, associations or organizations established, organized or chartered, without capital stock, under the provisions of titles 15, 16 or 17 of the Revised Statutes, or under a special charter or under any similar general or special law of this or any other state, and not conducted for pecuniary profit of any private shareholder or individual;"

The C.C.H. New Jersey State Business Tax Reporter correctly summarizes the requirements for tax exemption under this section as follows:

"In general there are four prerequisites for exemption under this section. The organization must prove that it is:

- (1) A non-profit corporation;
- (2) organized without capital stock;
- (3) established under Title 15, 16 or 17 of the Revised Statutes or under a special law or special charter; and
- (4) in actual practice is not conducted for profit." (Par. 5-225.)

Preliminarily, it should be noted that, as the subject corporation apparently agrees, the second enumerated requirement of the statute makes the exemption inapplicable to the Cooperative during any period when it was organized with capital stock. As to the period prior to the issuance of capital stock, our opinion is that the failure of the subject corporation to fulfill the fourth stated requirement renders it ineligible for the tax exemption and therefore makes it unnecessary to consider any of the other requirements for an exemption.

A section of the statute under which the subject corporation is incorporated, R.S. 4:13-3 lists the permissible purposes of an Agricultural Co-Operative as follows:

"An association may be organized to engage in any or all of the following activities for its members, and within the limitations hereinafter in this chapter set forth, for non-members:

- (a) The marketing or selling of agricultural products; or
- (b) the production, manufacture, harvesting, preserving, drying, processing, canning, packing, storing, handling, shipping, ginning or utilization thereof;
- (c) the manufacturing or purchasing for or hiring, selling or supplying machinery, equipment or supplies including livestock;

- (d) the hiring or supplying of labor;
- (e) the financing or any one or more of the above enumerated activities; or
- (f) any one or more of the activities specified in this section."

The following sections of the statute are also pertinent. R.S. 4:13-32 provides:

"In the case of associations without capital stock after payment of expenses and the establishment of the funds, as authorized in section 4:13-31 of this Title, and as soon after the end of the fiscal year as possible, the whole balance remaining shall be divided among those patrons, members and nonmembers, for whom the association has marketed, provided marketing facilities, processed or financed agricultural products, or for whom the association has manufactured, hired, sold or supplied machinery, equipment and supplies including livestock, during the fiscal year in the proportion that the volume of business done for such patrons by the association during the fiscal year bears to the total volume of business transacted by the association during the fiscal year; . . ."

R.S. 4:13-11 provides:

"After liquidation of the assets of the association, payment of its debts and of the reasonable expenses of dissolution, the balance remaining, if any, shall be distributed and paid in the following order:

\* \* \*

- (b) . . . or if the association has no capital stock, first, among the persons entitled to participate in the patrons' revolving capital fund, whether evidenced by certificates of equity or otherwise, to the extent of the amounts due to them, according to their respective earned patronage margins retained therein, without relationship to the times at which such margins accrued, with such interest, if any, as may be due thereon; and
- (c) Then, among the members of the association in proportion to the amount of business done by them with the association during the five years of active operation next preceding the date of dissolution, or such other period of time as may be specified in the by-laws, the entire balance, if any, then remaining undistributed."

In other words, the statute contemplates that a cooperative organized thereunder will derive a net return from its activities and that this excess of receipts over expenditures will be distributed among members or patrons in part from year to year, and the balance upon dissolution.

Although there are no judicial decisions construing the phrase "not conducted for pecuniary profit of any private shareholder or individual" in R.S. 54:10A-3, there have been numerous decisions construing other statutes similarly limiting tax exemptions to corporations not conducted for profit.

For example in *Fairmount Hospital, Inc. v. State Board of Tax Appeals*, 122 N.J.L. 8 (Sup. Ct. 1939) aff'd. o.b. 123 N.J.L. 201 (E. & A. 1939) the taxpayer sought an exemption under R.S. 54:4-3.6 which exempts from taxation "all buildings actually and exclusively used in the work of associations and corporations organized

exclusively for . . . hospital purposes . . . provided . . . the associations, corporations or institutions using and occupying them as aforesaid are not conducted for profit. . . ." (Emphasis added.) The hospital in question had originally been organized by a group of doctors as an ordinary stock corporation; they thereafter conveyed the hospital to a corporation organized under the act for the incorporation of corporations not for pecuniary profit, retaining, however, a mortgage on the assets of the corporation in an amount equal to their prior stockholdings. The doctors thus expected to receive interest on their mortgage certificates and presumably the return of their capital. The Court held that the hospital corporation, although organized under the Act for the incorporation of corporations not for pecuniary profit, was "conducted for a profit" within the meaning of the tax exemption statute and was therefore not entitled to the exemption claimed.

In *Consumers Research Inc., v. Evans*, 128 N.J.L. 95 (Sup. Ct. 1942) aff'd. o.b. 132, N.J.L. 431 (E. & A. 1945), the Court considered the claim of a consumers' research organization for exemption from the Unemployment Compensation Act as "a corporation . . . organized and operated exclusively for . . . scientific . . . purposes . . . , no part of the earnings of which inures to the benefit of any private shareholder or individual." R.S. 43:21-19 (i-7). (Emphasis added.) The corporate structure did not provide for any distribution of profits to any individuals, whether by dividends or otherwise during the operation of the business. During the course of its existence, the corporation had accumulated substantial assets, but all of these were, or would be, devoted to the acquisition, enlargement and maintenance of its facilities. The court pointed out, however, that in the event of dissolution, the net assets of the corporation would be transferred to the five stockholders of the corporation. For this reason, the court held that it was not a corporation, "no part of the earnings of which inures to the benefit of any private shareholder or individual."

Numerous cases have dealt with the question of whether particular "colleges, schools, academies or seminaries" were "not conducted for profit" within the meaning of the exemption from the real property tax. R.S. 54:4-3.6. Compare *Institute of Holy Angels v. Bender*, 79 N.J.L. 34 (Sup. Ct. 1909) with *Carlelet Academy v. Orange*, 98 N.J.L. 868 (E. & A. 1923). Our present Supreme Court has stated that the only test for determining the eligibility of a school for exemption under 54:4-3.6 is whether the school "is conducted for the purpose of making a profit." In reaching its determination, the court will consider among other factors, the background and nature of operation of the school, the amount of its income as compared with its cost of operation, the amount and purpose of its accumulated surplus, and the amount of its tuition charges. *Kimberly School v. Town of Montclair*, 2 N.J. 28 (1948).

Finally, in applying the rules of the cited cases, and numerous similar tax exemption cases, to the facts upon which you have requested our opinion, it must be remembered that it is an "accepted rule that since tax exemption statutes afford special privileges they are to be construed most strongly against the claimant." *Jersey City v. Liggett & Myers Tobacco Co.*, 14 N.J. 112, 116 (1953).

The principles of the cited cases and other similar cases, may be summarized as follows: In determining whether or not a particular corporation is conducted for a profit, the actual operation of the corporation, and not its certificate of incorporation or by-laws, must receive primary consideration. Whether or not the taxpayer operates at a profit in a given year is irrelevant if, in fact, it "is conducted for the purpose of making a profit." Conversely, even if the operations of the corporation consistently produce a net excess of income over operating expenses, but all such

surplus is reinvested in the corporate activities without actual or potential distribution for the benefit of any private shareholder or individual, the corporation is not conducted for pecuniary profit within the meaning of the law. But if there is a distribution of profit, the particular form of distribution is irrelevant; whether the profits of operation are distributed as interest on mortgage bonds or other fixed debt, by salaries so large that they necessarily constitute distribution of profits, or by any other means, or even if profits are undistributed, but accumulated with the potentiality of distribution to shareholders or other persons interested in the corporation upon its dissolution, the taxpayer must be considered as conducted for a profit.

Applying these principles to the facts which you have presented to us, our opinion is that the Farmers' Cooperative Association of New Jersey, Inc. No. 3821-2750 is subject to the New Jersey Corporation Business Tax Act for the years 1946 to 1952 because it contemplates making, and has made, a net return or profit, part of which is distributed annually to patrons and members, and the remainder of which will be distributed to members upon dissolution.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: MURRY BROCHIN  
*Deputy Attorney General*

MARCH 17, 1960

HON. GEORGE C. SKILLMAN, *Director*  
*Division of Local Government*  
Department of Treasury  
137 East State Street  
Trenton, New Jersey

MEMORANDUM OPINION—P-4

DEAR DIRECTOR:

You have asked whether a county board of chosen freeholders may contribute to a first aid, volunteer ambulance or rescue squad rendering service in less than all of the municipalities in the county. R.S. 40:5-2 provides that:

"Any county or municipality may make a voluntary contribution of not more than three thousand dollars (\$3,000.00) annually to any duly incorporated first-aid and emergency or volunteer ambulance or rescue squad association of the county, or of any municipality therein, rendering service generally throughout the county, or any of the municipalities thereof."

It has been suggested that a county board of chosen freeholders is prohibited from making contributions to a particular squad unless it is organized and operates on a county-wide basis. The argument is that the placement of the disjunctive term "or" conveys a direction that counties may only contribute to county squads and municipalities are limited to supporting municipal squads operating within the particular borders of the municipality.

It is our opinion that such an interpretation is not correct. The emphasis must be placed upon the term "any" as used in the section. In that regard, counties or municipalities may make contributions to any squad in any municipality in the county. This term clearly indicates the intention of the Legislature with respect to authorizing the discretionary payments by municipal or county authorities to rescue squads serving in part of or throughout the whole county. Had the Legislature intended otherwise, the term "respectively" could and should have been used.

The result conforms to the legislative policy of supporting squads rendering beneficent services in the county. Soundness dictates that county authorities be permitted to contribute to locally organized squads if, in the discretion of the county, it is found that the squad renders services beyond particular municipal borders. The same is true with municipalities which rely on the services of either a county-oriented squad or squad in another municipality. A liberal policy of authorizing contributions of this type encourages associations to organize and render services throughout the county and, in turn, lessens the burden of government in both the county and municipalities.

Such an interpretation finds support in practice. In 1958, county boards provided by appropriations contributions of \$28,250, ranging from \$1,250 to \$9,600 to municipally organized rescue squads. Thus, payments of this type have been consistently recognized as a legitimate expense by the Division of Local Government.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

DAVID M. SATZ, JR.  
*Deputy Attorney General*

MARCH 30, 1960

HONORABLE JOHN A. KEVICK  
*State Treasurer*  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-5

DEAR MR. KEVICK:

You have requested our opinion as to the proper interpretation of N.J.S.A. 43:15A-12 with regard to the cost formula to be applied in the purchase of service credit covering the period of time that an employee has been on loan to the Federal Government. This section reads as follows:

"Any State employee who was a member of the former 'State Employees' Retirement System' and whose services were or have been made available by this State to the Federal Government may, if and when he or she has returned or shall return to service with this State, or if he or she has retired or been retired under the said system, contribute to the annuity savings fund provided for in section 25 of this act, such sum or sums, either in 1 payment or in installments, as determined by the board of trustees

to be sufficient to cover the amount which would have been contributed by such individual had he or she remained a member of said system, together with such interest thereon as shall be determined to be just by the board of trustees; any board, body or commission of this State which has, had, or shall have, moneys contributed by the Federal Government for that purpose shall pay into such system such amount or amounts as would have been contributed by it on account of said services had not such services been made available to the Federal Government, together with such interest as shall be determined to be just by the board of trustees. The board of trustees is hereby authorized and required to receive said contributions, both for annuity and pension purposes, it being the intention hereby to restore, if and where possible, all retirement rights of such members lapsed or lost while rendering services to the Federal Government in and during the emergency of World War II." (Emphasis added.)

Thus it can be seen that N.J.S.A. 43:15A-12 *supra* provides for the purchase of service credit which could not be purchased otherwise, by certain employees, based on a specific cost formula. However, this formula would apply to an employee who qualifies by making application and payment promptly upon his return to state service.

N.J.S.A. 43:15A-12 requires that a state employee who desires to obtain pension credit in the Public Employees' Retirement System for service rendered to the Federal Government must do " \* \* \* when he or she has returned or shall return to service with this State." This language clearly contemplates the purchase of such credit at the time an employee returns or within a reasonable period thereafter. If an employee has not applied or does not apply for the purchase of this credit within a reasonable time after his return, he cannot qualify for any of the benefits of this act. It necessarily follows that only an employee who has been on loan to the Federal Government, and who applies within a reasonable time after his return to state service for the purchase of pension credit for the time of his federal service, would be entitled to purchase this credit at a cost based on the formula set forth in N.J.S.A. 43:15A-12.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: JUNE STRELECKI  
*Deputy Attorney General*

APRIL 7, 1960

MR. THOMAS O. AMELIA  
*State Records Committee*  
State House Annex  
Trenton, New Jersey

MEMORANDUM OPINION—P-6

DEAR MR. AMELIA:

You have requested our opinion whether or not the New Jersey Turnpike Authority is subject to the provisions of the "Destruction of Public Records Law," R.S. 47:3-15 et seq. as revised by L. 1953, c. 410.

The key section of the law is section 3 thereof which reads as follows:

"No person shall destroy, sell or otherwise dispose of any public record, archives or printed public documents which are under his control or in his care or custody, whether or not they are in current use, without first having advised the Bureau of Archives and History in the Department of Education of their nature, and obtained the written consent of that bureau; which consent may be given by said bureau only if the same is in conformance with regulations governing the granting thereof which shall be made and promulgated by the State Records Committee established by section six of this act."

The scope of the quoted section and hence of the succeeding sections of the Law, which merely amplify it, is determined by the definition of "public records" contained in section 2. The latter section defines "public records" to include records received by "any \* \* \* authority of the State or of any political subdivision thereof \* \* \* in connection with the transaction of public business \* \* \*." (Emphasis added.)

When used together with other words denoting state agencies or instrumentalities, the word "authority" refers to a semi-public corporation such as the New Jersey Turnpike Authority (N.J.S.A. 27:23-3) created by the State to act as an instrumentality thereof to carry out a public purpose.

While the New Jersey Turnpike Authority is an independent entity for some purposes, *N.J. Turnpike Authority v. Parsons*, 3 N.J. 235 (1949), nevertheless it is a public authority for the purposes of the Public Records Law.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: MURRY BROCHIN  
*Deputy Attorney General*

APRIL 18, 1960

HONORABLE JOHN A. KERVICK  
*State Treasurer*  
State House  
Trenton 25, New Jersey

MEMORANDUM OPINION—P-7

DEAR MR. KERVICK:

You have requested our advice concerning an application for accidental death benefits filed with the Board of Trustees of the Police and Firemen's Retirement System N.J.S.A. 43:16A-1 et seq. An accidental death pension has been previously granted the widow of a member but was revoked in accordance with N.J.S.A. 43:16A-10(2)(b) upon the widow's remarriage. Now a surviving child of the deceased member seeks continued pension benefits, presumably in accordance with a later clause of that same section which reads:

"If there be such children and no widow, or if the widow dies, the pension which the widow would have received had she survived shall be paid to those children who have not reached eighteen years of age \* \* \*."

N.J.S.A. 43:16A-10 provides for accidental death benefits which consist of "the member's aggregate contributions" payable to a designated beneficiary and a \$1,500 a year annuity payable to the member's widow until death or remarriage, and if there be children, such widow receives the annuity "for the use of herself and such children." Thereafter follows the statutory language under which this surviving child makes application for an annuity.

The question to be determined is whether the Legislature merely intended to extend benefits under this law to children of a deceased member until their mother's remarriage or whether it intended to provide such benefits absolutely to surviving children during the period of their statutory dependency.

The law expressly authorizes payments to children of a member if they survive and are not yet eighteen years of age: "[i]f there be \* \* \* no widow." In New Jersey and elsewhere it has been held that the "familiar, well fixed and certain" meaning of widow, both "popularly and legally," is a woman who has lost her husband through death and remains unmarried. *Montclair Trust Co. v. Reynolds*, 141 N.J. Eq. 276, 279 (Chan. 1948); *Crocheron v. Fleming*, 74 N.J. Eq. 567, 568 (Chan. 1908); 45 *Words and Phrases, Widows*; *Cf. Hanson v. Brown and Stewart Co.*, 90 N.J.L. 445, 447 (Sup. Ct. 1917). Since a child under the age of 18 does exist and there is no longer any widow, by reason of her remarriage, the Board should allow payments to the child in accordance with the legislative mandate to pay benefits during the period of statutory dependency. N.J.S.A. 43:16A-10(b)(2).

A review of the legislative history of the provision in question supports this result. In 1897 the Legislature allowed municipalities to extend accidental death benefits to a fireman's widow "during her widowhood" or to dependent parents of such fireman; however, if neither widow nor parents survived but there were children, the law provided: "Such pension shall be applied under the direction of the mayor of such city to the support of such child or children until they have attained the age of sixteen (16) years." L. 1897, c. 148, sec. 2, p. 284. In 1902 beneficiaries of policemen were granted accidental death benefits. The law similarly provided that the annuity continue "so long as she remains unmarried and at her death, unmarried," to go to minor children under the age of fourteen. L. 1902, c. 165; R.S. 40:174-55. However, accidental death benefits were later provided for beneficiaries of county policemen to be paid to "the widow or children \* \* \* so long as such widow remains unmarried or so long as such children or any of them remain under the age of 16 years." L. 1914, c. 36, sec. 4. While the Legislature has consistently excluded payments to widows upon remarriage, various other police and fireman pension laws reveal divergent provisions concerning benefits to surviving children after such event. *Cf. N.J.S.A. 43:10-25*; N.J.S.A. 43:10-38; N.J.S.A. 43:12-18 (now repealed); N.J.S.A. 43:12-28.1; N.J.S.A. 43:13-22.21 to 22.28.

In 1920 the predecessor of the existing Police and Firemen's Pension laws was enacted. Section 3, relating to pensions for dependents of a member who lost his life while on duty, included the following provision:

"If any widow entitled to a pension as aforesaid remarries, then such pension shall cease and shall not be paid to such widow or her children."  
L. 1920, c. 160.

This proscriptive clause concerning death benefits remains in the law governing the various police and firemen's pension funds which were consolidated by L. 1944, c. 253. N.J.S.A. 43:16-4. However in the same law annuities are provided for widows, de-

pendent parents, and surviving children of a *retired* member without expressly terminating payments to children of a remarried widow. N.J.S.A. 43:16-3. Recently the Law Division of the Superior Court held that a minor child was entitled to receive benefits under this section even though her widowed mother had remarried. *Clancy v. Consolidated Police and Firemen's Pension Commission*, Docket No. L-9324-56, decided March 24, 1958 (not officially reported).

On May 23, 1944, the same date the Legislature reenacted the express prohibition against such payments quoted above, N.J.S.A. 43:16-4, L. 1944, c. 253, it also enacted the law establishing the new police and firemen's retirement system, L. 1944, c. 255, N.J.S.A. 43:16A-1 et seq., at the same time continuing the consolidated system as to certain police and firemen. N.J.S.A. 43:16-1. The new law contained the section relating to accidental death benefits in question, in language almost identical to N.J.S.A. 43:16-3 as interpreted by the *Clancy* case. N.J.S.A. 43:16A-10. In view of this different legislative expression on the very same subject matter, and the subsequent holding in the *Clancy* case, there is an intent to provide continued payments to dependent children after the widow's remarriage would be authorized. *Cf. Key Agency v. Continental Cas. Co.*, 31 N.J. 98, 105 (1959).

In recent years the Legislature has adopted this liberal view, without ambiguity in other pension laws. In the revisions of the Teachers' Pension and Annuity Fund Law, L. 1955, c. 37, and the Public Employees' Retirement System law, L. 1954, c. 84, §§ 46 and 49, respectively, N.J.S.A. 18:13-112.48, N.J.S.A. 43:15A-49, the Boards of Trustees are directed to pay an annuity upon an accidental death of a member:

"\* \* \* if [there be] no widow, or in case the widow dies or remarries before the youngest child of such deceased member attains age 18, or if the member was a married female employee, then to the child or children of such member under age 18, divided in such manner as the board in its discretion shall determine to continue until the youngest surviving child dies or attains age 18."

The pension laws concerning accidental death benefits are remedial, and accordingly have been construed in light of analogous principles governing the Workmen's Compensation Act. *Roth v. Board of Trustees, etc.*, 49 N.J. Super. 309, 319 (App. Div. 1958). It is clear that a dependent child does not lose such compensation by the widow's subsequent remarriage. N.J.S.A. 34:15-13(g).

In accordance with the liberal purpose of the pension laws, *Satz v. State House Commission*, 18 N.J. 106, 111 (1955); *Roth v. Bd. of Trustees, etc., supra*, providing accidental death benefits to beneficiaries of a policeman or fireman, the subject child qualifies for benefits despite the widow's remarriage. We therefore advise you that the present application for dependency payments should be allowed.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: LEE A. HOLLEY  
*Deputy Attorney General*

APRIL 18, 1960

HONORABLE KENNETH H. CREVELING  
 Director, Division of Planning  
 and Development  
 520 East State Street  
 Trenton, New Jersey

## MEMORANDUM OPINION—P-8

DEAR DIRECTOR:

You have asked whether a riparian grant may be made to an applicant who has given six months' notice of his application to the owner of the upland abutting the area in the proposed grant where the owner thereafter conveys his interest in the uplands. It is our opinion that a conveyance by the upland owner whether before or after the expiration of the six months' period does not preclude the execution of the grant.

R.S. 12:3-23 provides as follows:

"The board, with the approval of the governor, may lease or grant the lands of the state below mean high-water mark and immediately adjoining the shore, to any applicant or applicants therefor other than the riparian or shore-owner or owners, provided the riparian or shore-owner or owners shall have received six months' previous notice of the intention to take said lease or grant such notice given by the applicant or applicants therefor, and the riparian or shore-owner or owners shall have failed or neglected within said period of six months to apply for and complete such lease or grant; the notice herein required shall be in writing and shall describe the lands for which such lease or grant is desired, and it shall be served upon the riparian or shore-owner or owners personally; and in the case of a minor it shall be served upon the guardian; in case of a corporation upon any officer performing the duties of president, secretary, treasurer or director, and in the case of a nonresident owner the notice may be by publication for four weeks successively at least once a week in a newspaper or newspapers published in the county or counties wherein the lands are situate, and in case of such publication, a copy of such notice shall be mailed to such nonresident owner (or in case such nonresident owner be a corporation, then to the president of such corporation, directed to him at his post-office address, if the same can be ascertained, with the postage prepaid); but nothing contained in sections 12:3-21 to 12:3-25 of this title shall be construed as repealing, altering, abridging, or in any manner limiting the provisions and power conferred upon the riparian commissioners and governor by sections 12:3-19 and 12:3-20 of this title."

See also R.S. 12:3-7 (dealing with the Hudson River, New York Bay and Kill Von Kull). The reference in R.S. 12:3-23 to a "board" is to the former Board of Commerce and Navigation whose powers under the section have been transferred to the Planning and Development Council in the Department of Conservation and Economic Development. N.J.S.A. 13:1B-13.

Though literal application of R.S. 12:3-23 might indicate that a conveyance by the upland owner after receipt of notice defeats the grant, such a construction must

be rejected. By Laws of 1894, c. 71 and Laws of 1903, c. 1, § 168, codified as R.S. 18:10-5, all of the lands of the State then or formerly flowed by tidewater were appropriated for the support of free public schools. R.S. 12:3-23 and R.S. 18:10-5 are in *pari materia*. *Cf. Palmer v. Kingsley*, 27 N.J. 425 (1958).

A holding that a conveyance of realty by an upland owner defeats a grant to the person serving notice would tend to limit the appropriate state officers from aggrandizing the school fund and is therefore to be avoided. In the event that an upland owner made a conveyance prior to its issuance the grant would be invalid. Moreover, this construction would permit successive upland owners to prevent the issuance of a riparian grant by making repeated conveyances within each six month period. Such a result is not the kind of power afforded by the statute. The protection given by R.S. 12:3-23 to upland owners is to apply for a riparian grant on their own behalf within the time specified.

While there is no provision for recording the service of a notice on an abutting upland owner, his prospective grantee may protect himself by securing appropriate warranties in the contract for sale and the deed. We therefore hold that proper notice on an abutting upland owner is effective against his grantees or devisees.

Very truly yours,

DAVID D. FURMAN  
 Attorney General

By: MORTON I. GREENBERG  
 Deputy Attorney General

APRIL 26, 1960

HON. JOHN W. TRAMBURG, *Commissioner*  
 Department of Institutions and Agencies  
 135 West Hanover Street  
 Trenton, New Jersey

## MEMORANDUM OPINION—P-9

DEAR COMMISSIONER TRAMBURG:

You have raised the following questions on behalf of the State Parole Board:

1. What constitutes a "crime" within the meaning of *N.J.S.A. 30:4-123.24*?
2. Are disorderly person offenses and quasi-criminal offenses without *N.J.S.A. 30:4-123.24*?
3. Where a prisoner has been paroled to another state and the offense occurs in that state, does the law of New Jersey or that of the other

state determine what constitutes a "crime" within *N.J.S.A. 30:4-123.24*? *N.J.S.A. 30:4-123.24* provides that:

"A prisoner, whose parole has been revoked because of a violation of a condition of parole or commission of an offense which subsequently results in conviction of a crime committed while on parole, even though such conviction be subsequent to the date of revocation of parole, shall be required, unless sooner re-paroled by the board, to serve the balance of time due on

his sentence to be computed from the date of his original release on parole. If parole is revoked for reasons other than subsequent conviction for crime while on parole then the parolee, unless sooner reparaoled by the board, shall be required to serve the balance of time due on his sentence to be computed as of the date that he was declared delinquent on parole."

The importance of determining what constitutes a "crime" in contemplation of the aforesaid section is evident because revocation of parole for conviction of crime committed while on parole obliges the parolee to suffer certain sanctions, namely, service of additional time in confinement.

The answers to questions 1 and 2 are found in *Sauran v. Lennon*, 19 N.J. 606 (1955), where our Supreme Court dealt with this same general subject matter and at page 611 the court said:

"There is considerable confusion in our law, both statutory and decisional, as to the nature of the various kinds of public wrongs which fall short of constituting crimes and as to the sanctions by which the law seeks to prevent them, on the one hand, and crimes on the other. Crimes are readily distinguished from all other public offenses by the fact that indictment by a grand jury is a constitutional prerequisite to proceedings to punish the defendants therefor, Const. 1947, Art. 1, par. 8, as is trial by jury, idem. Art. 1, par. 9, unless waived by the defendant, but the classes of offenses against the public other than crimes differ markedly from each other. Thus disorderly conduct, N.J.S. 2A:169-1 to 2A:170-96, a class of offenses which has grown extensively over the years, *State v. Maier*, 13 N.J. 235 (1953) (especially II, pp. 251-260) has always been deemed quasi-criminal in nature but not strictly criminal, and is punishable summarily without indictment or trial by jury by fines or imprisonment, or both. These offenses find their origin in statutes as above set forth, or in ordinances adopted pursuant to statute, *Paul v. Gloucester*, 50 N.J.L. 585 (E. & A. 1888); *Sherman v. Paterson*, 82 N.J.L. 345 (Sup. Ct. 1912); *Fred v. Mayor and Council, Old Tappan Borough*, 10 N.J. 515, 519 (1952); 6 McQuillan, *Municipal Corporations* (3rd ed.), chaps. 23, 24."

Thus, it will appear that a "crime," as the term is used in criminal jurisprudence in New Jersey and within the provisions of N.J.S.A. 30:4-123.24, is an indictable offense and where the defendant is entitled to a trial by jury unless same is waived. Also, by the same authority, "disorderly conduct" has always been deemed quasi-criminal and persons guilty of this offense are not deemed guilty of "crime" as this word is used in N.J.S.A. 30:4-123.24.

Concerning your inquiry as to whether the "crime" contemplated by N.J.S.A. 30:4-123.24 relates to a "crime" committed by the parolee in this state, or in some other state, there is no judicial determination of this precise question by our courts. However, some light is shed on the general problem by *In re Smith*, 8 N.J. Super. 573 (Essex Co. Ct. 1950) where Judge Hartshorne was called upon to determine whether an individual convicted of larceny in the State of Ohio would be deprived of the right of suffrage in New Jersey under that provision of our Constitution, (Art. II, par. 7), which provides that "The Legislature may pass laws to deprive persons of the right of suffrage who shall be convicted of such crimes as it may designate."

This constitutional provision, somewhat like N.J.S.A. 30:4-123.24, did not specify that the crimes shall be committed and conviction had in New Jersey. Nor does the implementing statute, R.S. 19:4-1, so provide. Judge Hartshorne reached the decision that the phrase "convicted of crime" in similar statutes consistently has been held in New Jersey to cover "convictions of crime in any jurisdiction, federal or state, domestic or foreign." Reference was made to *In re Marino*, 23 N.J. Misc. 159 (Co. Ct. 1945) wherein the court reviewed a long line of decisions which support the conclusion reached in both *Marino, supra*, and *Smith, supra*.

In *State v. Henson*, 66 N.J. 601 (E. & A. 1901) dealing with the disqualification of a witness because of a conviction of crime, the court said (p. 605):

"It is the conviction of crime which is to affect credibility. The word 'crime' being used without qualification, must be held to be used in its general sense to include any crime. It is not a word of double meaning."

In *State v. Romolo*, 89 N.J.L. 565 (E. & A. 1916), the defendant in a criminal trial, on his cross-examination, was asked if he had been convicted of the crime of burglary in one of the criminal courts of Pennsylvania. The State was permitted to produce the record of his conviction from the sister jurisdiction and "offered it in evidence for the purpose of impeaching the defendant's credit as a witness." See also *State v. Matelski*, 116 N.J.L. 543 (E. & A. 1936).

It is our opinion that the foregoing judicial decisions, which deprive a citizen of the right of suffrage in New Jersey and affect his credibility as a witness here for crimes committed elsewhere, apply with equal force to the interpretation to be placed upon the word "crime" as utilized in N.J.S.A. 30:4-123.24. Thus, if a parolee is convicted of an offense in another jurisdiction and if such offense would constitute a "crime" if conviction were had in our state courts, then such parolee must suffer the sanctions imposed by N.J.S.A. 30:4-123.24. However, if the offense were merely "disorderly person" in New Jersey (e.g., simple assault and battery as defined in *State v. Maier, supra*) and the same offense were a "crime" in a sister jurisdiction, then the sanctions of N.J.S.A. 30:4-123.24 should not apply following conviction of such offense outside New Jersey. This is so because of qualifying language in the opinion in *Smith, supra*, where the court said (p. 574) referring to *In re Marino, supra*:

"it was there held that one could not vote in New Jersey, who was convicted in the United States District Court for the District of New Jersey of a crime which, if in the state courts, would disenfranchise him." (Emphasis supplied.)

It is evident that the conviction of "crime" occurring elsewhere must cover an offense which, if conviction were in our state courts, would constitute a "crime" in contemplation of *Sauran v. Lennon, supra*.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: EUGENE T. URBANIAK  
Deputy Attorney General

APRIL 27, 1960

HON. JOHN A. KERVICK  
*State Treasurer*  
 State House  
 Trenton, New Jersey

## MEMORANDUM OPINION—P-10

DEAR MR. KERVICK:

You have asked us to advise you whether a corporate taxpayer is required to include in his entire net income for the purpose of New Jersey Corporation Business Tax Act (N.J.S.A. 54:10A-1 et seq.), the gain resulting from a sale or exchange of its assets pursuant to a plan of complete liquidation under Section 337 of the Internal Revenue Code where no gain or loss is recognized for Federal tax purposes.

You previously requested our opinion whether the gain realized by corporations subject to the New Jersey Corporation Business Tax Act is taxable to such corporations in either of the following two situations; i.e., first, where a parent corporation liquidates its wholly owned subsidiary and receives the latter's net assets having a present fair market value in excess of the tax basis of the parent's investment in the subsidiary, and pursuant to Internal Revenue Code of 1954, § 332, no gain is recognized for Federal income tax purposes; and secondly, where one corporation conveys all of its net assets to a second corporation, or to the latter's subsidiary, solely in consideration for the capital stock of the transferee which has a fair market value in excess of the tax basis of the transferor's net assets, and pursuant to Internal Revenue Code of 1954, § 368(a)(1)(c), no gain is recognized for Federal income tax purposes. In Attorney General's Formal Opinion 1960—No. 2, we advised you that such transactions do not give rise to "entire net income" within the meaning of the New Jersey Corporate Business Tax Act if they fall within the nonrecognition provisions of the Internal Revenue Code.

The reasoning of that opinion is applicable to your present query. Our conclusion is therefore the same, i.e., that a gain resulting from a sale or exchange of assets pursuant to a plan of complete liquidation under Section 337 of the Internal Revenue Code where no gain or loss is recognized for Internal Revenue tax purposes does not give rise to "entire net income" within the meaning of the New Jersey statute.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: MURRY BROCHIN  
*Deputy Attorney General*

APRIL 28, 1960

HONORABLE JOHN A. KERVICK:  
*State Treasurer*  
 State House  
 Trenton, New Jersey

## MEMORANDUM OPINION—P-11

DEAR MR. KERVICK:

You have requested our opinion as to the effect, if any, of Chapter 60 of the Laws of 1950 (N.J.S.A. 52:18-20.1 and 20.2) on checks drawn on the State Disability Benefits Fund established pursuant to the provisions of Chapter 110 of the Laws of 1948 (N.J.S.A. 43:21-46), and you have directed our attention to our Memorandum Opinion of January 13, 1955, wherein we advised that said Chapter 60, Laws of 1950 did not apply to checks drawn on the Unemployment Compensation Fund or the Unemployment Compensation Administration Fund.

Chapter 60 of the Laws of 1950 provides as follows:

"The State Treasurer is hereby authorized and directed to cancel of record, and to refuse to honor, all checks issued by the State Treasurer which have not been presented for payment within six years from the date they were issued.

"All State funds held on deposit for the payment of such checks shall, upon cancellation of the record of the checks by the State Treasurer, be credited to the State treasury for general purposes."

We have examined the legislative history of Chapter 60, Laws of 1950 and we are satisfied that this statute was not enacted in the exercise of the State's sovereign power to escheat unclaimed personal property but was primarily intended to eliminate the necessity of maintaining current bookkeeping records of checks which have not been presented for payment within six years from the date of issuance. The sponsor's statement accompanying the introductory copy of Senate Bill No. 235 (1950 Session) read as follows:

"The object of this bill is to relieve the state of the expense of carrying over from year to year a record of old outstanding checks. If these 'state' checks are presented and their validity is duly verified, payment thereof may be made by direction of the appropriations committee of the legislature."

This statement, which may be consulted as an extrinsic aid in the interpretation of the statute, *Deoney v. Linen Thread Co.*, 19 N.J. 578 (1955), indicates a legislative intent to avoid the expense of carrying year to year records of outstanding checks and gives absolutely no indication that it was intended to exercise the sovereign power to escheat unclaimed personal property.

In our Memorandum Opinion of January 13, 1955, above referred to, we indicated our conclusion that, because of the expressed provisions in our statute setting up the Unemployment Compensation Fund and the Unemployment Compensation Administration Fund which limits the use of such Funds to the purposes of the Unemployment Compensation Act, Chapter 60 of the Laws of 1950, was not intended to, nor could it, authorize the "escheat" of any of these funds to the State Treasury for general

purposes. An examination of Chapter 110 of the Laws of 1948, (N.J.S.A. 43:21-25 et seq.), leads us to a like conclusion.

N.J.S.A. 43:21-46 which established the State Disability Benefits Fund expressly provided:

"\* \* \* The fund shall be held in trust for the payment of disability benefits pursuant to this act, for the payment of benefits pursuant to subsection (f) of section 43:21-4 of the Revised Statutes, and for the payment of any authorized refunds of contributions. \* \* \*"

In view of this expressed provision limiting the use of the Fund, it is clear that the general provisions of Chapter 60 of the Laws of 1950 cannot be held applicable to said Fund to effect a transfer of moneys in the Fund to the General Treasury.

It is a settled principle of law that where there is a seeming conflict between a general statute and a specific statute covering a subject in a more detailed and definite way, the latter shall prevail over the former and will be considered an exception to the general statute. *Goff v. Hunt*, 6 N.J. 600 (1951); *State of New Jersey v. Hotel Bar Foods*, 18 N.J. 115 (1955).

This Fund was started (N.J.S.A. 43:21-47) by a withdrawal of \$50,000,000 from the accumulated workers contributions in the Unemployment Compensation Fund, deposited in and credited to the account of the State of New Jersey in the Unemployment Trust Fund of the United States of America, established and maintained pursuant to Sec. 904 of the Social Security Act as amended, (42 U.S.C. § 1104), and has since been maintained by contributions of workers and employers as provided in N.J.S.A. 43:21-7 (d) and (e). This indicates that the moneys in this Fund are not "State funds" within the meaning of Chapter 60, Laws of 1948.

It is, therefore, our opinion and you are so advised that Chapter 60 of the Laws of 1950 does not apply to checks drawn on the State Disability Benefits Fund and the moneys held on deposit for the payment of such checks are not transferable to the State Treasury for general purposes under Chapter 60 of the Laws of 1950.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: CHARLES J. KEHOE  
Deputy Attorney General

May 26, 1960.

HON. EDWARD J. PATTEN  
Secretary of State  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-12

DEAR SECRETARY PATTEN:

You have asked whether domestic corporations engaged in the banking, insurance, loan or other financial business are required to file annual reports with the Secretary of State pursuant to N.J.S.A. 14:6-2.

N.J.S.A. 14:6-2 provides:

"Every domestic and every foreign corporation doing business in this state shall file in the office of the Secretary of State, within thirty days after the first election of directors and officers, and annually thereafter, within thirty days after the time appointed for holding the annual election of directors, a report authenticated by the signatures of the president and one other officer, or by any two directors, stating: . . ."

Subsection "g" of that statute states, "no part of this section shall apply to corporations under the supervision of the department of banking and insurance." The legal question presented by your request for an opinion is, therefore, whether domestic corporations engaged in the banking, insurance, loan or other financial business are "under the supervision of the department of banking and insurance" within the meaning of N.J.S.A. 14:6-2g.

The statutory provision requiring corporations to file annual statements in the office of the Secretary of State was originally enacted as L. 1896, c. 185, p. 291, § 43. It expressly excluded from its filing requirements "any corporation which is required to file a similar statement in the office of the commissioner of banking and insurance." That statute was amended by L. 1900, c. 124, p. 313, § 43. The latter statute excluded from its requirements such "corporations as are now by law under the supervision of the department of banking and insurance." The exclusionary provision which appears in the present form of the statute is substantially similar. L. 1953, c. 14, p. 107, § 2. The change in the statutory exclusion from its original form to the form which appears in the present law emphasizes that all corporations which are "under the supervision of the department of banking and insurance," regardless of whether or not they are required "to file a similar statement" with that department, are exempt from the obligation of filing an annual statement with the Secretary of State pursuant to N.J.S.A. 14:6-2.

The Department of Banking and Insurance is expressly "charged with the execution of all laws relative to insurance, banking, savings, trusts, guaranty, safe deposit, indemnity, mortgage, investment and loan corporations," including "building and loan corporations or associations." N.J.S.A. 17:1-1. This general charge is implemented by numerous specific statutes, including those requiring that corporations which are subject to the supervision of the Department of Banking and Insurance file annual statements with the Commissioner of Banking and Insurance or otherwise supply him with information similar to that required by N.J.S.A. 14:6-2. Such information is required from banks (N.J.S.A. 17:9A-252 to 256; 17:9A-323 to 325), small loan companies (N.J.S.A. 17:10-12), provident loan associations (N.J.S.A. 17:11-8), savings and loan associations (N.J.S.A. 17:12A-85; 17:12A-110), credit unions (N.J.S.A. 17:13-49), check cashing companies (N.J.S.A. 17:15A-25), investment companies (N.J.S.A. 17:16A-13), insurance companies (N.J.S.A. 17:23-1; 17:35-8; 17:35-19), mutual benefit associations (N.J.S.A. 17:45-12), hospital service corporations (N.J.S.A. 17:48-11), medical service corporations (N.J.S.A. 17:48A-15) and business development corporations (N.J.S.A. 17:52-22). Safe deposit companies are also subject to the supervision of the Department of Banking and Insurance (N.J.S.A. 17:1-1; 17:14-1 et seq.), but there is no express requirement that they file annual reports.

You are, therefore, advised that all corporations, domestic or foreign, of the specific types enumerated above, or of similar types, which are engaged in the banking,

insurance, loan or other financial business and which, pursuant to specific statute, are under the active supervision of the Department of Banking and Insurance, are exempt from the requirements of N.J.S.A. 14:6-2. All other domestic corporations and all other foreign corporations doing business in this State must file annual reports with the Secretary of State pursuant to N.J.S.A. 14:6-2.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: MURRY BROCHIN  
Deputy Attorney General

June 9, 1960.

HONORABLE JOHN A. KERVICK  
State Treasurer of New Jersey  
State House  
Trenton 25, New Jersey

MEMORANDUM OPINION—P-13

DEAR MR. KERVICK:

The Board of Trustees of the Public Employees' Retirement System has inquired as to their authority to enroll certain local employees in the Retirement System.

After a request by certain employees of the school board, on September 25, 1958, at a special meeting of the Township Committee of Brick, the following question was ordered to be placed upon the ballots in the 1958 general election:

"Shall the Public Employees' Retirement System (R.S. 43:15A-1 to 86) be adopted and put into effect in the Township of Brick as to the employees of the Board of Education of the Township of Brick who are not members of or eligible to join the Teachers' Pension and Annuity Fund?"

This referendum received an affirmative vote.

You ask whether the above question may be treated as a vote upon the adoption of the Retirement System for all municipal employees in Brick Township. Obviously, by its express language, the referendum appeared to deal solely with "employees of the Board of Education" and not employees of the Township. To give the referendum a broader effect, by including all municipal employees, through a process of implication, would violate the provisions of N.J.S.A. 19:3-6, would tend to mislead the voters and would therefore become legally ineffectual. See also: *Bolkin v. Westwood*, 52 N.J. Super. 416 (App. Div. 1958), appeal dismissed 28 N.J. 218 (1958). In view of the conclusions reached herein the referendum in question was of no force or effect and, at most the only effect that it could have is that of determining the sentiment of the voters, as set forth in the preamble of the resolution authorizing the referendum. Non-binding referenda under certain circumstances are permitted by N.J.S.A. 19:37-1 *et seq.*

Municipal employees of the Township of Brick, Ocean County, were not previously covered by the State Employees' Retirement System, Title 43, chapters 14 and 15, nor has the governing body of that municipality directed that the question of the adoption of the Public Employees' Retirement-Social Security Integration Act, N.J.S.A.

43:15A-1 to 86, for all employees therein be submitted to the qualified voters at a general election. N.J.S.A. 43:15A-74. Thus, municipal employees generally in Brick Township are not covered by or entitled to the benefits of the Retirement System unless the 1958 referendum accomplished this. N.J.S.A. 43:15A-7; N.J.S.A. 43:15A-75.

In the Township of Brick all teachers are eligible for membership in the Teachers' Pension and Annuity Fund. N.J.S.A. 18:13-112.6; N.J.S.A. 18:13-112.12. The Legislature has declared that not only those persons employed in usual positions classified as the teaching profession, i.e., regular, special and helping teachers, principals, supervisors, superintendents and other professional staff members, are eligible for membership in the Fund, but also allowed membership to custodians, janitors and janitresses, engineers, firemen and other janitorial employees of a school district or school employer. N.J.S.A. 18:13-112.4(p). However, clerical and non-professional employees other than the above-specified were not afforded this privilege of membership in the Teachers' Fund.

In order to eliminate a "no-man's land" of pension and insurance coverage, the Legislature provided in N.J.S.A. 43:15A-77 in pertinent part:

"Every employee of any school district \* \* \* the boundaries of which are coterminous with those of a municipality \* \* \* in which chapter 15 of Title 43 of the Revised Statutes [43:15-1 to 43:15-6] has been adopted, or in which this act [43:15A-1 to 43:15A-86] is adopted, who is not a member of or eligible to join the Teachers' Pension and Annuity Fund \* \* \* shall be entitled to receive the same benefits as employees of such municipality \* \* \* are entitled to receive and the school district shall have the same obligations with respect to such employees as the municipality has to its own employees under this act \* \* \*."

By the express terms of the statute, the benefits of the Public Employees' Retirement System are available to Board of Education employees only where they are available to employees of the municipality in which the school district is located. Therefore, in these circumstances, the referendum in question cannot effectively make eligible for enrollment in the Public Employees' Retirement System employees of the Board of Education. The governing body must first invoke the proper statutory machinery to permit all qualified employees to join the system before school board employees can become eligible.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: LEE A. HOLLEY  
Deputy Attorney General

COL. JOSEPH D. RUTTER  
 Division of State Police  
 Route No. 29  
 West Trenton, New Jersey

July 27, 1960.

MEMORANDUM OPINION—P-14

DEAR COLONEL RUTTER:

You have requested an opinion relating to the right to withdraw contributory payments in the State Police and Retirement Benevolent Fund, N.J.S.A. 53:5-1, et seq., by a former trooper, William F. Charles.

Mr. Charles enlisted in the New Jersey State Police on June 16, 1928 and served as a trooper continuously until June 1, 1937, when he was granted a six month leave of absence without pay to terminate on November 30, 1937. Thereafter, on December 1, 1937 he was granted two single month extensions lasting until January 31, 1938. At that time he resigned to continue his service with the Pompton Lakes Police Department which he joined during his leave of absence. He presently is serving as its Chief.

During the time between 1928 and the date his leave of absence commenced, Mr. Charles made contributions to the Retirement Fund as required by law, N.J.S.A. 53:5-6. At the time that Mr. Charles actively served in the State Police there was no authority for withdrawal of funds which were contributed by members of the State Police. However, on the date when his leave of absence commenced, June 1, 1937, Chapter 114 of the Laws of 1937 was enacted, part of which amended what is presently N.J.S.A. 53:5-6 to provide that:

"Any person who is a member of the state police retirement and benevolent fund and who for a period of at least two years has made the payments required to be made to such fund, shall upon the termination of his service, prior to retirement as authorized by this chapter, be entitled to have and receive from the state treasurer the total sum of his said payments with interest thereon at the rate of two per cent per annum."

The specific question you present is whether Mr. Charles is entitled to withdraw the funds he contributed between 1928 and 1937 in view of the fact that the withdrawal provision was not enacted until the first day that he was on leave of absence.

It is our opinion that he was a member of the Retirement Fund while on leave of absence and is entitled to withdraw his contributions despite the fact that he was not on active service at the time this law was enacted. It is clear that a person on leave of absence from particular service does not lose any rights or benefits of an office including pension rights by virtue of the fact that he is not in active service. *Ward v. Keenan*, 3 N.J. 298, 310 (1949). The benefits of tenure are in force during a leave of absence so long as the person complies with all other requisites of that position. For instance, in the *Ward* case, *supra*, it was determined that a person who was granted a leave of absence from a police force to run for public office and who made charges against the force of which he was a member was recognized as being possessed with the rights of office such as the right to be removed only upon charges. In addition, *Ward* had an obligation to report crime to his superiors while on leave of absence.

Mr. Charles did not abandon any rights of his State Police employment during his leave of absence by joining the Pompton Lakes Police Force. It was his choice,

having been granted the leave of absence, to return within the time that the leave was extended. To that extent, the rights of the office continued until January 31, 1938, long after the withdrawal statute was enacted. Cf. *Formal Opinion No. 15-1958*, dealing with abandonment of state employment rights by persons in Military Service.

You are therefore advised that Mr. Charles may withdraw his contributions to the State Police Retirement Benevolent Fund, N.J.S.A. 53:5-1 et seq.

Very truly yours,

DAVID D. FURMAN  
 Attorney General

By: DAVID M. SATZ, JR.  
 Assistant Attorney General

July 28, 1960.

DR. ROSCOE P. KANDLE  
 Commissioner  
 Department of Health  
 State House  
 Trenton, New Jersey

MEMORANDUM OPINION—P-15

DEAR COMMISSIONER KANDLE:

We have been asked by the Visiting Homemaker Association of New Jersey, Inc. (an advisory committee to the Division of Chronic Illness Control of the State Department of Health) whether the individual Homemakers are immune from tort liability under Chapter 90 of the Laws of 1959 (N.J.S. 2A:53A-7 to 11).

The Act in question is entitled as follows:

"An Act concerning corporations, societies and associations organized exclusively for religious, charitable or hospital purposes; providing that they shall not be liable to respond in damages, in certain cases; and providing for the application and operation of the act." (Emphasis supplied.)

In a Memorandum Opinion dated October 30, 1959, the Attorney General advised you that under the law in question the local Homemaker Service Groups are "charitable" associations within the meaning of the statute. The question now posed is whether the immunity extends to the individual Homemakers who may perform, at the request of a physician, some personal care services to patients.

This question must be answered in the negative. The title of the Act already quoted indicates that the immunity runs only to the associations, corporations or societies themselves. Any possible doubt is removed by the terms of the statute itself; the last sentence of section one provides in applicable part:

"\* \* \* but nothing herein contained shall be deemed to exempt the said agent or servant individually from their liability for any such negligence."

It is therefore clear from the terms of the statute itself, as well as from the statutory history, see *LaParre v. Y.M.C.A. of the Oranges*, 30 N.J. 225 (1959), that the servants and agents of the immune associations would be liable for their negligence

in a tort action. This means, of course, that the individual Homemakers, if negligent in performance of their duties, would not be immune from liability to any person who may be harmed. This result is in accord with judicial interpretation disfavoring the doctrine of charitable tort immunity. See *Collopy v. Newark Eye and Ear Infirmary*, 27 N.J. 29 (1958); *Benton v. Y.M.C.A.*, 27 N.J. 67 (1958); and *Dalton v. St. Luke's Catholic Church*, 27 N.J. 22 (1958).

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: ROBERT S. MILLER  
Deputy Attorney General

July 28, 1960.

HON. EDWARD J. PATTEN  
Secretary of State  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-16

DEAR MR. PATTEN:

We have been asked whether the names of motels may be accepted for filing under Title 29, and whether the file of hotel (or motel) names compiled pursuant to Title 29 should be kept distinct from the file of names of corporations compiled pursuant to Title 14. In our opinion the names of motels may be accepted for filing pursuant to Title 29. The file provided by Title 29 for the names of hotels (or motels) is distinct from the file of names of corporations provided by Title 14.

R.S. 29:3-3 provides as follows:

"Any person engaged in and conducting the business of an hotel in this state may register the name by which such hotel is known and designated in the manner hereinafter provided, and, upon compliance with the provisions of sections 29:3-4 to 29:3-6 of this title, shall have the right to the exclusive use of such name or designation for an hotel in this state."

R.S. 29:3-11 forbids the Secretary of State to register any name identical with or so similar to a previously filed name as to mislead the public. The purpose of these statutes is to prevent deception of the public and to prevent unfair competition. The statutes do not say that the same name may not be used for another type of business and the statutes should not be construed to give the person the exclusive right to use that name except for hotel business. Statutes should not be construed any more broadly nor be given any greater effect than their language requires. *Belfer v. Borrella*, 9 N.J. Super. 287 (App. Div. 1950).

There is no special statutory definition of the word "hotel" as it is used in R.S. 29:3-3. R.S. 29:1-11 contains a definition of the word "hotel," but this definition

applies only to chapter 1 of Title 29, and does not apply to chapter 3 of Title 29. R.S. 29:1-10. Therefore, the ordinary or common sense definition of "hotel" applies to its use in R.S. 29:3-3.

In *Schermer v. Fremar Corp.*, 36 N.J. Super. 46 (Ch. Div. 1955), the court had to decide whether what is generally regarded as a motel was included within the scope of the term "hotel" used in a local zoning ordinance. No special definition of the term "hotel" was provided by the ordinance. In holding that the structure was within the scope of the term "hotel," the court said:

"In modern usage, it may be generally regarded that establishments which furnish lodging to transients, although designated motels, may be deemed hotels. The word 'motel' generally denotes a small hotel where lodgings are available for hire, with a minimum of personal service being furnished by the proprietor." 36 N.J. Super. at 51.

In *Pierro v. Baxendale*, 20 N.J. 17 (1955), the court held that a discrimination between "rooming houses" and "motels" in a local zoning ordinance was unconstitutional.

We may take notice of the fact that today motels compete with hotels. Not only do motels located on highways outside cities attract clients away from hotels but today hotels are faced with competition from motels located even in the heart of urban areas. The possibility of deception of the public and unfair competition would seem to be as great where a motel copies the name of a hotel as where another hotel does so. Thus the purpose of the statutes would be partially frustrated if motels were not regarded as hotels. For all of the above reasons the term "hotel" as used in R.S. 29:3-3 must be interpreted to include what are commonly known as motels.

A corporation of this state may be formed by filing a certificate of incorporation. R.S. 14:2-1. The certificate of incorporation must set forth the name of the corporation which must not be one already in use by another existing corporation of this state or so similar thereto as to lead to uncertainty or confusion. R.S. 14:2-3(a). R.S. 14:2-4 forbids the Secretary of State to accept for filing a certificate of incorporation which offends the terms of R.S. 14:2-3(a) outlined above. These provisions have been described as a crystallization of the familiar rules as to unfair competition, *Nat. Grocery Co. v. Nat. Stores Corp.*, 95 N.J. Eq. 588 (Chan. 1924), *affirmed* 97 N.J. Eq. 360 (E. & A. 1925), and their purpose is to avoid misleading or deceiving the public as to the identity of the corporation, *Munn & Co. v. Americana Co.*, 82 N.J. Eq. 63 (Chan. 1913), *modified on other grounds* 83 N.J. Eq. 309 (E. & A. 1914).

The file of corporations thus authorized applies to corporations generally without regard to the type of business which they are organized to conduct. It is concerned only with corporations, however, and not with other forms of business organizations. And it is concerned only with New Jersey corporations.

The file of hotel names resulting from R.S. 29:3-3 is concerned only with this type of business, but is not restricted to hotels run by corporations, and is not restricted to persons or entities domiciled in New Jersey. Because of these substantial differences, and the absence of any express provision relating the file of corporation names resulting from Title 14 to the file of hotel names provided by Title 29 it is our opinion that the two files should be kept distinct. It could happen that a New Jersey corporation operates a hotel in this state under a name different from its corporate name. In such a case a corporation should be permitted to register the name under

which the hotel was known pursuant to R.S. 29:3-3, as well as register the corporation name under Title 14.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: WILLIAM L. BOYAN  
Deputy Attorney General

November 30, 1960.

FREDERICK C. MCCOY, *Secretary*  
Morris County Board of Taxation  
Hall of Records  
Morristown, New Jersey

MEMORANDUM OPINION—P-17

DEAR MR. MCCOY:

You have asked our opinion whether a religious corporation which has more than one officiating clergyman, each of whom is housed in a separate residence, is entitled to a \$5,000 exemption from real property taxes for each such residence. The exemption to which you refer is granted by R.S. 54:4-3.6. Insofar as pertinent, that statute reads as follows:

"The following property shall be exempt from taxation under this chapter:  
... the building actually occupied as a parsonage by the officiating clergymen of any religious corporation of this State, to an amount not exceeding five thousand dollars (\$5,000.00)..."

In the case of *St. Matthew's, etc. Deaf v. Div. of Tax Appeals*, 18 N.J. Super. 552 (App. Div. 1952), the court suggested that "where two parsonages are created by a single congregation, one for the principal minister and one for his curate," both parsonages qualified for the exemptions. 18 N.J. Super. at p. 558. Although this statement is dictum, it appears to be a reasonable construction of the law. However, the question remains whether any single religious corporation would be entitled to a total exemption on all of its parsonages of more than \$5,000. In *Teaneck Tp. v. Lutheran Bible Institute*, 34 N.J. Super. 418 (App. Div. 1955), aff'd 20 N.J. 86 (1955), the Appellate Division referred to the *St. Matthew's* case and expressly noted that the exemption conferred by R.S. 54:4-3.6 "is limited in amount to \$5,000." 34 N.J. Super. at p. 421.

It is, therefore, our opinion that although the exemption may properly be claimed for two residences, both used by officiating clergymen of a single religious corporation, the total exemption for both may not exceed \$5,000.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: MURRY BROCHIN  
Deputy Attorney General

DECEMBER 15, 1960

MR. LEO I. MCGOUGH, *Secretary*  
*Legalized Games of Chance*  
*Control Commission*  
1100 Raymond Boulevard  
Newark 2, New Jersey

MEMORANDUM OPINION—P-18

DEAR MR. MCGOUGH:

You have asked us whether a provision in a municipal ordinance permitting games of chance on Sunday but restricting them to a specified number of Sundays would be in conflict with those provisions of the Bingo Licensing Law, R.S. 5:8-24 *et seq.* and the Raffles Licensing Law, R.S. 5:8-50, *et seq.* which relate to the frequency of such games and their operation on Sunday. In our opinion there would be no conflict.

R.S. 5:8-31 provides that bingo games may not be conducted on Sunday "unless it shall be otherwise provided in the license issued for the holding, operating and conducting thereof, pursuant to the provisions of an ordinance duly adopted by the governing body of the municipality issuing the license, authorizing the conduct of such games of chance under this act and on said day." R.S. 5:8-58 contains the same provision with respect to raffles.

Thus these two sections expressly empower a municipality to permit legalized games of chance on Sunday. In addition to its express powers, a municipality possesses any power which arises by necessary fair implication or is incident to powers expressly conferred. *Grogan v. DeSapio*, 19 N.J. Super. 469 (Law 1952), aff'd. 11 N.J. 308 (1953). Furthermore, the New Jersey Constitution requires that laws concerning municipalities be liberally construed in their favor. Article IV, Section 7, Paragraph 11 of the 1947 Constitution. Municipal ordinances are presumed valid and reasonable. *Bellington v. Township of East Windsor*, 32 N.J. Super. 243, 248 (App. Div. 1954). Although the power to permit games on Sunday is an exception from the general provisions of these sections which prohibit games of chance on Sunday, an exception to a statute may be liberally construed to serve the general legislative policy. *Wright v. Vogt*, 7 N.J. 1, 6 (151). See 2 *Sutherland, Statutory Construction*, Section 4936, p. 474 (3rd Ed. 1943). The existence of a general legislative policy against gambling (Article IV, Sec. 7, Par. 2 of the New Jersey Constitution; *Schwartz v. Battifarano*, 2 N.J. 478 (1949)) and in favor of some restriction of activities on Sunday (*Two Guys from Harrison v. Furman*, 32 N.J. 199 (1960)) has long been established in this State.

Applying the above principles to the instant question, a provision in an ordinance limiting the number of Sundays on which games of chance could be conducted would be clearly valid as incident to a municipality's express power to permit legalized games of chance on Sunday and in furtherance of general legislative policy in connection with gambling and Sunday activities.

It would be unreasonable to assume that the Legislature in passing R.S. 5:8-31 and R.S. 5:8-58 intended to compel a municipality to either permit games of chance on all Sundays or prohibit them on all Sundays. A reasonable construction in consonance with the Legislative intent is to be sought. *Alexander v. New Jersey Power and Light Co.*, 21 N.J. 373 (1956).

The provision in the ordinance limiting the number of Sundays on which games of chance could be conducted is undoubtedly for the purpose of meeting local differences and problems with respect to Sunday activities. Such is clearly permissible. In *Two Guys from Harrison, Inc. v. Furman, supra* the argument was made that the referendum with respect to Chapter 119 of the Laws of 1959 was invalid because the problem of Sunday activity was not local, but was rather of uniform concern throughout the State. Chief Justice Weintraub in refuting this argument said with respect to regulating activity on Sunday at p. 231 of 32 N.J. that:

"\* \* \* local differences may well exist in terms of the quantum and nature of the activity and its impact upon the opportunity for relief from the regular routine. It is generally held that municipalities may be empowered to deal directly with the subject."

See also: *Masters-Jersey Inc. v. Borough of Paramus*, 32 N.J. 296 (1960).

Nor is any such provision in an ordinance in conflict with R.S. 5:8-33 and 5:8-60. These sections provide that legalized games of chance may not be operated oftener than on six days in any one calendar month. These sections do not interfere in any way with the power of the municipality to prohibit or permit games on Sunday.

We, therefore, conclude that a provision in an ordinance limiting the number of Sundays on which games of chance can be held would not be in conflict with those provisions of the Bingo Licensing Law, R.S. 5:8-24 *et seq.* and the Raffles Licensing Law *et seq.* which relate to the frequency of such games and their operation on Sunday.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: BURRELL IVES HUMPHREYS  
*Deputy Attorney General*

JANUARY 23, 1961

MR. ROBERT M. FALCEY, *Chief Clerk*  
Office of Secretary of State  
State House  
Trenton, New Jersey

FORMAL OPINION 1961—No. 1

DEAR MR. FALCEY:

We have been asked who is responsible for the printing of ballots. We shall treat primary elections first and then general elections. In each case we shall treat ample ballots first and then official ballots.

Generally, municipal clerks must cause to be printed sample ballots for the primary election. R.S. 19:23-30. The cost must be paid by the respective municipalities. *Id.* The one exception is Bergen County where the county clerk must have the sample ballots for the primary election printed. L. 1945, c. 290, § 1, N.J.S.A. 19:23-22.2. In Bergen County the cost is to be borne originally by the county but thereafter reimbursed by the municipalities. L. 1945, c. 290, § 2, N.J.S.A. 19:23-22.3.

Generally, municipal clerks must cause to be printed official ballots for the primary election. R.S. 19:23-27. The cost must be paid by the respective municipalities. *Id.* Again, Bergen County is excepted. There, the county clerk must have the official ballots for the primary election printed. L. 1945, c. 290, § 1, N.J.S.A. 19:23-22.2. In Bergen County the cost is to be borne originally by the county but thereafter reimbursed by the municipalities. L. 1945, c. 290, § 2, N.J.S.A. 19:23-22.3.

The county clerk must cause to be printed both sample ballots and official ballots for the general election. This is provided in the case of the sample ballots by R.S. 19:14-21, and in the case of the official ballots by R.S. 19:14-18. The necessary implication of the provision that the county clerk shall cause to be printed ballots for the general election is that the county shall bear the costs. Cf. R.S. 19:45-4.

The adoption of voting machines in a county is not intended by the Legislature to alter the general provisions concerning responsibility for the cost of printing ballots discussed above. R.S. 19:49-4(b)(2) assumes generally "that the municipal clerks shall have primary sample ballots printed." This leaves unchanged R.S. 19:23-30, the general provision for sample ballots for primary election. R.S. 19:49-4(b)(2) provides only that the county clerk shall draw the specifications for the printing of the official primary ballots, and R.S. 19:49-2 provides expressly that "the providing of the official ballots \* \* \* shall be as now required by law." These provisions leave unchanged the effect of R.S. 19:23-27, the general provision for official ballots for the primary election. R.S. 19:49-4(b)(1) provides that "the county clerk shall have \* \* \* sample ballots for all general \* \* \* elections printed \* \* \*." This leaves unchanged the effect of R.S. 19:14-21. R.S. 19:49-2, quoted above, leaves unchanged the effect of R.S. 19:14-18, governing the providing of official ballots for the general election.

In summary, it is our opinion that the cost of printing ballots must be paid as follows:

in the case of sample ballots for the primary election, generally by the municipalities, except that in Bergen County, originally by the county but the county is to be reimbursed by the municipalities;

in the case of official ballots for the primary election, by the municipalities, except that in Bergen County, originally by the county but the county is to be reimbursed by the municipalities;

in the case of sample ballots for the general election, by the county; and  
in the case of official ballots for the general election, by the county.

One qualification of the above must be made. L. 1945, c. 290 currently controls in Bergen County. This law is in terms applicable to second class counties having a population of more than 400,000. Prior to the promulgation of the 1960 census, only Bergen County is in this category. With the changes in population this law will no longer apply to Bergen County, but will apply to Union, Middlesex and Passaic counties, unless the Legislature should amend the law.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: WILLIAM L. BOYAN  
*Deputy Attorney General*

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 Tide-water 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 HOPE, JR.  
*Deputy Attorney General*

FEBRUARY 6, 1961

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

FORMAL OPINION 1961—No. 3

DEAR MR. D'ALOTA:

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.

The Constitution in Art. IV, § 111, para. 1 provides that the number of members of the General Assembly is never to exceed sixty. By statute, the number of sixty is fixed as the membership of the General Assembly. L. 1941, c. 310; cf. L. 1961, c. 1, sec. 2. Because of resignations, the number of persons now serving as members of the General Assembly is 58.

In my opinion, the expression "all the members" refers to the full 60.

This phrase or a counterpart occurs in several places in the State Constitution. The majority of all the members of each house may petition for a special session. *Id.*, Art. IV, § 1, para. 4. The majority of all the members of a house constitutes a quorum to do business in that house. *Id.*, Art. IV, § IV, para. 2. The vote of two-thirds of all the members of a house is required to expel a member from that house. *Id.*, Art. IV, § IV, para. 3. The vote of three-quarters of all the members of a house is necessary to characterize a bill or joint resolution as an emergency measure in that house. *Id.*, Art. IV, § IV, para. 6. No bill or joint resolution shall pass unless the majority of all the members of each house are personally present and agree. *Ibid.* To pass a private, special or local law the vote of two-thirds of all the members of each house is required. *Id.*, Art. IV, § VII, para. 10. The vote of two-thirds of all the members of each house is necessary to override a veto by the Governor. *Id.*, Art. V, § I, para. 14 and 15. To impeach, the vote of a majority of all the members of the General Assembly is required. *Id.*, Art. VII, § 111, para. 2. To convict after impeachment, the concurrence of two-thirds of all the members of the Senate is required. *Ibid.* To submit to the people an amendment to the Constitution the vote of three-fifths of all the members of each house in one year or of a majority of all the members of each house in successive years is required. *Id.*, Art. XI, para. 1.

In *Schermerhorn v. Jersey City*, 53 N.J.L. 112 (Sup. Ct. 1890), the court relied on the apparently accepted construction of the language of the State Constitution of 1844 referring to "a majority of all the members" of each house of the Legislature. It stated:

"Our house of assembly is composed of sixty members and the senate of twenty-one members. In the one case the votes of thirty-one and in the other the votes of eleven members are essential to the passage of a bill or joint resolution." *Id.*, at 116.

The court held that the votes of 9 of 11 aldermen remaining after 2 of the 13 called for by statute had died did not satisfy a statutory requirement of the vote of "three-quarters of all the members."

In *Ross v. Miller*, 115 N.J.L. 61, 65 (Sup. Ct. 1935), Justice Heher stated that the Legislature itself has practically construed the expression in the Constitution "a majority of all the members" to mean "a majority of the entire membership of each house provided by law." He relied on this construction of the language in the Constitution in holding that 3 votes from among 5 surviving members of a municipal council reduced from the 7 provided by law due to deaths did not satisfy a statutory requirement of "a majority of all the members."

In *Stanton v. Hoboken*, 52 N.J.L. 88 (Sup. Ct. 1889), the court held that 5 votes did not satisfy a statutory requirement of "two-thirds of the members elected" where 1 of 8 councilmen elected had died.

In *Dombal v. Garfield*, 129 N.J.L. 555 (Sup. Ct. 1943), the court held that where 1 of 8 councilmen had resigned, a statutory requirement for "a majority of the whole

number of councilmen" was not satisfied by the participation of 4 of the remaining 7 councilmen.

In *State v. Rogers*, 56 N.J.L. 480 (Sup. Ct. 1894), where the main question was whether holdover senators had a right to organize the Senate at the beginning of a legislative year, without the participation of newly elected senators not yet sworn in, both the majority and the dissenter assumed that a quorum of the Senate was 11 members, even though the dissenter would have held that the holdover senators, necessarily a number less than the full 21, could organize the Senate. *Id.*, at 630, 632, 649.

Since the above authorities are in point and explicit, it is my opinion that constitutional references to a majority or to fractions of "all the members" of the houses of the Legislature must be construed to refer to fractions of the full membership authorized by law, even though from time to time one or more seats may be vacant, and that requirements of a majority, three-fifths, two-thirds or three-quarters of the General Assembly are only satisfied if 31, 36, 40 or 45 members, respectively, concur.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

FEBRUARY 7, 1961

MAJOR GENERAL JAMES F. CANTWELL  
*Chief of Staff*  
Department of Defense  
Trenton, New Jersey

FORMAL OPINION 1961—No. 4

DEAR GENERAL CANTWELL:

You have requested an opinion as to the police powers and duties of Civil Defense auxiliary police. My conclusions are based upon a construction of the Civil Defense and Disaster Control Act (L. 1953, c. 438 supplementing L. 1942, c. 251; App. A:9-33 to 57), the regulations proclaimed by the Governor pursuant thereto, and related general laws on police powers and the carrying of firearms.

The Civil Defense and Disaster Control Act is broadly drawn to provide a system of protection to the public, including rescue operations and maintenance of law and order in the event of war emergency or local disaster emergency. A clear legislative intention is evident that Civil Defense auxiliary police be adequately trained to supplement regular police forces in safeguarding against war disasters and in coping with war disasters or disasters from natural causes such as hurricanes or floods.

The statute sets forth in App. A:9-45:

"In order to accomplish the purposes of this act, the Governor is empowered to make such orders, rules and regulations as may be necessary adequately to meet the various problems presented by any emergency and from time to time to amend or rescind such orders, rules and regulations, including among others the following subjects:

" . . . c. Concerning the organization, recruiting, training, conduct, duties and powers of volunteer agencies, including air raid wardens, auxiliary

police and firemen, demolition and clearance crews, fire watchers, road repair crews, rescue squads, medical corps, nurses' aides corps, decontamination squads, drivers' corps, messengers' corps, emergency food and housing corps, utility repair squads, and all other civilian protection forces exercising or performing any functions or duties in connection with the problems of local civilian defense or disaster control."

Governor Meyner issued a proclamation prescribing rules and regulations for the development and training of civil defense auxiliary police on September 23, 1954. After declaring that such officers in the civil defense auxiliary police should have full police powers during any emergency as defined in the statute, the Governor in his proclamation vested equivalent powers in such auxiliary police during periods of training, as follows:

"Within time limits and rules and regulations to be prescribed by the State Civilian Defense Director, and with the approval of the governing body of any municipality, the auxiliary police of the duly authorized civilian defense organization of such municipality may be attached to the local police force for the purpose of training. During such period of training such auxiliary police shall have all the powers of peace officers, police officers and constables except as may otherwise be prescribed by such municipality."

My understanding is that your inquiry is directed to the police powers and duties of civil defense auxiliary police in times other than periods of emergency. By the Governor's proclamation the civil defense auxiliary police are limited in exercising police powers to periods of training, subject to the further rules and regulations of the State Director of Civil Defense and Disaster Control and the approval of their municipal governing body. The justification for such an extraordinary vesting of authority in citizens other than regular police officers is that, without the development of a knowledge of and skill in police methods, the auxiliary police could not handle rescue operations, expedite traffic flow and enforce the criminal laws during a war emergency or local disaster emergency.

The Acting State Director of Civil Defense and Disaster Control promulgated supplementary rules and regulations for the training of civil defense auxiliary police on October 10, 1957:

"In accordance with the Proclamation dated September 23, 1954 by Governor Robert B. Meyner concerning the powers of auxiliary policemen, there are hereby set forth the rules and regulations covering their actions while training with regular municipal police forces. Wherever a municipality does not have a regular police department the time of regular training and the decision to arm or not to arm the auxiliary police shall rest with the governing body of the municipality. The auxiliary police shall be subject to the orders of the Civil Defense Director. The time limits, rules and regulations are as follows:

"1. The length of time the auxiliary police may be attached to the local police for training shall be determined by the governing body and the Civil Defense Director, subject to the approval of the Chief of Police.

"2. During the period of time that the auxiliary police are attached to the local police for training, they shall be under the direction of the Chief of Police.

"3. The police authority and the arming of the auxiliary police with weapons during such period of training shall be determined by the Civil Defense Council, subject to the approval of the governing body of the municipality and the Chief of Police.

"4. Members of the auxiliary police shall be required to complete a preliminary course of training prior to assignment to duty, as prescribed by the Chief of Police.

"5. These same regulations shall apply during 'The time of drill or activity in preparation for the drill' as stated in paragraph No. 1 of Governor Robert B. Meyner's proclamation dated September 23, 1954."

My conclusion is that the Civil Defense and Disaster Control Act and the rules and regulations pursuant thereto vest police authority in civil defense auxiliary police during periods of training. Without adequate training, including law enforcement experience, the civil defense workers would be helpless and unequipped for the disaster or emergency against which the Legislature has sought to safeguard.

The critical question remaining is the length and extent of police training. Discretion has been reserved in the municipal governing body and State Director of Civil Defense and Disaster Control to approve the time limits and scope of police training of the civil defense auxiliary police. Several guiding legal principles, however, should be stated. Training must be bona fide and must not be abused as to extent. A municipality cannot substitute civil defense auxiliary police for regular or special police officers; an extension of the period of training to accomplish such a result would be unlawful. During valid periods of training civil defense auxiliary police are exempt from prosecution for the crime of carrying a concealed weapon (N.J.S. 2A:151-41-43). A municipality may be subject to liability for damages in an action founded upon its negligence in not adequately training a civil defense auxiliary police officer, for example in the law of arrest or the use of firearms. See *McAndrews v. Mularchuk*, 33 N.J. 172 (1960).

The objective in the application of the Civil Defense and Disaster Control Act should be to develop civil defense auxiliary police for disasters and emergencies through training and experience but without disruption of regular police activity or substitution of auxiliary police for regular or special municipal police officers.

Sincerely yours,

DAVID D. FURMAN  
Attorney General

APRIL 18, 1961

HONORABLE JOHN A. KERVICK  
State Treasurer  
State House  
Trenton, New Jersey

FORMAL OPINION 1961—No. 5

DEAR MR. KERVICK:

You have requested our opinion whether certain types of financial institutions would become subject to taxation under the New Jersey Corporation Business Tax

Act, N.J.S.A. 54:10A-1 et seq., by foreclosing a mortgage on New Jersey real estate and by subsequently managing the property for the purpose of collection of rents therefrom. The types of institutions with which you are concerned are: (a) a foreign savings and loan association; (b) a foreign building and loan association; (c) a national bank having its principal office in a state other than New Jersey; and (d) a state bank organized under the laws of a state other than New Jersey.

N.J.S.A. 54:10A-3 exempts from taxation thereunder, "railroad, canal or banking corporations, savings banks, production credit associations organized under the Farm Credit Act of 1933 or building and loan or savings and loan associations." The legal issue posed by your request for an opinion is, therefore, whether the enumerated types of financial institutions are "banking corporations, savings banks . . . or building and loan or savings and loan associations" within the meaning of N.J.S.A. 54:10A-3.

New Jersey does not impose any form of corporation tax upon domestic building and loan or savings and loan associations. N.J.S.A. 54:10A-3; N.J.S.A. 54:10B-2(b). Unlike domestic banks, domestic building and loan or savings and loan associations are not subject to the bank stock tax. N.J.S.A. 54:9-1 et seq. Although it might be constitutionally permissible to tax foreign building and loan associations which conduct a local business despite the exemption of domestic associations, the New Jersey Corporation Business Tax Act should not be construed to require such unequal tax treatment unless demanded by its terms. Far from demanding such a construction, however, the language of the statute appears to exempt all savings and loan or building and loan associations in unqualified terms without regard to their state of incorporation. It is, therefore, our opinion that foreign savings and loan or building and loan associations are not subject to the New Jersey corporation business tax under the circumstances which you have described.

Federal law prohibits New Jersey from imposing a franchise tax upon national banking associations whose principal offices are located in other states regardless of whether or not they are engaged in any activities here. National banks are not merely private monied institutions. They are agencies of the United States and are not subject to taxation by the states except as expressly permitted by consent of Congress. *First Nat. Bank v. Anderson*, 269 U.S. 341 (1926). See *Morris and Essex Investment Co. v. Division of Taxation*, 33 N.J. 24 (1960). Consequently, national banking associations can be taxed by New Jersey only in accordance with 12 U.S.C.A. sec. 548. This section permits taxation of such an association only by the state in which its principal office is located. *Bank of California National Ass'n. v. Richardson*, 248 U.S. 476 (1919); *National Bank of Redemption v. Boston, Mass.*, 125 U.S. 60 (1888). Accordingly, the Corporation Tax Act is inapplicable to national banks having their principal offices in states other than New Jersey.

The taxability of foreign state banks is less clear than that of the other financial institutions previously discussed. Section 331 of the New Jersey Banking Act of 1948, N.J.S.A. 17:9A-331, permits such banks to engage in limited activities in New Jersey. Although it could be argued that the statutory exemption granted to "banking corporations and savings banks" by the Corporation Business Tax Act refers only to banks which are subject to the Bank Stock Tax Act, the unqualified language of N.J.S.A. 54:10A-3 is to the contrary. From the language used it should not be presumed that the Legislature intended to impose a tax upon foreign state banks in situations in which New Jersey is constitutionally prohibited from taxing national banks which have their principal offices outside New Jersey. We are not aware that

either the charters or the laws of the states of incorporation purport to authorize banking institutions organized under the laws of foreign states to engage in activities in New Jersey more extensive than those permitted by the Banking Act of 1948. However, if more extensive activities are conducted, the foreign institution would become subject to the New Jersey corporation tax laws and other applicable tax laws on the same basis as any other foreign corporation engaged in such activities in this state. In our opinion, a foreign banking institution whose only activities in New Jersey are those expressly permitted by N.J.S.A. 17:9A-331, including activities reasonably ancillary to the foreclosure of a mortgage on New Jersey realty, does not become subject to the New Jersey corporation tax because of such activities.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: DAVID M. SATZ, JR.  
First Assistant Attorney General

APRIL 24, 1961

HONORABLE ARTHUR S. MEREDITH  
Prosecutor, Somerset County  
Court House  
Somerville, New Jersey

FORMAL OPINION 1961—No. 6

DEAR PROSECUTOR MEREDITH:

At a recent prosecutors' meeting my opinion was sought as to whether blood samples may be taken from comatose parties to automobile accidents to determine the presence of alcohol. The question requires a consideration of the constitutionality of such action under both the State and Federal Constitutions and the applicability of the death by automobile statute (N.J.S. 2A:113-9) and certain provisions of the Motor Vehicle statutes (N.J.S.A. 39:4-50 and 50.1).

There can be no doubt that the taking of blood samples from comatose suspects where there exists reasonable grounds to suspect such persons of having committed an offense in which the presence of alcohol is pertinent (see *Schutt v. MacDuff*, 127 N.Y.S. 2d 116 (Sup. Ct. 1954)) and where there are adequate health safeguards does not constitute a violation of the due process clause of the Fourteenth Amendment to the United States Constitution. In *Breithaupt v. Abram*, 352 U.S. 432, 77 S. Ct. 408 (1957) the Court considered a factual situation almost identical to the one now under consideration. The defendant in that case was involved in an automobile crash in which three persons were killed and he was seriously injured. An almost empty pint bottle of whiskey was found in the glove compartment of the defendant's vehicle. Defendant was taken to a hospital, unconscious, and, after detecting the smell of liquor on defendant's breath, a state policeman requested that a sample of defendant's blood be taken. While defendant was still unconscious a sample of 20 cc. was taken by an attending physician by using a hypodermic needle. Analysis of the sample indicated .17 per cent alcoholic content and this formed the basis of a conviction for involuntary manslaughter. In an ensuing habeas corpus proceeding the argument was made that

the taking of a blood sample while defendant was unconscious came within the prescription of *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205 (1952). In *Rochin* a stomach pump was forcibly used to extract narcotic pills and this conduct was held to be such that "shocked the conscience" and was so "brutal" and "offensive" that it violated traditional ideas of fair play; and, therefore, it constituted a violation of Due Process requirements. In distinguishing the *Rochin* fact situation, the Court in *Breithaupt* said (at page 435 of 352 U.S.):

"Basically the distinction rests on the fact that there is nothing 'brutal' or 'offensive' in the taking of a sample of blood when done, as in this case, under the protective eye of a physician. To be sure, the driver here was unconscious when the blood was taken, but the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right; and certainly the test as administered here would not be considered offensive by even the most delicate."

It should be noted that the Supreme Court in *Breithaupt* specifically pointed out, with approval, that State Police regulations applicable there required that such samples be taken by a physician only. It thus is clear that all medical precautions must be observed in the taking of blood samples.\*

In *State v. Alexander*, 7 N.J. 585 (1951) the defendant was arrested under a charge of murder. While incarcerated prior to trial, he submitted to the taking of a sample of his blood by a Board of Health physician to determine whether he had a venereal disease. Without defendant's knowledge a portion of this sample was turned over to police authorities and analyzed by them to determine his blood type. The result of the test for blood type was admitted in evidence to show the presence of defendant's blood on the knife used in the homicide. It was alleged as error, among others, that the admission of such evidence was a violation of the defendant's privilege against self-incrimination, an invasion of his rights against unreasonable search and seizure and a violation of due process of law. The major portion of the Court's opinion was devoted to the self-incrimination issue, and it was held that in this State the privilege applies to testimonial compulsion only and that no constitutional rights under the due process clause are violated where a defendant is compelled to submit to an examination to determine physical or mental condition. The Supreme Court of Oregon in *State v. Cram*, 176 Ore. 577, 160 P. 2d 283, 285 (1945), made the following catalog of instances of non-testimonial compulsion of evidence held to have been not violative of the privilege against self-incrimination:

"The accused, upon his arrest, may be required to do many things without having his constitutional rights against self-incrimination invaded. For the purpose of identification he may be required to stand up in court; to appear at the scene of the crime (3 Wharton, Crim. Ev., 11th Ed., § 1141); to put

\* While the New Mexico state police regulations involved in the *Breithaupt* case required that the blood sample be taken only by a physician, the court apparently considered that due process would permit the taking of a blood sample by a qualified medical technician not a physician. In a footnote, the court cited with approval the Kansas implied consent statute providing for suspension or revocation of the driving privileges of the operator of a motor vehicle who refuses to submit to a chemical test for the presence of alcohol in his blood. The Kansas statute provides that "only a physician or qualified medical technician . . . can withdraw any blood of any person submitting to a chemical test under this act." Kansas Gen. Stat. 1949, Supp. 1959, § 8-1003. Probably with this provision in mind the court stated in *Breithaupt*:

"We therefore conclude that a blood test taken by a skilled technician is not such 'conduct that shocks the conscience [citation omitted] nor such a method of obtaining evidence that it offends a "sense of justice" [citation omitted].'" 352 U.S. at 436, 77 S. Ct. at 411.

on a blouse to see if it fits him (*Holt v. United States*, 218 U.S. 245, 31 S. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138); to place a handkerchief over his face (*Ross v. State*, 204 Ind. 281, 182 N.E. 865); to stand up and remove his glasses (*Rutherford v. State*, 135 Tex. Cr. R. 530, 121 S.W. 2d 342); to remove his coat and shirt and permit the jury to see scars on his body and to don a shirt introduced in evidence (*State v. Oschoa*, 49 Nev. 194, 242 P. 582); or to exhibit his arm so as to reveal tattoo marks thereon, which a previous witness has sworn were there (*State v. Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530). He may also be fingerprinted, photographed and measured under the Bertillon system. *United States v. Kelly*, 2 Cir. 55 F. 2d 67, 83 A.L.R. 122, and cases therein cited; *Downs v. Swann*, 111 Md. 53, 73 A. 653, 23 L.R.A., N.S., 739, 134 Am. St. Rep. 586; *Barilletta v. McFeeley*, 107 N.J. Eq. 141, 152A. 17; *People v. Les*, 267 Mich. 648, 255 N.W. 407, and authorities therein cited; *Connors v. State*, 134 Tex. Cr. R. 278, 115 S.W. 2d 681. For other instances, see 8 Wigmore, § 2265, footnote 2."

See also *State v. Auld*, 2 N.J. 246 (1949); *Roesch v. Ferber*, 48 N.J. Super. 231 (App. Div. 1957). With regard to whether the taking of the blood sample constituted an unreasonable search and seizure the Court reiterated the rule in this State that after a lawful arrest the person of an accused may be examined without a search warrant. 7 N.J. at p. 594-5. See also *Breithaupt v. Abram*, *supra* and *cf. Eleuteri v. Richman*, 26 N.J. 506 (1958) wherein it was held that evidence unlawfully obtained is admissible in the courts of this State, if material and competent per se.

It is concluded, therefore, that there is no constitutional prohibition, under either State or Federal Constitutions, against taking blood samples with proper medical safeguards and upon reasonable grounds for suspicion from a comatose suspect to be used in a prosecution under the death by auto statute (N.J.S. 2A:113-9).

The foregoing conclusion does not apply, however, in cases in which such samples will be used in a prosecution for driving while under the influence of intoxicating liquor. In such cases there is a specific statutory prohibition against the taking of samples of body fluids without express consent. N.J.S.A. 39:4-50.1 provides in part:

"... No chemical analysis, as provided in this section, or specimen necessary thereto, may be made or taken unless expressly consented to, or requested by, the defendant."

In the light of the *Alexander* and *Breithaupt* cases discussed *supra*, there is no basis for extending the applicability of the express consent requirement of N.J.S.A. 39:4-50.1 beyond the provisions of N.J.S.A. 39:4-50. It should be noted that N.J.S.A. 39:4-50.1 contains within it such a limitation of its applicability:

"In any prosecution for a violation of section 39:4-50 of Title 39 of the Revised Statutes relating to driving a vehicle while under the influence of intoxicating liquor . . ."

It is my opinion, therefore, that a court, following the *Alexander*, *Breithaupt* and other decisions, would hold if confronted with these issues that blood samples may be taken from comatose suspects under adequate medical safeguards and upon reasonable grounds for suspicion to be used in a prosecution under the death by auto statute (N.J.S. 2A:113-9) but that such samples cannot be taken to be used in a prosecution

under the statute concerning the operation of a motor vehicle while under the influence of intoxicating liquors. (N.J.S.A. 39:4-50.)

Very truly yours,

DAVID D. FURMAN  
Attorney General

APRIL 25, 1961

HON. HAROLD J. ASHBY, *Chairman*  
State Parole Board  
State Office Building  
Trenton, New Jersey

FORMAL OPINION 1961—No. 7

DEAR MR. ASHBY:

You have inquired concerning the application of disenfranchisement provisions of the Constitution of New Jersey and implementing statutes to

- (a) Juvenile offenders between the ages of 16 and 18 years, and
- (b) Minor offenders between the ages of 18 and 21 years convicted in adult criminal court.

We conclude that these provisions have no application to juvenile offenders under the age of 16 and juvenile offenders between the ages of 16 and 18 years adjudicated as such in the Juvenile and Domestic Relations Court, but such provisions do have application to persons between the ages of 16 and 21 years convicted in the adult criminal court of specified disqualifying offenses.

Art. II, par. 7, of the *Constitution of New Jersey* (1947) provides:

"The legislature may pass laws to deprive persons of the right of suffrage who shall be convicted of such crimes as it may designate. Any person so deprived, when pardoned or otherwise restored by law to the right of suffrage, shall again enjoy that right."

The legislature implemented this constitutional provision by *Chap. 438, P.L. 1948*, as amended, *R.S. 19:4-1*, as amended, where it is provided:

"No person shall have the right of suffrage—

- (1) Who is an idiot or is insane; or
- (2) Who has been or shall be convicted of any of the following designated crimes, that is to say—blasphemy, treason, murder, piracy, arson, rape, sodomy, or the infamous crime against nature, committed with mankind or with beast, robbery, conspiracy, forgery, perjury or subornation of perjury, unless pardoned or restored by law to the right of suffrage; or
- (3) Who was convicted prior to October 6, 1948, of the crime of polygamy or of larceny of above the value of \$6.00; or who was convicted after October 5, 1948, and prior to the effective date of this act, of larceny of above the value of \$20.00; or

- (4) Who shall hereafter be convicted of the crime of larceny of the value of \$200.00 or more, unless pardoned or restored by law to the right of suffrage; or
- (5) Who was convicted after October 5, 1948, or shall be convicted of the crime of bigamy or of burglary or of any offense described in chapter 94 of Title 2A or section 2A:102-1 or section 2A:102-4 of the New Jersey Statutes or described in sections 24:18-4 and 24:18-47 of the Revised Statutes, unless pardoned or restored by law to the right of suffrage; or
- (6) Who has been convicted of a violation of any of the provisions of this Title, for which criminal penalties were imposed, if such person was deprived of such right as part of the punishment therefor according to law, unless pardoned or restored by law to the right of suffrage; or
- (7) Who shall be convicted of the violation of any of the provisions of this Title, for which criminal penalties are imposed, if such person shall be deprived of such right as part of the punishment therefor according to law, unless pardoned or restored by law to the right of suffrage."

The *Constitution of 1947*, with the exception of the judicial article, became effective January 1, 1948. The legislative enactment (*Chap. 438, P.L. 1948* as amended; *R.S. 19:4-1*, as amended) became effective October 6, 1948. Accordingly, it will be observed that the implementing statute had application only to convictions had after October 5, 1948 with respect to the classification and description of crimes for which disenfranchisement would occur. With respect to disenfranchisement for convictions had prior to October 5, 1948 we must look to the former *Constitution of New Jersey* which provided in *Art. II, par. 1*, that a "person convicted of a crime which now excludes him from being a witness unless pardoned or restored by law to the right of suffrage" shall be disqualified from exercising the right of suffrage.

The law disqualifying witnesses referred to in said constitutional provision is found in Sec. 1 of an act entitled "*An Act concerning witnesses*," enacted June 7, 1799 which continued without amendment until the adoption of the former *Constitution in 1844* and provides as follows:

"That no person, who shall be convicted of blasphemy, treason, murder, piracy, arson, rape, sodomy, or the infamous crime against nature, committed with mankind or with beast, polygamy, robbery, conspiracy, forgery or larceny, of above the value of \$6.00, shall in any case be admitted as a witness, unless he or she be first pardoned; and no person who shall be convicted of perjury, or of subornation of perjury, although pardoned for the same, shall be admitted as a witness in any case."

Our courts were confronted with the question of what constituted disenfranchisement from the period of the adoption of the *Constitution of 1947*, to wit, January 1, 1948, and the effective date of the implementing statute (*R.S. 19:4-1*) October 6, 1948.

It was held in *the Application of Palmer*, 61 A 2d 922 (Co. Ct. 1948) that *R.S. 19:4-1*, as amended, did not impliedly repeal the former statutes and constitutional provisions relating to disenfranchisement with respect to convictions prior to October 6, 1948. It was further held that there was no constitutional invalidity with respect to the requirement of disenfranchisement with regard to convictions had prior to the effective date of *R.S. 19:4-1*, as amended, to wit, October 6, 1948.

Thus, with respect to convictions had prior to October 5, 1948, the schedule of disenfranchisement convictions apparent in the *1844 Constitution* and the statute relating to witnesses will prevail. With respect to convictions had after October 5, 1948 the schedule appearing in *R.S. 19:4-1*, as amended, will obtain.

Regarding the application of the aforementioned law to disenfranchisement of individuals, it becomes evident that children under the age of 16 years are not affected adversely thereby because it is provided in *N.J.S. 2A:85-4* that "a person under the age of sixteen years is deemed incapable of committing crime," and there is no "conviction" of record.

Such children charged with juvenile offenses automatically come under the jurisdiction of the Juvenile and Domestic Relations Court and the adult criminal court has no jurisdiction.

The Juvenile Court as presently constituted in this State was established by *Chap. 157, P.L. 1929* and the jurisdiction of the court was limited to children under the age of 16 years, until enlarged by *Chap. 97, P.L. 1943*, to include, on a selective basis, children over the age of 16 but under the age of 18 years. It was the legislative scheme of *Chap. 97, P.L. 1943*, that all cases of minors between ages 16 and 18 would be referred to the juvenile court which might in turn forward the case to the prosecutor for disposition in the adult criminal court if special circumstances appeared in the situation. This same jurisdiction continues at the present time under similar circumstances. See *N.J.S. 2A:4-3*, et seq.

It is provided in *N.J.S. 2A:4-39* that "no adjudication upon the status of a child under the age of 18 years of age shall operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall such a child be deemed a criminal by reason of such conviction, nor shall such adjudication be deemed a conviction."

Accordingly, it becomes apparent that if the juvenile court retains jurisdiction of an individual under the age of 18 years and adjudicates the person as a juvenile offender then the disenfranchisement features of *R.S. 19:4-1*, as amended, shall not apply.

If the juvenile court avails itself of the provisions of *N.J.S. 2A:4-15* and transfers the case of a child between the age of 16 to 18 years to the adult criminal court for disposition, and if conviction is had therein, then it is evident that the provisions of *R.S. 19:4-1* will apply and disenfranchisement will occur if conviction is had for any of the crimes enumerated in the schedules referred to above. This is because it is provided in *R.S. 19:4-1*, as amended, that "No person shall have the right of suffrage \* \* \* (2) who has been or shall be convicted of any of the following designated crimes \* \* \*." The utilization by the legislature of the past tense with respect to conviction of crime is a clear intent that it should apply to convictions previously had as well as to those in the future.

This argument is bolstered by the language used in *the Application of Palmer*, *supra*, where it is indicated by the court that the purpose of the constitutional provision and the implementation thereof by the legislature is to maintain purity of elections. The same decision is authority for the proposition that *R.S. 19:4-1*, as amended, could apply retroactively without constitutional invalidity.

*Palmer, supra*, was approved in *the Matter of Smith*, 8 N.J. Super. 573 (Co. Ct. 1950) where Judge Hartshorne extended the provisions of *R.S. 19:4-1*, as amended, to include convictions had in sister states and federal courts.

We find nothing in any of the constitutional provisions or implementing statutes relating to disenfranchisement which can be interpreted to mean that persons under the age of 21 years convicted of disqualifying crimes should receive automatic amnesty therefrom upon attainment of majority and, thus, escape application of the disenfranchisement provisions of the Constitution and the laws of this jurisdiction.

We conclude that it was the intention of the framers of the Constitution and the Legislature to disenfranchise all persons convicted in adult criminal court of the specific enumerated offenses and to exclude therefrom minors adjudicated as juvenile offenders in the Juvenile and Domestic Relations Court.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: EUGENE T. URBANIAK  
Deputy Attorney General

MAY 25, 1961

DR. VINCENT P. BUTLER, *Secretary*  
*State Board of Medical Examiners*  
28 West State Street  
Trenton, New Jersey  
and

DR. EMANUEL C. NUROCK, *Secretary-Treasurer*  
*State Board of Optometrists*  
162 West State Street  
Trenton, New Jersey

FORMAL OPINION 1961—No. 8

DEAR SIRs:

You have asked whether Chapter 12 of Title 45 of the Revised Statutes regulating the practice of optometry authorizes optometrists to prescribe and fit contact lenses and, if so, whether optometrists are permitted to delegate this function to ophthalmic technicians or dispensers who are not licensed to practice optometry or medicine.

The first part of this question must be answered in the affirmative. R.S. 45:12-1 sets out the statutory definition of the practice of optometry as follows:

"The practice of optometry is defined to be the employment of objective or subjective means, or both, for the examination of the human eye for the purpose of ascertaining any departure from the normal, measuring its powers of vision and adapting lenses or prisms for the aid thereof.\* \* \*"

In *Abelson's Inc. v. N. J. State Board of Optometrists*, 5 N.J. 412 (1950), the Supreme Court held that optometry was a profession in sustaining the constitutionality of regulatory legislation. The opinion stated at p. 419:

"Optometry is directed to the measurement of the range of vision and the correction by lens, of visual defects and the increase of visual power with a minimum of eye exertion. \* \* \*"

Thus the Legislature and the Supreme Court have established and recognized the fitting of lenses as within the practice of optometry. No prescription on the authority to fit contact lenses can be construed by implication. The Legislature in 1954, at a time when contact lenses were already in widespread use, specifically referred to them in an amendment to the Optometry Act (L. 1954, c. 227):

"The board shall have the power \* \* \* to refuse to grant, to revoke or to suspend for a specified time \* \* \* any license to practice optometry in the State of New Jersey for any of the following causes: \* \* \*

(h) \* \* \* advertising to perform optometric services or with reference to providing glasses, spectacles, contact lenses, frames, mountings, lenses or prisms \* \* \*."

The conclusion that optometrists enjoy a statutory sanction to fit contact lenses is based upon the law as enacted. Whether this delicate prosthesis involving the fixing of a foreign body in contact with the cornea of the eye should be entrusted to other than medical doctors is a subject for continuing legislative scrutiny. This is a developing problem and the extent and incidence of permanent eye injuries and visual impairment through the indiscriminate use of contact lenses without medical safeguards are still unknown. More and more patients are seeking contact lenses for cosmetic or emotional reasons, instead of for their original purpose to improve vision because of pathological conditions in which correction of the refractive error through the use of spectacles would not work a satisfactory improvement in vision. Every wearer of contact lenses faces the possibility at some time of injury, irritation or inflammation of the eye as a direct or indirect result of the abrasion of contact lenses upon the cornea.

The Medical Society of New Jersey has conducted a survey of medical doctors practicing ophthalmology. An appreciable incidence of permanent injury or permanent visual impairment due to the wearing of contact lenses has been reported.

The bounds of the practice of optometry stop short. While optometrists have training in the diagnosis of pathology of the eye and unquestionably have a duty to refer cases involving ocular pathology to medical doctors, *Code of Ethics*, New Jersey Optometric Association, Section I, optometrists are prohibited from the care or treatment of injuries, growths or diseases of the eye. Medical examination and diagnosis, first an evaluation whether the use of contact lenses is medically permissible and secondly, periodic observation as long as the patient wears them to determine any physical and pathological impairments, appear to be of critical importance. This subsequent evaluation includes methods available to medical doctors and proscribed to optometrists; slit lamp biomicroscopy of the cornea with the drug fluorescein to diagnose the presence or absence of pathological change due to trauma or to metabolic disturbance.

The majority of recent judicial decisions recognize that the diagnosis but not the treatment of pathology is within the realm of the optometrist's professional competence. In *State v. Standard Optical Co.*, 182 Oregon 452, 188 Pac. 2d 309, 313 (1947), for example, the highest court of Oregon discussed optometry as follows:

"While it is true that an optometrist is not permitted by law to treat diseases of the eye, nevertheless, his training enables him to diagnose pathological conditions, and his duties require him to refer the patient to a prac-

itioner who is qualified to treat such conditions. The fact that he is trained to diagnose pathological conditions in itself indicates that the optometrist is not a mere skilled craftsman or mechanic."

The United States Supreme Court, in *Williamson v. Lee Optical Co.*, 348 U.S. 483, 486 (1955), commented on the subject:

"An ophthalmologist is a duly licensed physician who specializes in the care of eyes. An optometrist examines eyes for refractive error, recognizes (but does not treat) diseases of the eye, and fills prescriptions for eyeglasses."

See also *Lieberman v. Connecticut State Board of Examiners in Optometry*, 130 Conn. 344, 34 A. 2d 213, 215 (Supreme Ct. of Errors 1943) ("A properly qualified optometrist should be able to discover diseased conditions of the eye which require treatment by an ophthalmologist and should, when they are discovered, refer his patient to a doctor qualified to deal with them."); and *McMurdo v. Getter*, 298 Mass. 363, 10 N.E. 2d 139, 143 (Supreme Judicial Court, 1937) ("In recent times abnormalities of the eye, like those of the teeth, have been found sometimes to indicate and often to result in serious impairment of the general health. The work of an optometrist approaches, though it may not quite reach ophthalmology.")

In answer to the second part of the question you have posed, there is nothing in Chapter 12 of Title 45 which authorizes optometrists to employ anyone other than another duly licensed optometrist or a duly licensed physician to fit contact lenses as his agent.

Laws of 1948, Chapter 439 (R.S. 52:17(B)-41.1 to 52:17(B)-41.24 inclusive) provides for the regulation of the practice of ophthalmic dispensing, with the limitations set forth in R.S. 52:17(B)-41.1:

"\* \* \* A person [ophthalmic dispensers or ophthalmic technicians] registered under the provisions of this act is specifically prohibited from engaging in the practice of ocular refraction, orthoptics, visual training, or fitting contact lenses; or the prescribing of subnormal vision aids or telescopic spectacles, in his own behalf or as an employee or student of another, whether under the personal supervision of his employer or preceptor or not.

"No person not licensed to practice medicine or optometry in this State shall directly or indirectly, for himself or others, do or engage in any act or practices specifically prohibited to duly registered ophthalmic dispensers and ophthalmic technicians by the provisions of this act."

The manifest legislative intent of this statute is to prohibit any person other than a medical doctor or an optometrist from the practice of fitting contact lenses.

Very truly yours,

DAVID D. FURMAN  
Attorney General

JUNE 20, 1961

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

FORMAL OPINION 1961—No. 9

DEAR COMMISSIONER:

You have requested our opinion as to whether a limited-dividend housing corporation may be incorporated under the authority of Laws of 1949, c. 184, N.J.S.A. 55:16-1 et seq., as a wholly owned subsidiary of a business corporation organized pursuant to Title 14 of the Revised Statutes. In our opinion such incorporation would be lawful subject to the restrictions set forth below.

N.J.S.A. 55:16-6 provides for the incorporation of limited-dividend housing corporations in the following manner:

"Any 3 or more citizens of the State, as individuals or as the representatives of 1 or more banks, foundations, labor unions, employers' associations, veterans' organizations or insurance companies or any combination of the foregoing, may form a housing corporation for the aforesaid purposes by making, signing, acknowledging and filing a certificate as required for other corporations formed under Title 14, Corporations, General, of the Revised Statutes, \* \* \*"

The statute was enacted to encourage capital investment to alleviate the housing shortage in New Jersey by offering tax exemptions for projects providing decent, safe and sanitary dwellings for families in need of housing. N.J.S.A. 55:16-2, 18. The Legislature intended that such exemptions would encourage capital investment in the projects. At the same time, such corporations are subject to certain operating conditions among which are the control and supervision by the Department of Conservation and Economic Development over the projects, N.J.S.A. 55:16-11 to 17; and restrictions on payments of dividends to stockholders, N.J.S.A. 55:16-5, 6.

However, while the operations and profits are limited, the above quoted language of N.J.S.A. 55:16-6 does not prevent ownership, following formation pursuant to that section, by a Title 14 corporation. Delineation of the several types of business associations is not designed to be restrictive or exclusive as to the type of organization that may have control over or eventually function as a limited-dividend housing corporation. The apparent intent is to permit those enumerated entities to engage in limited-dividend housing activities despite other statutory limitations or disabilities which are found in legislation conferring authority to organize and function as such associations.

N.J.S.A. 55:16-6 permits 3 citizens of this State, as individuals, to form a limited-dividend housing corporation. At the same time, absent any statutory limitation to the contrary, such individuals may act as incorporators pursuant to the terms of R.S. 14:2-1 et seq. as agents for and in the name of a Title 14 corporation. In turn, all of the stock of the limited-dividend corporation may be purchased and held by a Title 14 corporation.

N.J.S.A. 55:16-19 provides that the provisions of law applicable to ordinary stock corporations shall, except in the case of conflict with the Limited-Dividend Housing Corporations Law, apply to corporations organized under the latter statute. N.J.S.A. 14:7-1 and 14:7-2 require that every corporation shall have at least three directors selected from its stockholders or from the stockholders of a corporation owning not less than 25% of its stock. The matter of directors not being dealt with in the Limited-Dividend Housing Corporations Law, this provision applies to corporations organized thereunder. Thus when a Title 14 corporation is the sole stockholder of a limited-dividend housing corporation, three directors of the latter corporation must be stockholders in the Title 14 corporation.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: DAVID M. SATZ, JR.  
*First Assistant Attorney General*

JUNE 20, 1961

HONORABLE FRANK A. VERGA  
*Deputy Attorney General*  
Chief, Bureau of Consumer Frauds  
1100 Raymond Boulevard  
Newark 2, New Jersey

FORMAL OPINION 1961—No. 10

DEAR MR. VERGA:

In your letter of May 4, 1961 you outlined a situation concerning which your office has received information and requested our advice. The situation is as follows:

Ice cream manufacturers often lend refrigeration equipment to retailers. These units have four to twelve wells or recesses wherein ten-gallon containers are placed. Ice cream is then scooped out of the open containers and placed on ice cream cones or hand packed in small cartons. The refrigeration unit bears the lending manufacturer's brand name. Some retailers are using these units to store and sell other brands of ice cream. Additionally, we are advised that retailers have used the borrowed units to store other frozen foods.

Such use other than to store ice cream of the brand name constitutes a violation of several statutes of this State. Ice cream manufacturers and dealers should be so advised.

Section 2 of the Laws of 1960, Chapter 39 (N.J.S.A. 56:8-2) states that:

"[t]he act, use or employment by any person of any . . . misrepresentation . . . in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice. . . ."

The customer who purchases ice cream which is scooped out of open ten-gallon containers located in the wells or recesses of the refrigeration unit, may see only the

brand or manufacturer's name affixed to the unit rather than any names which might appear on the ten-gallon containers. As a result, the customer may receive ice cream of a make or quality other than that which he believed he was buying. Under the circumstances misrepresentation undoubtedly is involved.

Chapter 355 of the Laws of 1933 (R.S. 56:3-14 to 34), also, is pertinent. Section 15 provides that:

"Any person . . . engaged in manufacturing . . . ice cream [or similar products] . . . or selling [ice cream] in . . . refrigerators . . . upon which his . . . name . . . or other marks [is] branded . . . may register his . . . name . . ."

and is thereafter

". . . deemed the proprietor of such name . . . and of every container upon which such name . . . may be branded." R.S. 56:3-15.

Where there has been a proper registration of the brand name in compliance with sections 16 through 19:

"No person . . . other than the owner or proprietor, of [the] name . . . shall fill or cause to be filled with [ice cream] . . . or shall . . . use . . . any [refrigerator] . . . nor shall . . . remove or conceal any such name . . . without the written consent of the owner." R.S. 56:3-20.

Absent written permission to store other ice cream, a violation would exist. Persons violating Section 20 are subject to prosecution under Section 21 which provides for fines of \$5.00 per unit or imprisonment for a period of not less than 10 days nor more than one year or both. On subsequent violations, the penalty is a fine of \$10.00 or imprisonment for not less than 20 days nor more than one year or both.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

JUNE 29, 1961

HONORABLE HAROLD J. ASHBY  
*Chairman, State Parole Board*  
State Office Building  
Trenton, New Jersey

FORMAL OPINION 1961—No. 11

DEAR MR. ASHBY:

You have requested our opinion as to whether R.S. 19:4-1 disenfranchises a person convicted of "carnal abuse" as distinguished from a conviction had for "rape."

A preliminary determination must be made that R.S. 19:4-1 operates to deprive persons convicted of certain enumerated offenses of the right of suffrage and to this extent works a forfeiture upon such persons. In *Marter v. Repp*, 80 N.J.L. 530, 532 (Supreme Ct. 1910); *aff. 82 N.J.L. 531* (E. & A. 1911), it was said that

"A penal statute is one which enforces a forfeiture or penalty for transgressing its provisions by doing a thing prohibited."

The court then observed that such a forfeiture statute falls within the category of a "penal statute" and the decisions in this jurisdiction to the effect that penal statutes are to be construed strictly against the state are legion. It was said in *State v. Vanderhove*, 47 N.J. Super. 483, 492 (App. Div. 1957); *aff. 27 N.J. 313* (1958) that

"Penal statutes are to be construed strictly against the state, for statutes creating and defining crimes cannot be extended by intendment. The condemned act must be plainly and unmistakably within the statute. \* \* \* Accordingly, any doubt as to the meaning of the statute is to be resolved in favor of the strict construction thereof."

In *Marler v. Repp*, *supra*, the court carefully made the observation "that 'penal' is a much broader term than 'criminal,' and includes many statutory enforcements of police regulations, the violation of which are in no sense crimes." Thus, we must conclude that R.S. 19:4-1, in that it provides for a forfeiture of the right of suffrage in certain cases, falls within the definition of a "penal" statute as defined in *Marler v. Repp*, *supra*, and is subject to the rule of strict construction. Accordingly, unless it clearly appears that the Legislature intended the forfeiture of suffrage by a person convicted of "carnal abuse," we must find that the forfeiture will not apply.

An examination of the pertinent portions of the statutes involved is essential to a determination of the issues raised.

The applicable part of R.S. 19:4-1 is as follows:

"No person shall have the right of suffrage—

- (1) Who is an idiot or is insane; or
- (2) Who has been or shall be convicted of any of the following designated crimes, that is to say—blasphemy, treason, murder, piracy, arson, rape, sodomy, or the infamous crime against nature, committed with mankind or with beast, robbery, conspiracy, forgery, perjury or subornation of perjury, unless pardoned or restored by law to the right of suffrage; or . . ."

The crime of "rape" or "carnal abuse" and the punishment for conviction thereof in various phases is described in N.J.S. 2A:138-1, which provides:

"Any person who has carnal knowledge of a woman forcibly against her will, or while she is under the influence of any narcotic drug, or who, being of the age of 16 or over, unlawfully and carnally abuses a woman-child under the age of 12 years, with or without her consent, is guilty of a high misdemeanor and shall be punished by a fine of not more than \$5,000, or by imprisonment for not more than 30 years, or both; or who, being of the age of 16 or over, unlawfully and carnally abuses a woman-child of the age of 12 years or over, but under the age of 16 years, with or without her consent, is guilty of a high misdemeanor and shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than 15 years, or both."

*State v. Lefante*, 12 N.J. 505, 513 (1953), observes that there are three separate crimes encompassed in N.J.S. 2A:138-1 and, to use the language of our Supreme Court, they are as follows:

- "(1) Rape,
- (2) Carnal abuse of a woman-child under the age of 12 years, and
- (3) Carnal abuse of a woman-child over the age of 12 years and under the age of 16."

The distinction between "carnal abuse" and "carnal knowledge" was made early in this jurisdiction in *State v. Hummer*, 73 N.J.L. 714 (E. & A. 1906) and *State v. Huggins*, 84 N.J.L. 254 (E. & A. 1912) and affirmed in *State v. MacLean*, 135 N.J.L. 491 (Supreme Ct. 1947) where it was held that

"Carnal abuse is an act of assault or debauchery of the female sexual organs by the genital organs of the male which falls short of knowledge with its accompanying penetration."

Of similar effect was *State v. Auld*, 135 N.J.L. 293 (E. & A. 1946); and *State v. Riley*, 49 N.J. Super. 570, 584 (App. Div. 1958) where the court said:

"The law is clear that what is required to constitute rape or forcible carnal knowledge is actual sexual penetration. Application of Faas, 42 N.J. Super. 31, 35 (App. Div. 1956)."

In *State v. Orlando*, 119 N.J.L. 175, 183 (Supreme Ct. 1937), Justice Trenchard said:

"Considered in its entirety the instruction of this topic was that to convict the defendant of rape the jury must find that he had sexual intercourse with the prosecutrix forcibly and against her will; that to complete the crime of rape there must be penetration by the sexual organ of the male in the sexual organ of the female, and that the slightest penetration is sufficient. That was right."

Summarizing the general situation described above, our Supreme Court said in *State v. Lefante*, *supra*:

"In normal usage rape, or forcible carnal knowledge, is entirely distinct from carnal abuse, the first involving actual sexual penetration, and the second being, as stated in *State v. Huggins*, 84 N.J.L. 254, 259 (E. & A. 1913), 'an act of debauchery of the female sexual organs by those of the male which does not amount to penetration.'"

It is evident that a conviction for "rape," referred to in N.J.S. 2A:138-1 as "carnal knowledge" is for an entirely different offense than "carnal abuse." Referring again to R.S. 19:4-1, the legislative enactment which disenfranchises certain convicted persons, it is significant that only the crime of "rape" is included and no reference is made to the application of the law to a person convicted of "carnal abuse."

Accordingly, we determine that a person convicted of "carnal abuse" has not been convicted of "rape," is not within the purview of the disenfranchising statute and is not obliged to forfeit the right of suffrage.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: EUGENE T. URBANIAK  
Deputy Attorney General

JULY 5, 1961

MR. WILLIAM KINGSLEY  
*Acting Director, Division of Taxation*  
 Department of the Treasury  
 State House  
 Trenton, New Jersey

## FORMAL OPINION 1961—No. 12

DEAR MR. KINGSLEY:

You have asked our opinion as to various questions that have been raised with regard to the tax exemption for senior citizens recently authorized by constitutional amendment (Art. VIII, Sec. 1, par. 4) and implemented by Chapter 9 of the Laws of 1961 (N.J.S.A. 54:4-3.36, *et seq.*) In general, the constitutional provision and the statute allow exemptions from taxation of real property in an amount not exceeding \$800.00 for citizens and residents of this State aged 65 or more, who have incomes not in excess of \$5,000 per year. The exemption applies to the assessment on real property taxed locally throughout the state. Exemption applications are to be processed by local assessors. It is obviously desirable to have a uniform application of the law and for that reason we answer below a number of questions that have been specifically raised.

## I

You have asked whether the income of a claimant's spouse or the income of other members of the claimant's family who reside in the same dwelling should be added to the income of the claimant for the purpose of measuring claimant's "income" against the \$5,000 limitation.

The act does not direct that income of the claimant should be combined with his or her spouse or other members of the family residing in the dwelling for the purpose of determining claimant's income. Section 2 of the act permits "[E]very person \* \* \* having an income not in excess of \$5,000.00 per year" who meets other conditions to claim the exemption. Section 9 of the law specifically provides that, "property held by husband and wife, as tenants by the entirety, shall be deemed wholly owned by each tenant \* \* \*." Therefore, either spouse is entitled to claim the exemption on the basis of his or her qualifications alone.

Consequently, the law as it presently stands would permit an \$800 exemption to a claimant wife whose income is less than \$5,000 per year but whose husband, for example, has an income of \$25,000 per year. However absurd this result may be, there is no provision in the statute which permits the combining of income in such cases.

The provision with respect to ownership of property by tenants by the entirety was apparently placed in the statute to avoid an interpretation which would require the husband and wife both to meet all the statutory conditions to obtain the exemption. For instance, one spouse may be 65 or more years of age and the other under 65 and still the exemption could be claimed by one spouse against the dwelling held in their names as husband and wife. Each spouse is expressly deemed the full owner of the property for the purpose of the exemption. It is this provision that emphasizes the conclusion that the income of the claimant alone as well as his other individual qualifications shall be considered apart from the income of his or her spouse.

Since the enactment of this law members of the Legislature have recognized this result. The Senate has passed Senate Bill No. 227 which would amend the law to the extent of providing that for the purposes of the Act the income of a husband shall be deemed to be the income of his wife in addition to her own income, and vice versa.

## II

You have asked whether an individual claimant eligible to receive the senior citizen exemption of \$800 may also receive, in addition thereto, the \$500 veteran's exemption or any other exemption. Article VIII, section 1, paragraph 4 of the New Jersey Constitution (the amendment which authorizes the senior citizen exemption) adequately provides the answer to this question. The amendment reads in part as follows:

"Any such exemption when so granted by law, shall be granted so that it will not be in addition to any other exemption to which the said citizen and resident may be entitled."

Consequently, the citizen receiving the \$500 veteran's exemption would not be qualified to receive the \$800 exemption as well; the granting of the senior citizen exemption extinguishes his right to the veteran's exemption. This is so whether or not the veteran's exemption is applied in whole or in part to personal property, or to other real property owned by such claimant. This view was expressed by Senator Wayne Dumont, one of the sponsors of the constitutional amendment, at the public hearing prior to the passage of Senate Concurrent Resolution No. 12 (now Art. VIII, section 1, paragraph 4 of the New Jersey Constitution). On page 13 of the transcript of the aforementioned public hearing the Senator said:

"I know that SCR 12 says in effect that where a senior citizen is also a veteran, they cannot get both exemptions."

We are further persuaded to the conclusion that this was the legislative intent by the fact that on this subject another Senate Concurrent Resolution, SCR 4, was considered by the Legislature. SCR 4 provided that the \$800 exemption would be in *addition* to other exemptions. Since SCR 4 was not adopted, this fortifies the conclusion that the Legislature did not intend to allow more than the one exemption for any one claimant.

## III

This provision does not bar a person from claiming a senior citizen exemption for the year 1961, even though he is already receiving a "standing" veteran's exemption of \$500 for the same year. Although N.J.S.A. 54:4-55 would prohibit the assessor from removing the veteran's exemption from the books, the assessor may allow the senior citizen an \$800 exemption credit for the year 1961 and debit the veteran's exemption of \$500 against the senior citizen exemption credit, L. 1961, c. 9, sections 5, 6. The veteran-senior citizen will receive for 1961 a credit determined as if he received an additional \$300 senior citizen exemption for that year alone.

## IV

Chapter 9, Laws of 1961, section 2 provides that the exemption claimed by the senior citizen on the "dwelling house" owned by him and wherein he resides shall

not exceed \$800 *in the aggregate* "on such real property." That section further provides that "no such exemption shall be in addition to any other exemption to which said person may be entitled." Where the dwelling house is owned by husband and wife as tenants by the entirety, a claimant's wife, otherwise eligible, could not be allowed the full \$800 senior citizen exemption if her husband is receiving a veteran's exemption of \$500 on the dwelling owned by them. The husband can claim the \$500 veteran's exemption but the wife can only receive a \$300 senior citizen exemption on that house. This result is required since section 2 of the Act limits the exemption on any dwelling house to an assessed valuation of \$800 *in the aggregate*, where the senior citizen exemption is applied to that house. However, if the veteran's exemption is applied to personal property, the veteran's wife could receive the full senior citizen exemption on the dwelling house owned by them as tenants by the entirety. Also a wife can obtain the full \$800 senior citizen exemption on their dwelling house if the husband's veteran's exemption is applied to property other than the real property on which the dwelling house is located.

## V

A claimant may obtain only one senior citizen exemption on but one dwelling house; this exemption may not be divided between two or more residences and the dwelling house must be the claimant's principal place of residence. Section 2 of the Act (Laws of 1961, Chapter 9) provides that a claimant "residing in a *dwelling house* owned by him \* \* \* shall be entitled \* \* \* to exemption from taxation on *such real property* \* \* \*." (Emphasis supplied.) The statute intends that the exemption be on a dwelling house, not *dwelling houses*. By limiting the exemption from taxation to a single dwelling and by requiring claimant to be *domiciled* in New Jersey for 3 or more years, the Legislature expressed the intent that the exemption shall apply to but one dwelling of claimant for the purpose of this statute, the dwelling where claimant makes his principal and permanent home.

Thus, where a claimant resides in an apartment house which is his principal place of residence and occupies a cottage or bungalow during the summer months, the summer home cannot be considered as a dwelling house upon which claimant may receive this exemption.

In a situation where both the claimant and his wife meet all the prerequisites for exemption as persons 65 years or over and where the claimant owns one residence and his wife another, an exemption may be obtained only with respect to the dwelling house which constitutes the principal place of residence. The result is the same where the claimant and his wife, as tenants by the entirety, own two residences. An exemption may be claimed only on the dwelling house which constitutes the principal place of residence. One spouse may not claim the exemption on one house and the other spouse claim the exemption on the second house.

Further, the statute makes no reference to apportioning the tax among two or more properties. In the legislation allowing the veteran's exemption (N.J.S.A. 54:4-3.12p) there appears specific authorization for an apportionment:

"\* \* \* but exemption may be claimed in any taxing district \* \* \* and may be apportioned, at the claimant's option, between two or more taxing districts; \* \* \*."

The absence of similar language in the senior citizen exemption statute compels us to conclude that the Legislature did not intend to allow the senior citizen exemption to be apportioned.

An example of the apportionment problems that may arise is illustrated by the following: A veteran-husband and his wife own a principal residence in one taxing district and own either vacant land or a summer cottage in another taxing district in New Jersey. If neither claims the senior citizen exemption, the husband could elect to apportion the veteran's exemption between the two properties. If a senior citizen exemption is claimed by the husband, it could not be apportioned between the two properties, and, as shown above, it is taken to the exclusion of his veteran's exemption on any property. However, if the wife claims the senior citizen exemption on the dwelling house, the husband may still claim the veteran's exemption on the other property in the full amount or he may claim the veteran's exemption against personal property, as indicated above. However, should the husband desire to apportion his veteran's exemption between the properties in both taxing districts, he can do so provided that the exemptions for himself and his wife on the dwelling house do not exceed \$800 in the aggregate.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: ROBERT L. SHELDON  
*Deputy Attorney General*

JULY 10, 1961

HONORABLE RAYMOND H. BATEMAN  
*Somerset County Assemblyman*  
118 West High Street  
Somerville, New Jersey

FORMAL OPINION 1961—No. 13

DEAR ASSEMBLYMAN:

You have requested an opinion as to the procedure to be used in filling the new offices on township committees in all townships which have exceeded a population of 4,500 in the 1960 federal census, except those located in sixth class counties (R.S. 40:146-2). The 1960 federal census was promulgated effective May 6, 1961, a date too late for the nomination at the regular primary of candidates for newly established offices.

It is my opinion that R.S. 19:27-11 applies to these circumstances and sets forth the procedure to be followed for selection of candidates. This statute has been considered in an earlier opinion, see Ops. Atty. Gen. No. 53 (1950) in which it is said:

"The obvious intent of R.S. 19:27-11 is to make unnecessary a special primary election in connection with certain vacancies and yet to make available the machinery of the general election for the filling of such vacancies."

This statute is aimed at filling "vacancies" and it must be considered whether the facts at hand present such a "vacancy" within the purview of the statute. In the

same title, R.S. 19:3-25 defines a "vacancy" to include offices which exist and become vacant but says nothing of offices which are newly created.

A similar problem arose in June 1954 when Pemberton Township of Burlington County became entitled to additional committeemen under R.S. 40:146-2. The procedure prescribed by R.S. 19:27-11 was followed. The court in *Michaels v. Johnson*, 33 N.J. Super. 77 (App. Div. 1954) held this to be the proper governing provision of law. In doing so, the court considered the term "vacancy" as appearing in that statute and held that the term was intended by the legislature to include all unfilled elective offices including those established by an increase in population of the municipality, citing supporting authority from New Jersey and other jurisdictions.

Briefly outlined, N.J.S.A. 19:27-11 permits the naming of candidates by two processes; first, the county committee of each political party is authorized to name a candidate and, second, independent candidates may be nominated by petition. Time requirements are very important in each instance; the vacancy must have occurred more than thirty-seven days prior to the general election, and the statements of selection or petitions of nomination must have been filed with the county clerk at least thirty-four days prior to the general election. When the vacancy occurs it is the duty of the municipal clerk of the township to give prompt notice of the vacancy to the county clerk, the chairman of the county committee of each political party and in counties of the first class to the county board of elections.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

JULY 18, 1961

HON. NED J. PARSEKIAN, *Acting Director*  
*Division of Motor Vehicles*  
25 South Montgomery Street  
Trenton, New Jersey

FORMAL OPINION 1961—No. 14

DEAR DIRECTOR PARSEKIAN:

We have been asked whether N.J.S. 2A:168-1 authorizes a magistrate to suspend the imposition or execution of a sentence where a mandatory penalty is fixed in subtitle 1 of Title 39 (Chapters 1 through 5) despite the provisions of R.S. 39:5-7. N.J.S. 2A:168-1 reads in part as follows:

"When it shall appear that the best interests of the public as well as of the defendant will be subserved thereby, the courts of this state having jurisdiction over criminal or quasi-criminal actions shall have power, after conviction or after a plea of guilty or non vult for any crime or offense, except those hereinafter described, to suspend the imposition or execution of sentence, and also to place the defendant on probation under the supervision of the chief probation officer of the county, for a period of not less than 1 year nor more than 5 years."

R.S. 39:5-7 reads as follows:

"In any proceeding instituted pursuant to the provisions of this subtitle, except where a mandatory penalty is fixed herein, the magistrate may suspend the imposition or execution of sentence, and may also place the defendant on probation under the supervision of the chief probation officer of the county for a period of not less than six months nor more than one year. The probation shall be effected and administered pursuant to the provisions of sections 2A:168-1 to 2A:168-13 of the New Jersey Statutes."

In our opinion, a magistrate cannot suspend sentence on a motor vehicle violation where a mandatory penalty is imposed by subtitle 1 of Title 39. The provisions of R.S. 39:5-7 govern.

It is a familiar principle that when two statutory provisions are in apparent conflict, the more specific controls. *State v. Hotel Bar Foods, Inc.*, 38 N.J. 115, 128 (1955). The provisions of Title 39 relating to motor vehicle offenses are more specific than the provisions of Title 2A referring to the administration of civil and criminal justice generally. R.S. 39:5-7 recognizes the existence of N.J.S. 2A:168-1 by providing that where sentences may be suspended pursuant to R.S. 39:5-7 probation shall be pursuant to N.J.S. 2A:168-1 to 13. If it was the intention of the legislature to make the provisions of N.J.S. 2A:168-1 concerning suspension of sentence controlling, it would not have left in R.S. 39:5-7 the express prohibition on the suspension of sentences where subtitle 1 of Title 39 prescribes a mandatory penalty.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: WILLIAM L. BOYAN  
*Deputy Attorney General*

JULY 19, 1961

HONORABLE JOHN W. TRAMBURG  
*Commissioner, Dept. Institutions and Agencies*  
State Office Building  
Trenton, New Jersey

FORMAL OPINION 1961—No. 15

DEAR COMMISSIONER TRAMBURG:

You have asked our opinion concerning the apparent conflict in law between R.S. 30:6A-11 and N.J.S. 2A:37-12. R.S. 30:6A-11 deals with assets of inmates of the New Jersey Home for Disabled Soldiers that remain unclaimed for three years after death. N.J.S. 2A:37-12 deals with the escheating of property, generally of persons who die without heirs or known kindred.

R.S. 30:6A-11 provides as follows:

"Moneys, choses in action and effects deposited by an inmate in trust with the chief executive officer of the home and unclaimed at the death of the inmate, dying intestate, shall be held in trust by the chief executive officer,

with power to invest the funds with the consent of the board of managers and to use the income for the benefit of the inmates as the board may deem most advisable.

"Upon claim made and sustained by legal proof, the sufficiency of which the chief executive officer or board of managers shall be the sole and exclusive judges, the funds shall be paid over to the claimant entitled thereto upon acknowledging, executing and delivering a proper release and discharge.

"A fund remaining unclaimed three years after the death of its depositor shall with the income therefrom escheat to and become the property of and subject to the absolute control and disposal of the board of managers to be used for such purposes as they deem most advisable."

N.J.S. 2A:37-12 provides as follows:

"If any person, who, at the time of his death, has been or shall have been, the owner of any personal property within this state, and shall have died, or shall die, intestate, without heirs or known kindred, capable of inheriting the same, and without leaving a surviving spouse, such personal property, of whatsoever nature the same may be, shall escheat to the state."

More directly you ask if under the provisions of R.S. 30:6A-11 the chief executive officer of the Soldiers Home may demand and receive the estate of an inmate therein who died without any known heirs, next of kin, or surviving spouse since the enactment of the general Escheat Act, L. 1946, c. 155, N.J.S. 2A:37-11, et seq., or whether such estate is subject to escheat to the State of New Jersey.

It is our opinion and you are so advised that R.S. 30:6A-11 was impliedly repealed by the enactment of the general Escheat Act, L. 1946, c. 155 to the extent that the statutes are inconsistent.

*Mahr v. State*, 12 N.J. Super. 253 (Ch. 1951), involved a contest between the State and the municipality of Cedar Grove for the estate of a person who died intestate without known heirs, next of kin, or surviving spouse. The Court held that the enactment of L. 1946, c. 155 impliedly repealed R.S. 3:5-9, 10 and 11. R.S. 3:5-9, 10 and 11 had provided that the administrator of the estate of an intestate leaving no spouse and no known kindred or relatives should after one year from the intestate's death put the surplus of the personal estate out at interest, paying the income thereon annually to the municipality where the intestate had a legal residence, and paying the principal to such municipality seven years after the date of death for the use of the poor. After discussing the general rules applicable to implied repealers, the Court stated at page 262:

"Applying the tests recited to the dispute here, it is plain that the Legislature, in enacting the Escheat Act, intended to efface the sections of the Distribution Act relied upon by the defendant township.

"Concededly the State had no general escheat law relating to tangible and intangible personal property prior to 1946. In that year, the lawmakers undertook to deal with the whole problem of escheat of such property, both as to the conditions which would bring about acquisition thereof by the State and as to the manner and means of accomplishing the acquisition. It must be assumed that the Legislature was aware at the time that revenue provided by interest on funds of an intestate after administration, as well as by the

unclaimed funds themselves, after seven years, was going to the various municipalities. And the act adopted leaves no room for doubt that the intention was to pre-empt this revenue for the State.

"It must be noted that the definition of personal property set forth in the Escheat Act is broad enough to include every conceivable kind of tangible and intangible personal property. However, specifically excluded are personal property 'in the custody of any court in this State' and 'any personal property covered by Chapter 199 of the Laws of 1945.'

"Chapter 199 of the Laws of 1945 relates to the escheat of unclaimed bank deposits. (R.S. 17:9-18 to 26.) 'Personal property in the custody of any court in this State' cannot be deemed to include funds in the hands of an administrator under the circumstances of this case. The administrator holds the funds here only for the purpose of distribution according to law, which means to the State or to Cedar Grove, depending upon the determination of the vital question of implied repeal now presented and the obtaining by the State of a judgment in an escheat proceeding.

"On fundamental principles of statutory construction, these two express exclusions demonstrate an intention to include escheatable personal property in all other classes of cases. *Expressio unius est exclusio alterius*.

"Furthermore, the Legislature dealt with the personal property of an intestate in a separate and distinct section (sec. 16). In this section, the 14-year period, the elapse of which must precede escheat under section 17, in cases other than intestacy, was eliminated. Such elimination manifests an intention not to require a waiting period of 14 years before personalty of an intestate would escheat. And the declaration of escheat was expressly made applicable to 'any personal property within this State' of an intestate owner. Thus there is present inescapable evidence that the Legislature intended to deal generally and fully with escheat in cases of intestacy and to exclude any existing form of disposition of such property."

\* \* \*

"The only reasonable and feasible conclusion from all these considerations is that R.S. 2:53-15 through 32, representing the later expression of the legislative will and being plainly repugnant to R.S. 3:5-9, 10 and 11, operate as an implied repealer thereof."

The holding in the *Mahr* case was followed by the New Jersey Supreme Court in *State v. Roberts*, 21 N.J. 552 (1956). The *Roberts* case involved a contest between the State of New Jersey and the Township of Middletown for the estate of a decedent intestate without known heirs, next of kin, or surviving spouse. In *Roberts* at page 554 of 21 N.J. the Court stated:

"Judge Schettino, who decided the case in the Chancery Division, held that R.S. 3:5-9, 10 and 11, although historically originating as part of the Distribution Law, see L. 1898, p. 778, were in actuality but the means by which the State at that time exercised its sovereign right to escheat such personal property, *State by Parsons v. Standard Oil Co.*, 5 N.J. 281, 297 (1950), affirmed 341 U.S. 428, 71 S. Ct. 822, 95 L. Ed. 1078 (1951), and that in enacting the general Escheat Act the State displaced its creature municipalities in favor of itself as taker, thereby accomplishing the repealer

of the sections by implication. Judge Schettino followed in this respect the decision of Judge Francis, who, also sitting in the Chancery Division, held, in *Mahr v. State*, 12 N.J. Super. 253, 262 (1951), that 'it is plain that the Legislature, in enacting the Escheat Act, intended to efface the sections of the Distribution Act relied upon by the defendant township.'

"We fully agree that such was the legislative design. A comparison of the two statutes plainly reveals that the later Escheat Act fully asserts the State's sovereign right to escheat property of this kind to itself and covers the whole subject of escheatable property dealt with by the mentioned sections of the Distribution Act. The reasonable, indeed inescapable, conclusion therefore is that the Escheat Act was intended by the Legislature to supplant the earlier law. This is thus a case for application of the settled rule of statutory construction that in that circumstance the later statute, though not expressly saying so, will be held to operate to repeal the earlier law. *State Board of Health v. Borough of Vineland*, 72 N.J. Eq. 862 (E. & A. 1907)."

We are satisfied that the foregoing reasoning applied to R.S. 3:5-9, 10 and 11 in the *Mahr* case and the *Roberts* case is equally applicable to R.S. 30:6A-11. Accordingly, the estate of any inmate in the Soldiers Home who dies without known heirs, next of kin or surviving spouse is subject to the general Escheat Act of New Jersey (N.J.S. 2A:37-12).

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: CHARLES J. KEHOE  
*Deputy Attorney General*

JULY 20, 1961

HONORABLE WILLIAM F. HYLAND, *President*  
*Board of Public Utility Commissioners*  
101 Commerce Street  
Newark 2, New Jersey

FORMAL OPINION 1961—No. 16

DEAR COMMISSIONER HYLAND:

You have asked our opinion whether a municipal water utility filing reports pursuant to N.J.S.A. 40:62-1 may be charged any fees under N.J.S.A. 48:2-56 for the furnishing of report forms and for the filing, examination and audit of such reports.

N.J.S.A. 40:62-1 provides:

"Every municipality operating any form of public utility service shall keep accounts thereof in the manner prescribed by the board of public utility commissioners for the accounting of similar public utilities, and shall file with the board such statements thereof as may be directed by the board."

N.J.S.A. 48:2-56, the so-called "fee bill," provides, in part:

"The Board of Public Utility Commissioners is hereby empowered, authorized and required to charge and collect fees and charges for the purposes and in the amounts hereinafter set out. Such fees and charges are applicable to all public utility companies and persons unless otherwise indicated."

The essential issue is twofold, that is, whether a municipal water utility is a public utility company or whether it is a person within the meaning of the act. N.J.S.A. 48:2-13, which sets forth the general jurisdiction of the Board of Public Utility Commissioners and which defines a public utility, provides, in part:

"The term 'public utility' shall include every individual, co-partnership, association, corporation or joint stock company, their lessees, trustees or receivers appointed by any court whatsoever, that now or hereafter may own, operate, manage or control within this State any steam railroad, street railway, traction railway, autobus, canal, express, subway, pipeline, gas, electric light, heat, power, water, oil, sewer, telephone or telegraph system, plant or equipment for public use, under privileges granted or hereafter to be granted by this State or by any political subdivision thereof."

It seems to be settled now that except as noted below, a municipal water utility is not a public utility and is not subject to the jurisdiction of the Board of Public Utility Commissioners, at least for rate-making purposes. It has been held by the Supreme Court of New Jersey in *In re Glen Rock*, 25 N.J. 241, 135 A. 2d 506 (Sup. Ct. 1957), that N.J.S.A. 48:2-13 does not include a municipal corporation, since a municipal corporation is of an entirely different nature than a commercial corporation and the Legislature would have specifically included municipal corporations if it had intended to submit them to the jurisdiction of the Board. The Court further held that a municipal water utility was not included within the scope of N.J.S.A. 40:62-24 which declares every municipality in supplying electricity, gas, steam or other product beyond its corporate limits to be a public utility. "Other product" does not encompass a municipal water utility.

However, not all municipal water utilities are exempted from the Board's jurisdiction. Under N.J.S.A. 40:62-49(1), a municipality acquiring property pursuant to the provisions of paragraph (d) thereof "... shall furnish and supply water to the adjoining municipality in which the connected distribution system is located and to any other municipality served from the same source or sources of supply when acquired, to the extent, for such length of time and under such terms and conditions as may be ordered by the board of public utility commissioners." This section has been construed by our Supreme Court in the *Glen Rock* case, *supra*, and in *Woodside Homes, Inc. v. Morristown*, 26 N.J. 529, 141 A. 2d 8 (Sup. Ct. 1958), as applying only to municipal water systems acquired after the date of its enactment, which was 1929.

We find a further grant of jurisdiction to the Board in N.J.S.A. 40:62-85.1 whereunder any second class city having a population of not less than 120,000 and supplying water to users within any other municipality is treated for rate-making purposes the same as public utilities and is deemed for that purpose to be a public utility.

While municipal water utilities generally are thus not subject to the jurisdiction of the Board for rate-making purposes or to its regulatory powers, it is clear that

for certain purposes the Legislature has placed them under the Board's control. By its very language, N.J.S.A. 40:62-1 requires all municipal utilities, water or otherwise, to keep its accounts in the manner prescribed by the Board for similar public utilities, and requires a filing of such statements as the Board directs.

Whether or not municipal water utilities would be considered as public utilities for this limited purpose of accounting is a question that it is unnecessary to decide, for the Legislature has made the fees and charges applicable to persons as well as to public utility companies. The organization and language of the "fee bill" (N.J.S.A. 48:2-56) reveals a systematic approach and intent to charge fees for all services rendered or materials supplied by the Board. The fees and charges are applicable ". . . to all public utility companies and persons *unless otherwise indicated.*" (Emphasis supplied.) To contend that a municipality or a municipal utility is not within the meaning of either term is in accord with neither the practice of the Board in administering the fee bill nor with the intent of the Legislature. One or two illustrations conclusively substantiate this interpretation: (1) the fee bill in paragraph C provides charges for copies of the Board's annual report, pamphlets and decisions, as well as charges for sundry other materials, and there is no indication that municipalities upon requesting such materials are to receive them free of charge; (2) when a municipality files a complaint with the Board, it is required to pay a fee under paragraph E (15), of the fee bill which requires a fee for "Any application or petition not herein specifically designated or described." The Board is not only empowered and authorized but is *required* under the statute to charge and collect fees and charges for the purposes and in the amounts set out and yet, under an interpretation that municipalities are not subject to the fee bill, all materials and services would be rendered by the Board free of charge. "Unless otherwise indicated," the fees are applicable, and nowhere does it appear in the fee bill that a municipal corporation or a municipal utility shall be exempt from paying the charges. Paragraphs A and B of the statute designate the charges for the filing, examination, and auditing of annual reports. As indicated above, municipalities operating any form of public utility service are required to file such statements regarding their accounts as the Board directs, and the Board has required them to file annual report forms.

To conclude that a municipal utility can be considered to be a person is not to reach a unique result, for municipal corporations have been considered as persons in other contexts. For example, municipal corporations have been treated as persons in the imposition of liability upon them within the wrongful death statute. *Hartman v. City of Brigantine*, 42 N.J. Super. 247, 126 A. 2d 224 (App. Div. 1956). Whether a municipal corporation be considered as a public utility for the limited purpose of the fee bill or whether it be treated as a person, it is clear that a municipality obtaining services or materials from the Board of Public Utility Commissioners within the confines of the fee bill is required to pay the applicable fee or charge. The intent of the Legislature that fees and charges be paid is manifest in the systematic organization of the fees and charges.

The authority of the Legislature over municipal moneys and the disposition of them seems to be undisputed.

"The doctrine everywhere prevails, sustained by early and late cases, that public moneys in the custody of municipalities are subject to state control and disposition for governmental purposes, within the limitations of the constitution. . . . The authority of the legislature of a state to direct a municipality

to make any payment of its funds rests upon the fact that such funds are public moneys acquired under the authority of the state for public purposes. The legislature has the same power of disposition over the public moneys in the custody of the municipality that it has over those in the state territory." I McQuillan, *The Law of Municipal Corporations*, 710.

We therefore wish to advise you that a municipally-owned water utility is required to pay the applicable fees for report forms and for the filing, examination and audit of them pursuant to N.J.S.A. 40:62-1.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: ANTHONY D. ANDORA  
*Deputy Attorney General*

AUGUST 1, 1961

HONORABLE VINCENT P. KEUPER  
*Prosecutor, Monmouth County*  
Court House  
Freehold, New Jersey

FORMAL OPINION 1961—No. 17

DEAR PROSECUTOR:

You have asked for my construction of the recent supplement to the Lottery Law (N.J.S. 2A:121-1 *et seq.*), Chapter 39 of the Laws of 1961, which redefines the term "lottery" to exclude giveaways. That enactment provides:

"As used in this chapter, the term 'lottery' shall mean a distribution of prizes by chance in return for a consideration which may be in the form of money or other valuable thing or in the form of an actual inconvenience. This definition shall not pertain to a distribution of prizes by chance when there is an intent to distribute prizes as a gift where the class of donees performs acts not exceeding those necessary to become a member of the class of donees or to receive the gift."

The statement of legislative purpose is significant:

"The purpose of this bill is to permit the distribution of prizes by chance when no actual price is paid or inconvenience suffered as a condition for participation. It will bring New Jersey in line with the more modern majority rule in this country which recognizes a liberal construction of the term 'consideration.' The bill does not violate the Constitutional prohibition against gambling, for it will merely define the term 'consideration' as it was probably understood when the Constitutional amendment was made in 1896."

Chapter 39 of the Laws of 1961 would infringe the State Constitution if its purpose was to legalize any activity which constituted common law gambling. The State Constitution is specific in Art. IV, Sec. VII, para. 2:

"No gambling of any kind shall be authorized by the Legislature unless the specific kind, restrictions and control thereof have been heretofore submitted to, and authorized by a majority of the votes cast by, the people at a special election or shall hereafter be submitted to, and authorized by a majority of the votes cast thereon by, the legally qualified voters of the State voting at a general election, . . ."

The new enactment must be construed, if possible to render it constitutional, in accordance with a settled principle of statutory construction. *State v. Hudson County News Company*, 35 N.J. 284 (1961).

The only construction of Chapter 39 of the Laws of 1961 which meets the test of constitutionality is a readily available one, in obvious accord with the legislative intent. Gambling at common law comprised three elements: prize, chance and consideration. A giveaway lottery without consideration was a statutory violation, as determined by the Supreme Court in *Lucky Calendar Co. v. Cohen*, 19 N.J. 399 (1955). The new enactment circumvents *Lucky Calendar Co. v. Cohen* but without expanding legalized gambling, i.e., common law gambling, against the proscription of Art. IV, Sec. VII, para. 2 of the State Constitution.

You have asked whether Chapter 39 of the Laws of 1961 legalizes: (1) box top contests; (2) contests open to all patrons of a theatre or store and (3) contests open to all members of the public through a general distribution of entry blanks.

The answer to the first two questions is negative. The courts of this State have consistently ruled that the purchase of merchandise or a theatre ticket is consideration in law for a chance on a lottery prize. *State v. Berger*, 126 N.J.L. 39 (Sup. Ct. 1941); *State v. Shorts*, 32 N.J.L. 398 (Sup. Ct. 1868). A requirement of attendance at a drawing constitutes consideration in the suffering of an inconvenience. *Furst v. A. & G. Amusement Co.*, 128 N.J.L. 311 (E. & A. 1942). A box top entry blank is available only through the purchase of a commodity. To offer a chance on a prize in addition to merchandise or a ticket sold violates N.J.S. 2A:121-1 *et seq.* and is punishable as a misdemeanor, without any exemption or modification of the law through Chapter 39 of the Laws of 1961.

The final inquiry is answered in the affirmative. Contests open to the general public with entry blanks distributed in newspapers through widespread mailings and available in stores or other places of business both to customers and noncustomers are bona fide gift contests legalized by the new enactment. The acts of clipping and mailing the entry blanks fall short of inconvenience amounting to consideration as an element of common law gambling.

Sincerely yours,

DAVID D. FURMAN  
Attorney General

AUGUST 2, 1961

HON. NED J. PARSEKIAN  
Acting Director  
Division of Motor Vehicles  
25 South Montgomery Street  
Trenton, New Jersey

FORMAL OPINION 1961—No. 18

DEAR DIRECTOR PARSEKIAN:

At the completion of an audit of your Division undertaken by the State Auditor, it was recommended that an opinion be sought from this office upon the following question: Where the Director deems under Section 3 of the Motor Vehicle Security Responsibility Law (*L. 1952, c. 173, § 3, as amended; N.J.S.A. 39:6-25*) that a deposit of security is required of an operator or owner of a vehicle involved in an accident, may he allow the required security to be paid in installments?

The intent of this legislation was specifically to provide a means whereby a financially irresponsible driver would furnish some sufficient security in the event that judgment was entered against him for damages resulting from a motor vehicle accident, (*N.J.S.A. 39:6-25(a)*). The Director was provided with means to enforce his demand through suspension of the license of each operator and all registrations of each owner of any motor vehicle involved, if within a specified period of time the amount determined to be sufficient to satisfy the judgment was not deposited (*N.J.S.A. 39:6-25(b)*). The same statute (*N.J.S.A. 39:6-25(c)*) exempted owners or operators covered by a liability insurance policy in any form or self-insured as provided in *N.J.S.A. 39:6-52, (L. 1952, c. 173, § 30)*. The revocation sanction vested in the Director is applicable, therefore, only to owners or operators who were uninsured at the time of the accident.

These requirements were lifted in certain enumerated instances, even with respect to uninsured vehicles or operators, in cases where, patently, no liability attached to the person concerned, or where an adjudication had resulted in a determination of non-liability, or if a written agreement for payment in installments had been executed with respect to all claims for injuries or damages resulting from the accident, (*N.J.S.A. 39:6-26*).

We conclude that there is no statutory authority to accept installment payments of a security deposit. The Director under the terms of *N.J.S.A. 39:6-30* must, with this deposit, stand ready to satisfy, to the extent possible, all judgments rendered against an individual based upon his involvement in a specific accident. To insure that the amounts demanded would be available, the Legislature resorted to the drastic sanction of suspension of licenses and registrations in the event of failure to deposit sufficient security. It is obvious that the Legislature intended that the entire sum required be promptly paid, and gave the respondent only ten days notice to do so, (*N.J.S.A. 39:6-25(b)*).

In addition, the specific recognition in the act (*N.J.S.A. 39:6-26(d)*) of written agreements for installment payments of claims for damages, is confirmation that the Legislature did not intend to approve installment payment in another section of the act by implication only.

Accordingly, we advise that when you act under the provisions of *N.J.S.A. 39:6-25(b)*, you must demand the entire amount deemed sufficient for the purposes thereof and that upon failure of such deposit, you should apply the sanctions of license and registration revocation.

Very truly yours,

DAVID D. FURMAN  
Attorney General

AUGUST 2, 1961

HONORABLE ARCHIBALD S. ALEXANDER  
Chairman, Board of Governors  
Rutgers, The State University  
New Brunswick, New Jersey

FORMAL OPINION 1961—No. 19

DEAR MR. ALEXANDER:

You have sought my opinion as to the legality of the regulation of the former Board of Trustees of Rutgers, The State University, dated April 14, 1961, establishing a mandatory retirement age of 65, with a provision for its waiver under exceptional circumstances. I understand that this regulation has been ratified by the present Board of Governors.

You refer in your opinion request to the recent unreported opinion of County Judge Lester A. Drenk of Burlington County in *Eiselman v. Burlington County Board of Freeholders*. Judge Drenk ruled in that case that a resolution of the Burlington County Board of Freeholders setting a mandatory retirement age of 65 was invalid because of its conflict with the Public Employees' Retirement-Social Security Integration Act, L. 1954, c. 84. That act provides in Section 47 (*N.J.S.A. 43:15A-47*):

"Retirement from service shall be as follows:

"a. A member who shall have reached 60 years of age may retire from service by filing with the board of trustees a written statement, duly attested, stating at which time subsequent to the execution and filing thereof he desires to be retired. The board of trustees shall retire him at the time specified or at such other time within 30 days after the date so specified as the board finds advisable.

"b. A member who shall have reached 70 years of age shall be retired by the board for service forthwith, or at such time within 90 days thereafter as it deems advisable, except that an employee reaching 70 years of age may be continued in service from time to time upon written notice to the board of trustees by the head of the department where the employee is employed."

As you realize, Rutgers, The State University is:

"... subject to the same membership, contribution and benefit provisions of the retirement system and to the provisions of chapter 3 of Title 43 of the Revised Statutes as are applicable to State employees..." (*N.J.S.A. 43:15A-73(b)*).

The case of *Eiselman v. Burlington County Board of Freeholders* dealt with employees having protection of tenure under the Civil Service Act. Because it lacks a specific provision for removal of employees other than for cause, the Civil Service Act was construed by Judge Drenk as precluding any mandatory retirement program except according to the terms of the Public Employees' Retirement-Social Security Integration Act. The reasoning is inapplicable to employees not within the classified service of Civil Service or not otherwise protected by tenure, who are subject to removal according to a uniform administrative policy determined by the employer. See *R.S. 11:21-1 et seq.*; *Connors v. City of Bayonne*, 36 N.J. Super. 390 (App. Div. 1955); and *Gordon v. State Board of Education*, 132 N.J.L. 356 (E. & A. 1945), among others.

*Messano v. Board of Education of Jersey City*, 32 N.J. 561 (1960) established a parallel principle to the *Eiselman* case in striking down an administrative rule fixing mandatory retirement at age 65 for non-instructional employees even though some enjoyed tenure rights under the Education Law.

It has been the consistent policy of the State not to interfere with the retirement requirements imposed by the various employers who come within its retirement requirements. Employees of Rutgers, The State University who serve until age 70 are subject to mandatory retirement by the Board of Trustees of the Public Employees' Retirement System.

My conclusion is that *N.J.S.A. 43:15A-47* does not afford the employees at Rutgers, The State University a vested right to remain employed until reaching the age of 70 and that the administrative regulation of the Board of Governors fixing a mandatory retirement age of 65 is a valid exercise of the Board's discretionary authority to determine administrative and personnel policy for Rutgers, The State University.

Very truly yours,

DAVID D. FURMAN  
Attorney General

AUGUST 2, 1961

SUPERINTENDENT JOSEPH D. RUTTER  
New Jersey State Police  
State Police Headquarters  
West Trenton, New Jersey

FORMAL OPINION 1961—No. 20

DEAR SUPERINTENDENT RUTTER:

You have requested our opinion on the meaning of *N.J.S. 2A:151-43(n)*. That statute provides certain exceptions to *N.J.S. 2A:151-41*, which prohibits carrying concealed weapons on the person or in a vehicle. Excepted by the statute in question are "persons having a hunter's license in going to or from places of hunting." You have asked two questions:

1. "Is a New Jersey resident having a valid New Jersey hunting license permitted to carry a pistol or revolver while enroute to or coming from places of hunting in this state?"

2. "Are New Jersey or out-of-state residents having a valid hunting license excepted from the Carrying Concealed Weapons Law while traveling

through New Jersey to another state and having weapons, (i.e., pistols or revolvers) in their possession that are allowed for hunting purposes in that particular State?"

The answer to the first question is in the negative. Anyone hunting in this State is not exempted by the statute in question. The reason is this: the current fish and game regulations do not allow any hunting with a pistol. N.J.S.A. 23:4-13. It would be contrary to common sense and good public order to suppose that the statute under consideration, which seeks to prevent the carrying of concealed weapons except when in the public interest, would exempt one whose purpose for carrying the weapon is of necessity illegal. Impliedly in the statute is a requirement that there be a pistol season open during the time the gun is carried.

It could be argued that the statute contemplated the carrying of pistols for self-protection. This would be a strained interpretation since (1) the hunter already has a legal weapon at his disposal, (2) realistically there is no danger on the roads, fields and woods of New Jersey which would require the carrying of a concealed weapon for protection. Besides, it would be illegal to have pistol bullets "in possession in the woods or fields at any time." N.J.S.A. 23:4-13.

We therefore advise you that a hunter going to or returning from a place of hunting in New Jersey is not exempted by N.J.S. 2A:151-43(n).

The answer to the second question is in the affirmative, provided that certain requirements are met. To come within the exception of the statute, a person with a concealed weapon (1) must have a valid hunting license in his possession from the state of his destination, (2) there must be a pistol season open in that state at the time or reasonably close in point of time, (3) he must be traveling the most expeditious route to or from the foreign state, and (4) he must be going to the foreign state with intent to hunt, or if he is returning, then in fact have hunted.

The reasons for this conclusion are as follows. The first requirement, hunting license, is called for by the statute. It does not specify from which state the license must be obtained, but since the holder may not hunt with pistol in New Jersey, the requirement is reasonably interpreted to mean that the license must be from the state of destination. The second prerequisite, that there be a pistol season open or reasonably close in point of time, is grounded on the same rock of public policy as is the similar requirement with regard to New Jersey. Requiring travel by the most expeditious route, the third prerequisite, is consistent with the purpose of the statute, which is to permit the carrying of concealed weapons only when really necessary. If one is not traveling the most expeditious route, then he is sightseeing, visiting, shopping, or something else—but he is not "going to or from places of hunting" as required. Without the requirement of intent, the fourth prerequisite, the statute would be a mockery. For it would provide a license to carry concealed weapons to anyone who said he was going to another state to hunt, even though in fact he had no such intention.

We therefore advise you that a hunter going to or from a place of hunting outside of New Jersey is exempted by N.J.S. 2A:151-43(n) only if he fulfills the four requirements detailed above.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: MARVIN M. WODLINGER  
Deputy Attorney General

AUGUST 9, 1961

HONORABLE KATHARINE E. WHITE  
Acting State Treasurer  
State House  
Trenton, New Jersey

FORMAL OPINION 1961—No. 21

DEAR MRS. WHITE:

You have asked my opinion as to the constitutional validity of a lease-purchase agreement for the acquisition of office space for the Division of Employment Security in the Department of Labor and Industry. You assert that the entire cost of such acquisition would be defrayed by grants from the Federal Government to the State under Title III of the Social Security Act (42 U.S.C.A. 501 *et seq.*) See R.S. 43:21-13(a).

Lease-purchase agreements payable out of funds of the State constitute a violation of the debt limitation clause of the State Constitution, Art. VIII, Sec. 11, para. 3. See *McCutcheon v. State Building Authority*, 13 N.J. 46 (1953). That is the holding of Formal Opinion 1957—No. 10, which I am herewith affirming. The numerous judicial decisions that the State or a governmental subdivision may enter into long term leases without violation of the debt limitation clause are not in conflict. A lease-purchase agreement, at the conclusion of which the State is vested with title, is not a long term rental but an installment purchase. *Cf. McMahon v. City of Bayonne*, 10 N. J. Misc. 12, 15 (Sup. Ct. 1932); *Viracola v. Long Branch*, 1 N.J. Misc. 200 (Sup. Ct. 1923); *DeBow v. Lakewood Township*, 131 N.J.L. 291 (Sup. Ct. 1944).

Your inquiry, however, raises another legal issue. The constitutional provision imposing a debt limitation on the State Legislature specifically exempts Federal funds, as follows:

"This paragraph shall not be construed to refer to any money that has been or may be deposited with this State by the government of the United States."

The procedure for the payment of amounts due under a lease-purchase agreement for the acquisition of Division of Employment Security office space rules out the applicability of the foregoing exception to the constitutional debt limitation. The lessee would be the State, with the responsibility resting on the Director of the Division of Purchase and Property to execute the lease on the State's behalf. Formal Opinion 1954—No. 14; L. 1954, c. 48. The payments would be drawn out of the general treasury in accordance with an appropriation made by law (*State Constitution*, Art. VIII, Sec. 11, para. 1), as provided for in the blanket appropriation of excess Federal funds for the use of the State in Section 2 of the Appropriations Act, L. 1961, c. 38. The pre-audit and warrant functions of the Director of the Division of Budget and Accounting would govern disbursements.

An inquiry may be raised as to the significance of the exemption of Federal funds in the debt limitation clause of the State Constitution, if it is determined not to apply in situations where the State is, in a sense, a conduit and the payments are made to it for a specified purpose and disbursed for that purpose pursuant to a valid appropriation.

Whatever the scope of that exemption, I am satisfied that it is inapplicable here. The State's obligation under a lease-purchase agreement, as lessee, would continue

despite the unavailability of Federal funds in any given year. It is true that the State might resist payment legally by raising the defense of sovereign immunity. *Strobel Steel Construction Co. v. Sterner*, 125 N.J.L. 622 (Sup. Ct. 1941). But the State would bear a moral obligation and, properly, the debt limitation clause encompasses debts which are not enforceable by action at law. *McCutcheon v. State Building Authority*, *supra*. This analysis assumes that the lease-purchase agreement would not be subject to termination because of the non-availability of Federal funds.

I, therefore, advise you my opinion that a lease-purchase agreement for the acquisition of Division of Employment Security office space, under the circumstances specified in your letter, would constitute a violation of Art. VIII, Sec. 1), para. 3 of the State Constitution.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

AUGUST 10, 1961

HONORABLE DWIGHT R. G. PALMER  
*Commissioner, State Highway Department*  
1035 Parkway Avenue  
Trenton, New Jersey

FORMAL OPINION 1961—No. 22

DEAR COMMISSIONER:

You have asked for my opinion as to whether you have authority pursuant to Chapter 66 of the Laws of 1960 to authorize intrastate railroad passenger fare increases prior to execution and during the term of contracts between the State and a railroad carrier for maintenance of commuter and suburban passenger service.

The statute vests such authority in you. Section 9 provides that the State Highway Commissioner may fix fare tariffs prior to the execution of such a contract to be incorporated therein. The statutory procedure requires a notice and an opportunity for a hearing for the benefit of users of the passenger service. My construction is that Chapter 66 of the Laws of 1960 thus supersedes the general provisions of the Public Utility Laws (R.S. 48:12-1 et seq.).

You are likewise authorized during the term of a commuter subsidy contract to approve intrastate fare increases. Section 5 establishes this authority as follows:

"During the term of the contract and such further period as the contract may provide, unless otherwise approved in writing by the commissioner, [each contract . . . shall obligate the carrier] not to initiate, take or prosecute, and to actively resist, any proceedings before any State or Federal agency or court for any order, approval, judgment, decree or other action \* \* \* (2) authorizing, directing or permitting the discontinuance or other curtailment of any passenger service operated by the carrier after the effective date of said contract or the increase of any rate of fare charged or collected after such effective date for the use of such suburban passenger service \* \* \*."

This construction of Section 5 of the statute is supported by the provision of Section 9 that the fare tariffs fixed by the Commissioner prior to the execution of the contract "shall remain in effect for the duration of the contract only unless modified by future contracts or determinations." Future contracts or determinations, as referred to in this section, must embrace approvals by the Commissioner, during the term of the contract, for the increase of rates of fare because of hardship or other justification arising subsequent to its execution. Again the procedure by notice and an opportunity for a hearing should be adopted and followed.

The whole thrust of several sections of L. 1960, c. 66 is to avoid rigidity and to provide adaptability to changing circumstances in passenger service subsidy contracts. Section 7 permits waivers in the event of circumstances beyond the control of the carrier as conditions of the contract. Section 8 is specific authority for mutually agreed to amendments during the life of the contract with respect to the manner in which service is to operate. Under Section 10 the Commissioner is directed, within his discretion, to re-evaluate passenger service which was initially determined not to be essential in the public interest and to reach a determination that it is required for the balance of the contract. Finally, Section 14 declares that the entire act is subject to a liberal construction to obtain its objectives of maintaining and preventing discontinuances in commuter and suburban railroad passenger service.

You have asked also as to your authority to authorize the railroad carrier, both prior to and during the term of a commuter subsidy contract, to apply to the Interstate Commerce Commission for interstate railroad passenger fare increases.

Any exercise of authority by the Commissioner over interstate rates would infringe the Interstate Commerce Act. 49 U.S.C.A. § 15(1). The Commissioner, however, retains the statutory authority to withhold subsidy payments upon a breach of an essential provision of the contract. The contract includes in Section 5, as noted *supra*, an undertaking not to charge passenger fares at rates exceeding those incorporated therein. Accordingly, the Commissioner, on behalf of the State, need not enter into a commuter subsidy contract except at interstate fares which are fair and not excessive in his judgment and may upon notice and hearing approve in writing the application for and prosecution of a proceeding for an interstate railroad passenger fare increase before the Interstate Commerce Commission before execution and during the term of the contract.

Sincerely yours,

DAVID D. FURMAN  
*Attorney General*

AUGUST 11, 1961

COLONEL JOSEPH D. RUTTER  
*Superintendent, Division of State Police*  
Department of Law and Public Safety  
West Trenton, New Jersey

FORMAL OPINION 1961—No. 23

DEAR COLONEL RUTTER:

You have sought my opinion as to whether a member of the State Police who has reached the fourth anniversary of his enlistment may be denied reappointment

without preference of charges, an opportunity for a hearing and a determination of cause.

My answer is that you as Superintendent may deny reappointment summarily under such circumstances. The fourth anniversary trooper has not attained tenure under R.S. 53:1-8.1. He is one year short of the requisite five years' continuous service to qualify.

The State Police Act (L. 1921, c. 102) provides protection to members of the State Police against removal except for cause during two year enlistment terms. That section, now R.S. 53:1-8, is as follows:

"All the officers and troopers enumerated in section 53:1-5 of this title shall be appointed or reappointed by the superintendent for a period of two years, and shall be removable by him after charges have been preferred and a hearing granted. Any one so removed from the state police for cause after a hearing shall be ineligible for reappointment."

Pursuant to R.S. 53:1-8, a member of the State Police is entitled to a preference of charges, an opportunity for a hearing and a determination of cause prior to his removal during the two year period after his first appointment, during the two year period after his reappointment, if he is reappointed on his second anniversary, and during the one year period after a second reappointment on his fourth anniversary, until he qualifies for statutory tenure under R.S. 53:1-8.1.

R.S. 53:1-8 fixes no requirement that the Superintendent reappoint members of the force at the termination of two year enlistment periods except upon a determination of cause for their removal and ancillary procedural safeguards. *McQuillin, Municipal Corporations*, Sec. 12.269, p. 424 sets forth the general rule applicable to public employment:

"So, if the term of office is fixed and has expired, mandamus to compel reappointment will be denied, for, in such case, the officer is not removed."

I recommend as head of the Department of Law and Public Safety an administrative policy favoring reappointments to second and fourth anniversary troopers in the absence of substantial grounds to question their fitness to serve as members of the State Police.

Very truly yours,

DAVID D. FURMAN  
Attorney General

AUGUST 16, 1961

HONORABLE KATHARINE E. WHITE  
Acting State Treasurer  
State House  
Trenton, New Jersey

FORMAL OPINION 1961—No. 24

DEAR MRS. WHITE:

We have been asked to render an opinion on the relationship between N.J.S.A. 43:15A-50 and N.J.S.A. 43:15A-59 (Public Employees' Retirement System) as well

as between the analogous provisions of N.J.S.A. 18:13-112.49 and N.J.S.A. 18:13-112.70 (Teachers' Pension and Annuity Fund). Hereinafter statutory references will be made solely to the applicable provisions in the Public Employees' Retirement-Social Security Integration Act, Laws of 1954, c. 84, N.J.S.A. 43:15A-1 to N.J.S.A. 43:15A-86, although what is said is equally applicable to the Teachers' Pension and Annuity Fund-Social Security Integration Act, Laws of 1955, c. 37, N.J.S.A. 18:13-112.3 to N.J.S.A. 18:13-112.75.

The first question posed concerns the effect of the Social Security offset provision in N.J.S.A. 43:15A-59 upon that part of N.J.S.A. 43:15A-50 which establishes the privilege in retiring members to select certain options in order to provide, upon the death of the retirant, payments to designated beneficiaries.

The latter section in applicable part reads:

"Subject to the provisions of section 59 of this act [N.J.S.A. 43:15A-59], at the time of his retirement any member may elect to receive his benefits in a retirement allowance payable throughout life, or he may on retirement elect to receive the actuarial equivalent \* \* \* of his annuity, his pension, or his retirement allowance, in a lesser annuity, or a lesser pension, or a lesser retirement allowance \* \* \* with the provision that:

"Option 1. If he dies before he has received in payments the present value of his annuity, his pension or his retirement allowance as it was at the time of his retirement, the balance shall be paid to his legal representatives or to such person as he shall nominate \* \* \*." (Emphasis supplied.)

Three other options are also provided in this section. What is said hereinafter with regard to the necessity of maintaining an actuarial equivalent is equally applicable to all the options.

Section 59 [N.J.S.A. 43:15A-59], referred to above, reads in pertinent part as follows:

"\* \* \* upon retirement of a member after the attainment of age 65, the board of trustees shall reduce such member's retirement allowance by the amount of the Old Age Insurance Benefit under Title II of the Social Security Act payable to him. \* \* \* however, such reduction shall be subject to the following limitations:

\* \* \*

"(b) The retirement allowance shall not be reduced below the amount of the annuity portion of the retirement allowance being paid at the time of his retirement."

The question can be paraphrased as follows: In the case where a retirant is covered by Social Security and is subject to the offset provisions of section 59, upon what basis shall the actuary figure the insurance benefits payable under the options referred to in section 50? In other words, shall the insurance reserves be established upon the basis of the full retirement allowance as it would exist if no offset were applicable, or shall the basis be the full retirement allowance reduced by the amount of Social Security payments payable to the retirant, but in no event less than the annuity. We are of the opinion that the latter interpretation is the proper one.

The option provisions of the statute (section 50) are expressly tied in with the offset provisions found in section 59:

"Subject to the provisions of section 59 of this act \* \* \*"

*Cf.* the predecessor to N.J.S.A. 43:15A-50, R.S. 43:14-38. Inasmuch as the retirement allowance must be reduced by the amount of the Social Security benefits payable, when a member selects an option based upon his retirement allowance, it must be the retirement allowance *as reduced* under section 59. With this as the basis the "actuarial equivalent" can be determined for purposes of computing the insurance reserves which will have to be established under the various options.

We understand that under the present interpretation of the statutes by the respective boards of trustees, more than an "actuarial equivalent" is being provided. This has resulted from the failure to apply the reduced retirement allowance as indicated above. The "premium" necessary to pay for the optional benefits, i.e., the monthly reduction from a full retirement allowance, has not been fully paid by the members, and the system has been required to make up the balance. As we interpret the statute, this is not proper.

The boards' policies, purportedly, have been based upon that part of section 59 which declares that the retirement allowance "shall not be reduced below the amount of the annuity portion of the retirement allowance." Clearly the purpose of this provision is to make certain that, as a result of Social Security integration, the retirant's benefits payable by the State shall not be reduced to a figure below the annuity portion of his retirement allowance. This provision, however, does not authorize the establishment of insurance reserves in the manner heretofore followed. An administrative body has no power to waive or alter a statutory requirement by interpretation. *DeNike v. Board of Trustees etc. Retirement System*, 62 N.J. Super. 280, 300 (App. Div. 1960), *affirmed*, 34 N.J. 430 (1961); *Frigiola v. State Board of Education*, 25 N.J. Super. 75 (App. Div. 1953).

It should be observed that under the interpretation as we now set it forth, a member who selects Option 1 is precluded from obtaining the same amount of insurance that he would have been entitled to if Social Security integration had not occurred. (Of course it also results in the member's having to pay a smaller "premium.")

The result of this opinion is, as indicated, to require that a new basis be used for establishing the initial insurance reserve. This fact bears on another question posed: how should the initial insurance established under Option 1 be reduced each month in which a retirant receives a benefit? At present the Teachers' Pension and Annuity Fund reduces the initial insurance reserve by the amount of the annuity and pension established, whereas the Public Employees' Retirement System reduces the initial insurance reserve by the amount of the annuity plus the amount of the member's Social Security benefit in cases where there is a complete offset.

Since the statutes are worded the same in all material respects, there is no reason to have different methods for purposes of reducing the reserve. Under the interpretation rendered in this opinion it is necessary to reduce the initial insurance reserve by the amount of the member's annuity plus the amount, if any, required to be paid by the system as part of the "pension." This must be the procedure followed in both systems.

Finally, we have been asked to consider the present relevance of an opinion of the Attorney General dated February 6, 1930 dealing with the meaning of the term "present value" found in the provision establishing Option 1 benefits. Under the 1930 opinion the "present value" of a retirant's annuity, pension or retirement allow-

ance is considered to be the value reduced by virtue of his selection of an option. This interpretation is applied only with respect to the Teachers' Pension and Annuity Fund. We are informed that this interpretation is *sui generis*. It is not followed by the Public Employees' Retirement System nor by systems having similar provisions. We are further informed that the interpretation was rendered at a time when the statute, R.S. 43:14-38, did not have its present 30-day limitation militating against deathbed selections. Clearly, moreover, the 1930 interpretation results in the establishment of lower initial insurance reserves and in the ultimate beneficiary's receiving a lesser sum than he would receive under the interpretation followed by the Public Employees' Retirement System.

The statutory language concerning Option 1 benefits is substantially identical in both the Teachers' Pension and Annuity Fund and the Public Employees' Retirement System. There is no sound reason why different interpretations should exist in this connection. We are therefore of the opinion that the 1930 interpretation is no longer relevant to the present statute and should no longer be followed. The method presently employed by the Public Employees' Retirement System for determining "present value" should be followed by the Teachers' Pension and Annuity Fund also.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: ROBERT S. MILLER  
*Deputy Attorney General*

SEPTEMBER 1, 1961

JOSEPH SOLIMINE, *Secretary*  
*Essex County Board of Taxation*  
Hall of Records  
Newark, New Jersey

FORMAL OPINION 1961—No. 25

DEAR MR. SOLIMINE:

The Essex County Board of Taxation has asked our opinion as to the taxability of land owned by a municipality and leased by the municipality to a non-exempt person, corporation or other entity. In the example given, land of considerable value has been leased on a long-term basis to a business corporation. A building, constructed on the land, is used for business purposes under the control and management of the lessee.

*Jamouneau v. Division of Tax Appeals*, 2 N.J. 325 (1949) dealt with land owned by the City of Newark and leased to the C-O-Two Fire Equipment Company. On this site was erected a building by and at the cost of the tenant, C-O-Two Fire Equipment Company. The building was actively used by the tenant for its own commercial purposes. The Newark Tax Assessor's list showed an assessment of the personal property on the premises against the tenant and showed an assessment value of the land at \$42,900 and of the building at \$250,000. Although the land and building were assessed, they were carried in the name of the City of Newark as owner and

were not taxed. The lease between the City of Newark and the tenant was made in 1941 at an annual rental of \$5,000 for a term of 50 years and gave the tenant an option to purchase the city's fee at any time during the term for a fixed consideration.

The Supreme Court held that the use of the property was exclusively private and commercial and that there was no present public use nor any prospect of a future public use within the terms of the lease, although the lease provided that the building erected on the premises would become a part of the freehold estate of the landlord. The court held that such a provision was not a conclusive barrier against taxation. The lease also provided that the City would pay taxes upon the improvements to be erected by the tenant. The court held that the undertaking by the City to pay taxes did not give the building a tax exempt status, nor did it relieve the Assessor from the duty to make an assessment for the purpose of taxation.

The court clearly held in 2 N.J. at 332 that both the land and the buildings were taxable since they were not "used for public purposes" within the meaning of the tax exemption provided in R.S. 54:4-3.3. The court held that public use as well as public ownership were required as conditions of exemption from taxation and that "the receipt of rentals from a private lessee does not transform a private use into a public use." 2 N.J. at 333.

*Jamouneau v. Local Government Board*, 6 N.J. 281 (1951), dealt with real property leased by the City of Newark to a non-exempt owner for a term of 50 years commencing January 1, 1929. The lessee was required to construct a fire-proof building on the premises and to keep the building in good repair. The lease further provided that the building should be deemed to be attached to the freehold and the land and building would both be surrendered to the lessor at the expiration or other termination of the lease. The lessee agreed to pay a fixed rent for the land plus, as additional rent, all taxes "upon the buildings and improvements upon said property," but not "taxes on the ground." 6 N.J. at 285. The building in question is located at Commerce Street and Raymond Boulevard in the City of Newark. The Raymond-Commerce Corporation was the successor in interest to the original lessee and was the lessee at the time of the *Jamouneau* case.

The *Jamouneau* case arose out of an effort by the Raymond-Commerce Corporation to purchase the land and cancel the lease. The actual transfer was prevented by the court on the ground that the City would not receive a fair consideration in the transaction for the property sold and the rights surrendered. However, in the decision the court passed upon the question of liability for the payment of taxes "on the land as distinguished from buildings and improvements." 6 N.J. at 291. The court noted that: "The land is not in public use and therefore is taxable \* \* \*." In 6 N.J. at 291 the court said as follows:

"A question is raised about liability for the payment of taxes on the land as distinguished from buildings and improvements. We construe the lease to mean that during the term thereof the lessee shall not be called upon to pay the land tax. The land is not in public use and therefore is taxable, *Jamouneau v. Division of Tax Appeals*, 2 N.J. 325 (1949), but the obligation upon the municipal owner to pay the land tax out of its land rental is not unreasonable, is not an excessive part of the receipts from the use of the land and, in our opinion, is not an unlawful incident. It is not, as appellant appears to contend, a grant of tax exemption. It is a retention of the tax obligation as a burden on the owner to be met from the annual rent charges and is not within

the application of *Whipple v. Teaneck Township*, 135 N.J.L. 345 (E. & A. 1946). There is nothing novel about the obligation of a municipality to pay taxes on property owned by it and not devoted to a public use. *Newark v. Township of Clinton*, 49 N.J.L. 370 (Sup. Ct. 1887); *City of Perth Amboy v. Barker*, 74 N.J.L. 127 (Sup. Ct. 1906); *Essex Co. Park Commission v. State Board*, 129 N.J.L. 336 (Sup. Ct. 1943). To the extent that a yearly tax on the land would result in a reduced net income from rental, it lessens the worth of the lease as an asset to the city \* \* \*."

Where such a lease provides that the municipality will pay taxes levied upon land and buildings, the levying of municipal taxes which are then paid out of rentals from the property does not alter the net return to the city on the lease. However, by taxing the land and buildings, the assessments become part of the aggregate of assessments of the municipality for the purpose of allocating county taxes. See *Passaic v. Passaic County Board of Taxation*, 31 N.J. 413 (1960). Thus, it would be unfair to other municipalities sharing the county tax burden not to assess municipally owned land which becomes taxable when leased and used for private purposes.

You also have asked whether the provisions of L. 1949, c. 177, N.J.S.A. 54:4-2.3 *et seq.* are applicable to the leases under discussion. The act in question provides for the taxing of leasehold estates and appurtenances as the property of the lessee of real estate when the real estate is exempt from taxation and is leased to a non-exempt entity, "the leasing of which does not make the real estate taxable \* \* \*." N.J.S.A. 54:4-2.3. An example of a lease within the purview of this section is a lease of land owned by the Federal Government which is tax exempt, the leasing of which to a non-exempt entity for non-public purposes nevertheless does not make the land, as such, taxable. In such a case, the leasehold estate of the non-exempt entity would be taxable and would be "assessed as real estate." N.J.S.A. 54:4-2.3.

L. 1949, c. 177 is not applicable to land owned by a municipality and leased to a non-exempt entity. The leasing in that case, as stated above, does make the land taxable. The act is otherwise made inapplicable by the express provision in N.J.S.A. 54:4-2.12(2). This section specifically excludes from the application of the act leasehold estates of persons leasing real property owned by any municipality.

Under the circumstances we advise you that land owned by a municipality which is leased to a non-tax-exempt entity and not used for public purposes should be assessed and taxed regardless of the provisions in the lease which determine whether the taxes are to be paid by the municipal lessor or by the tenant.

Very truly yours,

THEODORE I. BOTTER  
Acting Attorney General

SEPTEMBER 20, 1961

HON. H. MAT ADAMS, *Commissioner*  
*Department of Conservation and*  
*Economic Development*  
 205 West State Street  
 Trenton, New Jersey

## FORMAL OPINION 1961—No. 26

DEAR COMMISSIONER ADAMS:

We have been asked to review Formal Opinion, 1958—No. 18 which treated the question of whether the State as owner of the Delaware & Raritan Canal may charge a water utility company a fee for the privilege of installing a water main on Canal property. Our opinion is that the decision previously rendered that a fee may be charged is correct.

It was originally urged that a fee could not be charged because the canal was a "public highway" and thus came within the scope of R. S. 48:19-17<sup>1</sup> which permits water companies to lay pipes beneath public roads, streets and alleys free from all charge upon obtaining the necessary municipal consent. Formal Opinion No. 18 decided that the canal was no longer a public highway and that R.S. 48:19-17 was thus inapplicable. Since the publication of Opinion No. 18, the suggestion has been made that while the canal may no longer be a "public highway" it is still a "public place" because of its recreational use, and, as such, subject to installation of utility facilities without charge. This contention has been advanced on the theory that R.S. 48:19-19,<sup>2</sup> which permits water companies to lay water supply mains and pipe "under the surface of any streets, roads, highways or public places" upon obtaining the necessary municipal consent, frees water utilities from the necessity of paying any fee or charge for the use of public lands. (Emphasis supplied.)

It is to be noted that section 19 is broader than section 17 in that it authorizes pipes to be laid under "public places" in addition to streets, roads and highways; however, section 19 is silent as to whether or not a fee may be charged by a municipality for the use of such "public places." While conceivably a distinction could be drawn that, therefore, the "No Fee" provision of R.S. 48:19-17 is not applicable to "public places" under R.S. 48:19-19, such a statutory construction is not necessary to resolve the question here posed.

The State of New Jersey has absolute jurisdiction and control over roads, streets and highways within its borders. *Hackensack Water Co. v. Ruta*, 3 N.J. 139 (1949). It has delegated control over roads, streets and alleys within the boundaries of

<sup>1</sup> R.S. 48:19-17: "Each such company may lay its pipes beneath such public roads, streets, and alleys as it may deem necessary for its corporate purposes, free from all charge to be made by any person or body politic whatsoever for such privilege, and may also construct and maintain hydrants on and along such streets and alleys, provided that the consent shall be obtained of the corporate authorities of the municipality through which the pipes may be laid.

"The pipes shall be laid at least three feet below the surface and shall not in anywise unnecessarily obstruct or interfere with the public travel or damage public or private property."

<sup>2</sup> R.S. 48:19-19. "Every company organized under this chapter may contract with any company organized under any law of the state for a supply of water upon such terms and for such times as may be mutually agreed upon. Such companies may lay such supply mains and pipes as may be thought necessary to furnish such supply through any property upon obtaining the consent in writing of the owner thereof, or under the surface of any streets, roads, highways or public places, provided that the companies first obtain the consent by ordinance of the municipalities through which the mains and pipes are to be laid.

"The municipal body having control of such streets, roads, highways or public places shall designate the place therein where and the manner in which the pipes or mains shall be laid."

municipalities and counties to the respective governing bodies, at least in so far as the granting of consents for the installation of public utility facilities is concerned. See: R.S. 48:7-12 (electric light, heat and power companies); 48:13-11, 12 (sewerage companies); 48:17-10 (telegraph and telephone companies); 48:19-17, 19 (water companies). However, by these delegations of authority, the state has not granted control over State roads or properties to municipal or county governing bodies. Control over State highways and the granting of consents or franchises as to them is vested in the State Highway Commission. R.S. 27:7-12, R.S. 27:7-44.1. Custody and jurisdiction of the Delaware and Raritan Canal is vested in the Department of Conservation and Economic Development, R.S. 13:13-2, which has been given the power:

"a. To grant to any public utility the right to cross the lands of the canal, including the canal itself, upon such conditions as in the judgment of the department may be necessary to protect the state in its use and occupancy thereof;". R.S. 13:13-10.

R.S. 48:19-17 is concerned with the installation of water utility facilities in roads, streets and alleys and R.S. 48:19-19 with streets, roads, highways and public places which are within the control of municipal governing bodies. They do not purport to delegate control over State lands such as the Delaware and Raritan Canal title to which is in the State of New Jersey, R.S. 13:13-1. The municipal powers with which R.S. 48:19-17 and 19 are concerned, that is, the granting of consents to the installation of utility facilities do not, as we have seen, extend to the canal property. That jurisdiction is in the aforementioned Department. R.S. 48:19-17 and 19 are thus inapplicable to the installation of public utility facilities on property of Delaware and Raritan Canal.

Where the Legislature has imposed a restriction or limitation on the State's power to charge a fee for the use of highways or state property by public utilities, it has specifically done so. This is evident not only in R.S. 48:19-17 but also in R.S. 27:7-13, wherein the legislature specified charges the State may exact for the use of viaducts or bridges by public utilities. In N.J.S.A. 27:7A-7, the responsibility of the State Highway Commissioner for the cost of removal or relocation of public utility facilities in freeways and parkways is defined. There is no indication in R.S. 13:13-10 that a public utility receiving a grant to cross the canal lands should receive it free of charge. We, therefore, construe the legislative intent to be that a charge should be exacted in the absence of any contrary provision.

You are therefore advised that a water utility company can be required to pay a fee for the privilege of installing a water main on the canal property if the department determines that a charge is a condition required to protect the state in its use and occupancy of the property.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: ANTHONY D. ANDORA  
*Deputy Attorney General*

SEPTEMBER 29, 1961

HONORABLE KATHARINE E. WHITE  
Acting State Treasurer  
State House  
Trenton, New Jersey

## FORMAL OPINION 1961—No. 27

DEAR MRS. WHITE:

We have been asked for an interpretation of N.J.S.A. 43:15A-41 and N.J.S.A. 18:13-112.36 which concern the handling of military leave contributions in the Public Employees' Retirement System and the Teachers' Pension and Annuity Fund, respectively.

In the operation of both retirement systems the employer is obligated to make contributions to the member's account during any period of military leave. R.S. 38:23-6. The member's account may be continued in an inactive status up to a maximum period of two years from the date contributions were last received for his account. N.J.S.A. 43:15A-41 and N.J.S.A. 18:13-112.36.

Both N.J.S.A. 43:15A-41 and N.J.S.A. 18:13-112.36 permit the member to withdraw the amount of accumulated deductions contributed by the employer during military leave but only if the member "shall have returned to the payroll and contributed to the retirement system for a period of 90 days."

Your first inquiry is whether the statutes require that, in order to withdraw the above contributions, the veteran return to the particular employer who is making them. We are of the opinion that this is not necessary. Both statutes make no mention of the necessity to return to the same employer. The language of each is identical in stating that the employee must only "have returned to the payroll and contributed to the retirement system for a period of 90 days." The clear intention was to have the employee return to service and make contributions to the same system rather than to limit his return to the particular employer with whom he had been associated prior to military service. See *Race v. Board of Education of Town of Newton*, 37 N.J. Super. 333, 336-337 (App. Div. 1955); and *Murphy v. Zink*, 136 N.J.L. 235, 245 (Sup. Ct. 1947), *affirmed*, 136 N.J.L. 635 (E. & A. 1948) (interpreting R.S. 43:4-1 et seq. to permit veterans benefits even where the period of service required is not rendered exclusively in the employment of one and the same particular department of government). See also N.J.S.A. 38:23-4; *State Highway Department of New Jersey v. Civil Service Commission and Kenyon*, 35 N.J. 320 (1961) ("The statute [N.J.S.A. 38:23-4] was indubitably enacted for the highly proper and beneficent purpose of protecting the employment status of a public employee while he was discharging his citizen's duty to the Nation in a time of war or emergency").

In sum, the legislative intention was to protect veterans and to grant them broad benefits under the pension laws. This intention would be defeated by a narrow construction of the statute. Cf. *Bruder v. Teachers' Pension and Annuity Fund*, 27 N.J. 266, 269, 274-276 (1958) (the Court construed other provisions of the Teachers' Pension and Annuity Fund Act in accordance with their specific terms to bar the return of contributions made by an employer on an employee's behalf while on military leave as part of the accumulated deductions to which he was entitled under N.J.S.A. 18:13-112.72(a)).

For the reasons expressed above, we also hold that the Boards' present practice of computing the 90 day period mentioned above at any time within the two year period is correct. This means in effect that the 90 days may be rendered in any period of two years plus 89 days after discharge.

Your third inquiry in connection with this subject matter concerns divergent practices of the Public Employees' Retirement System and the Teachers' Pension and Annuity Fund in the case of the accumulation of interest due on members' contributions. N.J.S.A. 43:15A-41 provides that "a member who withdraws from service or ceases to be an employee for any cause other than death or retirement shall receive \* \* \* the accumulated deductions standing to the credit of his individual account in the annuity savings fund, plus regular interest \* \* \* except that no interest shall be payable \* \* \* in the case of those members who resign from service with less than 5 years of membership credit for which contributions have been made." N.J.S.A. 18:13-112.36 permits the same withdrawal privilege "provided, however, that no interest shall be payable if such a member does not have 3 years of membership service at the time of withdrawal from service or cessation of employment." We are informed that in the Teachers' Pension and Annuity Fund the practice has been to grant interest if the combination of previous membership service and the period of military leave covered by employer contributions exceeds 3 years, notwithstanding such military leave contributions are not paid to the member but rather are transferred to the Contingent Reserve Fund. In the Public Employees' Retirement System, on the other hand, the period of military leave for which employer contributions have been made is not considered in calculating the 5 year period for the payment of interest if such contributions are returned to the employer, but they are considered if the member has returned in the 90 day period and has thus earned a right to such contributions upon resignation.

We hold, for the reasons expressed in answer to your first two inquiries, that the practice adopted by the Teachers' Pension and Annuity Fund is the proper one. An employee who enters military service should not be penalized by failing to count as part of his membership credit the time he has spent in the military service. R.S. 38:23-4 provides that:

"\* \* \* during the period of such leave of absence such person would be entitled to all the rights, privileges and benefits that he would have had or acquired if he had actually served in such office, position or employment during such period of leave of absence \* \* \*"

See also N.J.S.A. 43:15A-7 and N.J.S.A. 43:15A-39 which together spell out a clear pattern of continuation of membership credit for employees during their period of military service. This credit should be computed for purposes of N.J.S.A. 43:15A-41 as well as for purposes of N.J.S.A. 18:13-112.36.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: ROBERT S. MILLER  
Deputy Attorney General

SEPTEMBER 29, 1961

HONORABLE KATHARINE E. WHITE  
*Acting State Treasurer*  
 State House  
 Trenton, New Jersey

## FORMAL OPINION 1961—No. 28

DEAR MRS. WHITE:

You have requested our opinion concerning the operative date of retirement for members of the Public Employees' Retirement System and of the Teachers' Pension and Annuity Fund who elect to receive benefits pursuant to N.J.S.A. 43:15A-38 and N.J.S.A. 18:13-112.38, respectively.

Specifically, you desire to know whether the aforesaid members fall within the provisions of Chapters 123 and 124 of the Laws of 1960 which provide that the Social Security offset required by P.L. 1954, c. 84, § 59 and P.L. 1955, c. 37, § 68 "shall not be made in the case of retired members who retired after August 1, 1956 or prior to October 1, 1960 and who at the time of their retirement had not attained a fully insured status under the provisions of the Social Security Act as those provisions obtained on December 31, 1959 \* \* \*."

In short, the question is whether members who took advantage of the "vesting" privilege between the operative dates above-mentioned are considered to be "retired" for purposes of Chapters 123 and 124 of the Laws of 1960.

We are of the opinion that this question must be answered in the affirmative. The evident intention of the Legislature in enacting the above laws was to protect those people who took advantage of the opportunity to avoid the Social Security offset but who were suddenly deprived of their choice by an unforeseen change in the Social Security Act made in 1956. The statement appended to Assembly Bill No. 332 which subsequently became Chapter 123 of the Laws of 1960 makes this clear. It reads as follows:

"When teachers voted (in October, 1955) to accept the new teacher retirement plan contained in chapter 37, P.L. 1955, they clearly understood that for a few years, while adjusting to the new law, a limited group of older teachers had an opportunity of avoiding the social security offset.

"Some teachers were suddenly deprived of this 'choice' by an unforeseen change in the Federal Social Security Act made in 1956. Attempts to enact corrective legislation to eliminate this discrimination have not been successful thus far.

"A second group of teachers could be deprived of this 'choice' by some future amendment to the Federal Social Security Act. This bill is designed to prevent such an occurrence. It requires that the Federal Act in effect on December 31, 1959 be the basis for determining the eligibility to a social security benefit. This would preserve the 'status quo' as far as the ability to avoid a social security offset is concerned.

"There is no cost to this bill since its purpose is to preserve conditions as they exist now. This bill does not touch any provisions written in chapter 37, P.L. 1955 on contributions to social security or the amounts of social security benefits to be 'offset.'"

It would surely be unfair to members who have vested their pension rights in reliance upon the present status of the law to be deprived of substantial benefits by reason of a subsequent change in the legislation. This the Legislature tried to avoid by enacting Chapters 123 and 124.

It is clear, therefore, that to hold that Chapters 123 and 124 do not apply to members who vest would be to defeat the legislative intent, a result which should be avoided.

It should be observed, moreover, that when a member vests his benefits after having completed 20 years of service, all administrative steps applicable to retirement are taken, except for the pro forma approval of the retirement by the Board upon the member's attaining age 60. The contributions of members and employers are determined; both noncontributory and contributory death benefits are accumulated; and the right to monthly retirement allowances at the service retirement age of 60 accrues.

Therefore, we advise you that for purposes of Chapters 123 and 124 of the Laws of 1960 members who vested their benefits pursuant to N.J.S.A. 43:15A-38 and N.J.S.A. 18:13-112.38 are considered to be "retired."

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: ROBERT S. MILLER  
*Deputy Attorney General*

OCTOBER 20, 1961

ELMER J. HERRMANN, *Clerk*  
*Essex County Board of Elections*  
 Hall of Records  
 Newark 2, New Jersey

## FORMAL OPINION 1961—No. 29

DEAR MR. HERRMANN:

Our opinion has been asked as to whether or not the members of district election boards are casual employees as that term is used in the Workmen's Compensation Act and consequently whether or not they are excluded from coverage under the provisions of that Act.

The members of the district boards of election are appointed by the various County Boards of Election, N.J.S.A. 19:6-1, to serve for a period of one year, N.J.S.A. 19:6-8. The County Board specifies the municipalities and districts in which the members shall serve, N.J.S.A. 19:6-3 and 19:6-7; the time and place of any meeting that the district board members must attend is fixed by the County Board, N.J.S.A. 19:6-9; and the County Board may remove with or without cause any member of the district board, N.J.S.A. 19:6-4 and 19:6-5. The members of the district boards ordinarily perform their duties only on primary and general election days. The salary of the members of the district boards of election is paid by the county in which they perform their services, N.J.S.A. 19:45-4.

Casual employment is defined by N.J.S.A. 34:15-36. Under the provisions of this section of the statute if the work is done ". . . in connection with the employer's

business . . ." then the occasion for it must arise by "chance" or it must be "purely accidental" in order to find "casual employment." If, on the other hand, the work is not done in connection with the employer's business then casual employment is defined as ". . . employment not regular, periodic or recurring; . . ."

Thus, it is apparent that there are in fact two tests which may be applied in order to determine whether or not a person is a "casual employee." The test which will be used in any particular factual situation depends upon a determination, in the first instance, as to whether or not the work or service performed is the kind of work that is ordinarily undertaken by the employer. *Graham v. Green*, 54 N.J. Super. 397 (1959).

It is apparent that the members of district election boards perform a service of the kind ordinarily undertaken by their employer. This is true whether it is held that the county itself is the employer, since the salaries are paid by the county, or whether it is held that the County Board of Elections is the employer, since the members of the district boards are appointed and controlled by the County Boards.

The decided cases in New Jersey have held, without exception, that the duration or frequency of the employee's work is immaterial if the work is performed in connection with the employer's business. In *Malloy v. Capitol Bakery*, 38 N.J. Super. 516, 521 (1955) the court stated:

"Even assuming that the petitioner's work was only for a single day, his right to compensation cannot be denied, if it was not occasioned by chance or pure accident and was in accordance with the plans of the respondent to carry out its usual business."

Casual employment in instances where the work performed is of the kind ordinarily performed by the employer, is employment which comes about ". . . to meet the exigencies of a particular situation or a temporary emergency." *Ludwig v. Kirby*, 13 N.J. Super. 116, 125 (App. Div. 1951).

Therefore, it is clear that the statutory definition of "casual employee" does not apply to the appointment of the members of a district board of elections. They are appointed or employed in accordance with a statutory plan or design (N.J.S.A. 19:6-1 et seq.). The elements of "chance" or "accident" do not exist, even in the slightest degree, with regard to their appointment.

For these reasons and also keeping in mind that "casual employments are only exempted because they occur under circumstances rendering it difficult to provide coverage in advance," *Malloy v. Capitol Bakery*, 38 N.J. Super. 516, 523 (1955), we have reached the conclusion that the members of district boards of election are not "casual employees" within the meaning of that term as it is used in the Workmen's Compensation Act.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: RAYMOND H. LEAHY  
*Deputy Attorney General*

October 20, 1961.

HONORABLE RAYMOND F. MALE  
*Commissioner, Department of Labor & Industry*  
20 West Front Street  
Trenton, New Jersey

FORMAL OPINION 1961—No. 30

DEAR COMMISSIONER MALE:

We have been asked whether a proposal to assist jobless workers to find employment through vocational training or retraining programs would be legally valid. Your department has specifically proposed that its Division of Employment Security recommend vocational training courses to unemployed individuals and, where they are otherwise eligible for unemployment compensation benefits not disqualifying them from such benefits on the sole grounds that they are taking the specified training program. It is assumed that the Department of Education would approve or establish training courses for occupational skills which the State Employment Service identifies as being in demand or offering reasonable opportunities for employment to jobless workers.

It is our opinion that the subject proposal is incompatible with the "available to work" provisions of N.J.S.A. 43:21-4(c).

Such action by the Division of Employment Security would appear to be valid under provisions of N.J.S.A. 43:21-11(f), to wit:

"Employment stabilization. The division, with the advice and aid of its advisory councils, and through its appropriate divisions, shall take all appropriate steps to reduce and prevent unemployment; to encourage and assist in the adoption of practical methods of vocational training, retraining and vocational guidance; . . . to promote the re-employment of unemployed workers throughout the State in every other way that may be feasible, . . ." (Emphasis supplied.)

We see no reason why the director, by virtue of N.J.S.A. 43:21-4(c) cannot modify the active search for work requirement provided therein. N.J.S.A. 43:21-4(c) provides as to benefit eligibility conditions:

"(c) He is able to work, is available for work, and has demonstrated that he is actively seeking work, except as provided in subsection (f) of this section; provided, that the director may, in his discretion, modify the requirement of *actively seeking work* if, in his judgment, such modification of this requirement is warranted by economic conditions; . . ." (Emphasis supplied.)

However, it must be pointed out that the other criteria which must be met under N.J.S.A. 43:21-4(c), namely that the individual must be "able to work" and "available to work" are *not* subject to the director's discretion or subject to his modification.

The Supreme Court of New Jersey, in *Krauss v. A. & M. Karagheusian*, 13 N.J. 447 (1953) at p. 457 has held:

"In determining whether a claimant is entitled to benefits the 'available for work' test under sub-section 4(c) is of first importance. The availability requirement is a test to discover whether claimants would, in actuality, now

be working, were it not for their inability to obtain work that is appropriate for them.' *Allman, Availability for Work* (Harv. Univ. Press 1950), p. 259. The test is met if it appears that the 'individual is willing, able and ready to accept suitable work which he does not have good cause to refuse, that is when he is genuinely attached to the labor market.' *Freeman, Able to Work and Available for Work* (1945), 55 *Yale L. J.* 123, 124; *Reger v. Administrator, Unemployment Compensation Act*, 132 *Conn.* 647, 46 *A. 2d* 844 (Sup. Ct. of Err. 1946); *Ludwigsen v. N. J. Dept. of Labor & Industry*, *supra*; *W. T. Grant Co. v. Board of Review*, *supra*; *Volenti v. Board of Review*, *supra*.

The policy set out by the courts in previous cases makes clear that "suitable work" comprises the equivalent in wages and working conditions of work formerly engaged in by the individual, and, further, that the courts held if such work is or becomes available an individual who withholds himself from same because he is engaged in seeking a job elsewhere, with a bigger wage, is not within the eligibility sections of the act. *W. T. Grant Co. v. Board of Review*, 129 *N.J.L.* 403 (Sup. Ct. 1943); *Ludwigsen v. N.J. Dept. of Labor & Industry*, 12 *N.J.* 64 (1953). It is clear from the proposal under consideration that setting up vocational training programs would in effect withdraw the trainees from the labor market, and make them, for the duration of their training at least, unavailable for "suitable employment" in direct violation of the principles enumerated in the cases cited above. For that reason the subject proposal is invalid.

Verly truly yours,

DAVID D. FURMAN  
Attorney General

By: DAVID A. BIEDERMAN  
Deputy Attorney General

November 29, 1961.

HONORABLE NED J. PARSEKJAN  
Acting Director, Division of Motor Vehicles  
South Montgomery Street  
Trenton, New Jersey

FORMAL OPINION 1961--No. 31

DEAR DIRECTOR PARSEKJAN:

You have asked for our opinion as to the legality of your administrative interpretation of the provisions of N.J.S.A. 39:4-204 relating to the issuance of special vehicle identification cards to amputees and other persons. N.J.S.A. 39:4-207 provides that persons exhibiting on their windshield a certificate showing that a special vehicle identification card has been issued for said motor vehicle cannot be penalized for overtime parking unless the vehicle is parked in one location for more than 24 hours.

N.J.S.A. 39:4-204 provides:

"The word 'amputee' as employed herein shall include any person, male or female, who has sustained an amputation of either or both legs, or of parts of

either or both legs, or of either or both arms, or parts of either or both arms, or who has been otherwise disabled in any manner rendering it difficult and burdensome for him to walk."

You inquire specifically about the interpretation to be given to the words "or who has been otherwise disabled in any manner rendering it difficult and burdensome for him to walk" You advise that on June 15, 1959 pursuant to your directive the application for a special identification card was revised to require the applicant's doctor to certify as to applicants who are not amputees "that the disability listed above affects the applicant's ability to walk to at least the same degree as that experienced by an amputee." Prior to that date the application simply required a doctor's statement describing the disability and certifying that such disability "rendered it difficult or burdensome for him (or her) to walk." You ask whether your interpretation which has applied since June, 1959 is correct.

N.J.S.A. 39:4-204 was enacted by L. 1949, c. 280. This law derived from Assembly Bill No. 109 which did not contain any statement of purpose. The law as originally enacted applied only to a person whose leg or legs had been partly or wholly amputated "or who has been otherwise disabled in any manner rendering it difficult and burdensome for him to walk." As amended by L. 1950, c. 191 (Senate Bill No. 144), "amputee" status was extended to persons who suffered an amputation of all or parts of either or both arms. The statement attached to Senate Bill No. 144 expressed the purpose of that bill as follows: "to enlarge the definition of the word 'amputee' so that persons other than leg amputees, who are disabled to a similar extent by virtue of amputation of other limbs may enjoy the privileges and provisions heretofore conferred only on leg amputees." (Emphasis added.)

In our view, the original meaning intended to be given to the phrase "or who has been otherwise disabled in any manner rendering it difficult and burdensome for him to walk" may be inferred from the fact that this phrase followed the definition of "amputee" as a person who had sustained an amputation of either or both legs or of part of either or both legs. It is unlikely that the Legislature would make available to persons who are mildly impaired in their ability to walk the same special parking privileges afforded to persons suffering the grave disability resulting from leg amputations.

The true weight to be given to the words "difficult and burdensome for him to walk" is found in the statement annexed to Senate Bill No. 144, a bill that amended the original Act one year after its first enactment. This statement suggests that the enlargement of the term amputee to include persons who have not suffered an amputation of one or both legs, or parts thereof, was intended to afford special parking privileges only to others who were "disabled to a similar extent" as those who have suffered a leg amputation. The Legislature enlarged the class of amputees to include those who have lost an arm or part thereof. Such a disability normally would not impair the ability of a person to walk. However, the Legislature has permitted special parking permits in such cases, presumably because such disability would seriously hamper a person's ability to perform other physical functions, "to a similar extent" as a person who underwent a leg amputation. As to persons other than those suffering amputations of an arm or leg, the statute requires that his ability to walk be impaired by a physical disability. A person whose limb or limbs have not been amputated and who suffers serious physical disability other than a disability impairing his ability to walk would not be entitled to a special parking permit. An example may be given

of a person suffering from severe arthritis of the arms which may render that person disabled to a large extent from performing many physical functions but not in any way impairing that person's ability to walk. Such a person, though extremely disabled, would not be entitled to a special parking permit.

Thus, in our opinion it was not the intent of the Legislature to extend special parking privileges to persons suffering from minor disabilities. A minor disablement from walking is not sufficient to satisfy the statutory requirement that it be "difficult and burdensome" for the person to walk. In our opinion you should interpret this phrase in your administrative application of the Act so as to issue special vehicle identification cards to only those persons whose ability to walk is seriously impaired. Obviously, persons who are disabled from walking without suffering an amputation are entitled to a special parking permit, but only upon your finding that the disability from walking suffered by a person coming within the statutory definition of "amputee," such as paralysis or severe arthritis of a leg.

This opinion corresponds to the advice given you verbally in July of this year, following your request for an opinion.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: THEODORE I. BOTTER  
*Assistant Attorney General*

December 7, 1961.

HONORABLE KATHARINE E. WHITE  
*Acting State Treasurer*  
State House  
Trenton, New Jersey

FORMAL OPINION 1961—No. 32

DEAR MRS. WHITE:

I. You have asked certain questions concerning the rights of members of the State retirement systems who receive differential pay when called into active military service with New Jersey National Guard units.

(1) If the pension deduction and the Social Security tax are to be taken on this differential pay it will sharply reduce the employee's Social Security benefit as well as the salary subject to retirement benefits. Can the Boards of Trustees permit the employee to contribute on the basis of his salary prior to entering the military for pensions and contributory insurance?

Our conclusion is that the Boards of Trustees should require the employee to contribute on the basis of his salary prior to entering the military for pension and contributory insurance.

N.J.S.A. 38:12-4 and N.J.S.A. 38:12-5 provide that when an employee of the State, county or municipality, who is also a member of the National Guard, is called into Federal service, he should be given leave without loss of pay or time. In order to

avoid loss of pay the individual is to receive such portion of his salary or compensation as will equal the loss he may suffer while in active military service.

N.J.S.A. 38:23-4 and N.J.S.A. 38:23-5 provide that such an individual shall retain all rights and privileges, including any pension or retirement rights conferred by the laws of the State.

N.J.S.A. 38:23-6 provides that during the period of active service:

"the State . . . shall contribute or cause to be contributed to such fund the amount required by the terms of the statute governing such fund based upon the amount of compensation received by such person prior to his entry into such service and during the period first mentioned in this section any such person receiving compensation from the State, county, municipality, school district, political subdivision, board, body, agency or commission, shall continue to contribute the amount required by statute to be paid by members of such fund . . ."

Under this section it is clear that the State must contribute its share to the pension or retirement funds based upon the compensation received by the employee prior to entering active duty. The problem is whether an employee who receives differential pay while serving on active military duty must contribute his statutory share to the pension fund. The precise statutory question is whether an employee receiving differential pay while on active duty is a person receiving "compensation" from the State within the meaning of N.J.S.A. 38:23-6. Differential pay is that portion of the salary paid by the State to an employee as will equal the loss of pay he may suffer while in active military service. This payment is made by the State in order to maintain the financial status quo of an employee while on active duty. Clearly, differential pay is to be considered "compensation" within the meaning of N.J.S.A. 38:23-6. Therefore, an employee who receives differential pay while serving on active military service is receiving "compensation" within the meaning of N.J.S.A. 38:23-6 and must contribute his statutory share to the pension fund.

In order to maintain the status quo of an employee with respect to his insurance and retirement benefits, the employee receiving differential pay shall continue to contribute his share for pension and contributory insurance on the basis of his salary prior to entering the military.

The next question to be considered is whether Social Security deductions are taken from differential pay and if so, how is this done.

The specific question is whether differential pay is "wages" within the meaning of 42 U.S.C.A. § 409. Under 20 C.F.R. § 404.1025, the term "wages" means all remuneration for employment unless specifically excepted under § 404.1027. Differential pay is not included within the exclusion section of the regulations.

In an Attorney General's Memorandum Opinion dated January 20, 1955, it was held that differential pay to public employees should be considered as wages subject to Social Security coverage.

The practice of the Social Security Division is to consider differential pay to public employees while on military service as "wages" for Social Security purposes. There are, however, two conditions that must be met. First, there must be no intention to terminate the employment relationship while the employee is on military duty. Second, the differential pay must be current compensation and not back pay. If either one of these conditions exists, the differential pay is not considered as wages and

Social Security payments are not deducted. In our situation there is no intention to end the employer-employee relationship and the differential pay is current compensation rather than back pay; therefore, differential pay is to be considered as wages within the Act and Social Security deductions must be made.

Social Security payments are deducted from differential pay based upon the amount of differential pay which the employee receives while on military service. In other words, Social Security payments based on differential pay are made by the State and the employee as if the employee were continuing in public service. Social Security payments are deducted from his military pay by the Federal Government based upon the amount of military pay which the employee is entitled to.

Social Security taxes, pension and insurance contributions are to be deducted from the differential pay. Where the differential pay minus the Social Security tax is not sufficient to cover the deductions for insurance and pension contributions, it shall be the responsibility of the employer to pay the additional pension contributions pursuant to N.J.S.A. 38:23-6, but payment of the contributory insurance presents a special problem and is discussed under the next question.

(2) While we assume that military leave is like any other leave so that the individuals would be covered for noncontributory insurance for the first 93 days of their leave, would they also be entitled to contribute for their additional insurance for the same period?

This question involves the applicability of N.J.S.A. 43:15A-108. This section provides that for purposes of both contributory and noncontributory insurance, an individual shall be considered in service for no more than 93 days while on leave of absence without pay. National Guard personnel who receive differential pay pursuant to N.J.S.A. 38:12-5 do not come within the purview of N.J.S.A. 43:15A-108, since they cannot be considered on leave of absence without pay.

Therefore, members on leave of absence with pay are covered with noncontributory insurance for the entire period they are in active service, and shall make contributory insurance payments during such period. This position is based upon the fact that there is no other statutory provision which denies the right to insurance coverage when an individual is on leave of absence with pay and consequently, we conclude that it is the intent of the statute to maintain such coverage. Furthermore, continuation of the insurance coverage is necessary in order to maintain the individual's status quo.

Where the differential pay has been exhausted by Social Security and pension deductions and is not sufficient to cover the contributory insurance payments, the employee is still deemed to be on leave of absence with pay and may continue his contributory insurance payments during the entire period he is serving on military duty. Under the present insurance contract, an individual who dies while on military duty is entitled to full death benefits.

(3) If they are indeed permitted to contribute for the first 93 days of their leave for the additional insurance that they have, would they also have the right to convert all of their insurance at the end of that period?

N.J.S.A. 43:15A-93 provides that the conversion privilege must be available whenever there is a termination of service for reasons other than death or retirement. A similar provision is contained in the insurance policies as required by law. Since it has been concluded that the employee going on active duty with the National Guard

is deemed to be on a leave of absence with pay, the 93-day limitation provided by N.J.S.A. 43:15A-108 does not apply. Therefore, an employee deemed on leave with pay is to be continued in the plan during his entire period of active service and the problem of conversion after 93 days does not arise.

II. You have asked certain questions concerning the rights of employees of the State Defense Department, who are also members of the National Guard, who request leave in order to attend a military service school.

In general, National Guard members attending a military service school are in no different status than other individuals in situations discussed under the preceding question. A person attending a military service school is entitled to all the rights and privileges pertaining to pension and retirement funds as if he had stayed in civilian service. N.J.S.A. 38:23-4 provides that any public employee is to be granted a leave of absence on entering active military service "for or during any period of training," without any loss of rights, privileges and benefits except, unless otherwise provided by law, the right to compensation. It is clear that a person entering on active duty while attending a military service school comes within the purview of this section and should be granted full pension benefits. Of course, the right to recover loss of pay while on military service is provided in N.J.S.A. 38:12-4 and 38:12-5. Employees of the State Defense Department, who are also members of the National Guard who request leave in order to attend military service schools, are ordered to such duty by the Governor. Therefore, such employees come within the purview of N.J.S.A. 38:12-4.

The discussion of insurance coverage under question one is equally applicable to the instant situation. Since the individual is considered on leave of absence with pay, contributory insurance premiums and pension contributions should be deducted from the differential pay and the insurance would continue without interruption.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: STEVEN S. RADIN  
*Deputy Attorney General*

December 7, 1961.

HONORABLE KATHARINE E. WHITE  
*Acting State Treasurer*  
State House  
Trenton, New Jersey

FORMAL OPINION 1961—No. JJ

DEAR MRS. WHITE:

You have asked whether military pay used as a basis for determining differential pay within the meaning of R.S. 38:12-5 should include military allowances. Our conclusion is that military pay used as a basis for determining differential pay within the meaning of R.S. 38:12-5 should include military allowances.

R.S. 38:12-5 reads as follows:

"During the absence of any such officer or other employee, mentioned in section 38:12-4 of this title, on active service with the army or navy of the

United States or any other organization affiliated therewith, such person shall receive such portion of his salary or compensation as will equal the loss he may suffer while on such active service."

Thus, this statute provides that an employee on active duty shall receive such portion of his salary *as will equal the loss he may suffer* while on such duty. The general problem is the method of computing the loss the employee may suffer. The precise question is whether to subtract his total military remuneration (basic military salary and allowances) from his salary prior to his entrance upon the military, or to subtract from such salary merely his basic military pay without including allowances.

It is clear that the rationale of the statute is to permit the employee entering active duty to maintain his status quo with respect to his finances. An employee who receives differential pay while on active duty based solely upon his basic military salary may receive a gross sum (consisting of basic military salary, military allowances and differential pay) in excess of that which he received before entering the military. Certainly, the intention of the Legislature in enacting R.S. 38:12-5 was not to provide a possible windfall to the employee entering active military service. On the contrary, the purpose of R.S. 38:12-5 is to protect the employee from any financial deficit he may suffer while serving on active military duty. Therefore, in order to equalize the loss an employee may suffer, differential pay should be based upon total military remuneration rather than solely upon basic military salary.

A definition of military pay is contained in National Guard Regulation 51, promulgated by the Federal National Guard Bureau, which establishes the Army National Guard Technician Program. Paragraph 14 of this regulation provides that differential pay may be given to technicians attending a military school. Differential pay is stated to be the difference between technician pay and military pay. Military pay is defined as *base pay plus allowances* which includes longevity, subsistence, quarters, special and hazardous duty pay.

In conclusion, it is our opinion that differential pay made pursuant to R.S. 38:12-5 must be based upon basic military salary plus all military allowances.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: STEVEN S. RADIN  
*Deputy Attorney General*

December 12, 1961.

HONORABLE KATHARINE E. WHITE  
*Acting State Treasurer*  
State House  
Trenton, New Jersey

FORMAL OPINION 1961—No. 34

DEAR MRS. WHITE:

In the general election held in November 1960 the people of the State of New Jersey voted to adopt a constitutional amendment, as proposed by Senate Concurrent Resolution No. 12, filed June 8, 1960. This constitutional amendment provides:

"The Legislature may, from time to time, enact laws granting exemption from taxation on the real property of any citizen and resident of this State of the age of 65 or more years residing in a dwelling house owned by him which is a constituent part of such real property but no such exemption shall be in excess of \$800.00 in the assessed valuation of such property and such exemption shall be restricted to owners having an income not in excess of \$5,000.00 per year. Any such exemption when so granted by law shall be granted so that it will not be in addition to any other exemption to which the said citizen and resident may be entitled." (N.J. Const. (1947), Art. VIII, sec. 1, par. 4)

The Legislature implemented this constitutional amendment by enacting P.L. 1961, c. 9. In pertinent part this statute provides:

"Every person, a citizen and resident of this State of the age of 65 or more years, having an income not in excess of \$5,000.00 per year and residing in a dwelling house owned by him which is a constituent part of his real property, shall be entitled, on proper claim being made therefor, to exemption from taxation on such real property to an assessed valuation not exceeding \$800.00 in the aggregate, but no such exemption shall be in addition to any other exemption to which said person may be entitled."

You have requested our opinion as to the proper interpretation to be accorded to the term "citizen." In particular, you have asked whether a person, otherwise satisfying the requirements of the statute, would nevertheless be disentitled to the exemption because he is an alien. On July 5, 1961, the Attorney General by Formal Opinion No. 12, clarified certain aspects of P.L. 1961, c. 9. The precise questions which you now raise, however, were not considered in this opinion.

The word "citizen" as used in the constitutional amendment and in the statute does not appear in isolation but as part of a larger phrase, i.e., "citizen and resident of this State." So used, "citizen and resident of this State" is an adjective phrase which prescribes one set of conditions or qualifications which a claimant must fulfill in order to be entitled to the statutory tax exemption. Other constitutional and statutory prerequisites for the exemption, in addition to the requirement that a person be "a citizen and resident of this State," are that such a person must also be 65 years of age or more, have an income not in excess of \$5,000.00 per year and reside in a dwelling house owned by him which is a constituent part of his real property.

The concept of citizenship is broad and the term "citizen" has no precise or fixed meaning. A "citizen," for example, is not necessarily synonymous with or equivalent to a "resident," "inhabitant," "elector," "taxpayer" or "voter," although it is frequently used interchangeably with such words. 14 C.J.S. *Citizens*, § 1, p. 1129.

The terms "citizenship" or "citizen" also may involve the concept of dual citizenship. There is a recognized distinction between national citizenship and state citizenship. The United States Supreme Court in *United States v. Cruikshank*, 92 U.S. 542, 550, 551, 23 L. Ed. 588, 590, 591 (1875) stated:

"The people of the United States resident within any State are subject to two governments: one State and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate

jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. \* \* \* It is the natural consequence of a citizenship which owes allegiance to two sovereignties, and claims protection from both. The citizen cannot complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction."

The distinction between state citizenship and national citizenship was noted in *Harding v. Standard Oil Co.*, 182 Fed. 421, 424 (C.C.N.D. Ill., 1910), leave to appeal denied 219 U.S. 363 (1911), wherein it was stated:

"A person may be a citizen of a state but not of the United States; as, an alien who has declared his intention to become a citizen, and who is by local law entitled to vote in the state of his residence, and there exercise all other local functions of local citizenship, such as holding office, claiming the right to poor relief, etc., but who is not a citizen of the United States."

In *Halaby v. Board of Directors of University*, 162 Ohio St. 290, 123 N.E. 2d 3 (Sup. Ct. 1954) the Ohio Supreme Court was called upon to construe a statute which granted free tuition in the academic departments of universities located in municipalities to "citizens of such municipalities." The Board of Directors of the University of Cincinnati contended that United States citizenship was a prerequisite to municipal citizenship and that the plaintiff Halaby, not being a United States citizen, was not entitled to attend the University tuition free. The Court stated:

"It is apparent, however, from a study of legislation and court decisions, that, except where a citizen of the United States is referred to, a variety of meanings is loosely given to the term, 'citizen,' and that such use creates legal ambiguity. It is to be observed that the term, 'citizen,' is often used in legislation where 'domicile' is meant and where United States citizenship has no reasonable relationship to the subject matter and purpose of the legislation in question." (123 N.E. 2d at p. 5)

\* \* \*

"In the opinion of this court, the fact that the plaintiff, as well as other residents of the city, must be a citizen of the municipality in order to qualify for free tuition to the academic department of the university can not disqualify him because he is not a citizen of the United States." (123 N.E. 2d at p. 7)

The Court noted an earlier Ohio decision, *State ex rel. Owens v. Trustees of Section 29*, 11 Ohio 24 (Sup. Ct. 1841) wherein the Court was called upon to construe a legislative enactment that "each and every denomination of religious societies, after giving themselves a name, shall appoint an agent who shall produce to the trustees a certificate containing a list of their names and numbers, specifying that they are citizens of said township; \* \* \*." It was stated at page 27 of 11 Ohio:

"Here a question is raised as to the meaning of the word 'citizens,' as used in this connection. That this word does not always mean one and the same thing is clear. Thus we speak of a person as a citizen of a particular place, when we mean nothing more by it than that he is a resident of that place. When we speak of a citizen of the United States, we mean one who was born within the limits of, or who has been naturalized by, the laws of the United States. It can hardly be believed that the Legislature, in using the word 'citizen,' in this statute, intended to make a distinction between native or naturalized citizens, and resident aliens. \* \* \*"

Other decisions and authorities have also drawn the distinction between United States citizenship and citizenship of a state or political subdivision of a state. E.g., *Smith v. Birmingham Waterworks Co.*, 104 Ala. 315, 16 So. 123 (Sup. Ct. 1894), reversed on other ground, 42 So. 10 (Sup. Ct. 1906); *Vachikinas v. Vachikinas*, 91 W. Va. 181, 112 S.E. 316 (Sup. Ct. of App. 1922); *Devanney v. Hanson*, 60 W. Va. 3, 53 S.E. 603 (Sup. Ct. of App. 1906); *McKenzie v. Murphy*, 24 Ark. 155 (Sup. Ct. 1863); *Petition of Sproule*, 19 F. Supp. 995, 997 (S.D. Cal. 1937); *City of Minneapolis v. Reum*, 56 Fed. 576, 580, 8th Cir. 1893; *Note*, 8 Ala. L. Rev. (1955), p. 175; *Stout, Privileges and Immunities of National Citizenship*, 14 Univ. of Pitts. L. Rev. (1952) p. 48.

The foregoing authorities indicate generally that a citizen of a state is one who is a permanent resident or inhabitant or domiciliary of a state, without necessary regard to his qualifications for United States citizenship. In contrast, "citizenship," in the sense that it describes the status of a citizen of the United States, has a more precise meaning, firmly established by the United States Constitution, Federal statutes and decisional law. Stated simply, a citizen of the United States is one who is born within the limits of or has been naturalized by the laws of the United States.

Both the constitutional amendment and P.L. 1961, c. 9 use "citizen" in the sense of state citizenship rather than United States citizenship. The constitutional amendment refers to "any citizen and resident of this State." The statute refers to "every person, a citizen and resident of this State." The adjective phrase "of this State" in each instance refers to and qualifies the word "citizen" as well as "resident." There is no reference in either the amendment or the statute to United States citizenship as such. Moreover, the legislative history of the enactments evinces a public concern for the economic plight of elderly and needy persons. The expressed purpose of the amendment and implementing legislation was to provide financial relief in the form of a tax exemption to such persons, frequently referred to in the public hearings as "senior citizens." Clearly, there was no intent to delimit the benefits of the proposed tax exemption only to residents of New Jersey who were citizens of the United States.

Examination of other enactments reveals that the Legislature, when it refers to national citizenship, as distinct from state citizenship, ordinarily uses the terms "United States citizenship" or "citizen of the United States." For example, the Constitution provides that the Governor shall be "a citizen of the United States" and a "resident of this State." N. J. Const. (1947), Art. V, sec. 1, par. 2. The Constitution further provides that "every citizen of the United States \* \* \* who shall have been a resident of this State" in addition to other requirements, shall be entitled to vote. N. J. Const. (1947), Art. II, par. 3. In R.S. 44:1-24, the Legislature provided that a superintendent of welfare appointed by a county welfare board must "be a citizen of this State and of the United States." N.J.S.A. 18:13-4.1 provides that a citizen of any other country who has declared an intention of becoming "a United States citizen"

may be granted a teacher's certificate. With respect to the adoption of children, it is provided that an adoption action may only be brought by a person who, among other things, "shall be a citizen of the United States" or who shall have officially declared an intention to become a citizen of the United States. N.J.S.A. 9:3-22. Such examples can, of course, be multiplied.

In contradistinction, when the Legislature refers to State citizenship, it generally unmistakably so specifies. For example, it is provided that any two or more "citizens of the State" may by appropriate proceedings challenge the passage of legislation or participate in such proceedings. N.J.S.A. 1:7-4, 1:7-5. Under N.J.S.A. 2A:148-22, it is a high misdemeanor for any person to advocate or teach that "citizens of this State" should not aid, abet or assist the United States in prosecuting or carrying on war with enemies of the United States, and "citizen of this State" is defined to be "any person within the confines of this State." These illustrative enactments are entirely comparable to the constitutional amendment and P.L. 1961, c. 9, referring to "citizen \* \* \* of this State."

It is thus clear from the very language of the constitutional amendment and the statute, the legislative history, and a comparison with other constitutional provisions and statutes that the Legislature did not intend to make United States citizenship a prerequisite to qualification for the tax exemption.

This construction of the constitutional amendment and statute is consistent with well-established State policy and, wherever possible, all statutes of the State should be construed in a manner which will contribute to and effectuate common public policy. *Modern Industrial Bank v. Taub*, 134 N.J.L. 260, 263 (E. & A. 1946); 3 Sutherland, *Statutory Construction* (3d, ed. 1943) §§ 5901, 5902. If the statute were construed to require United States citizenship as a qualification for the tax exemption, aliens would be disentitled to the benefits of the statute, although aliens who own property within a taxing district would be subject to property taxation in common with all other property owners. This result would be clearly inconsistent with R.S. 46:3-18 which provides:

"Alien friends shall have the same rights, powers and privileges and be subject to the same burdens, duties, liabilities and restrictions in respect of real estate situate in this State as native-born citizens. \* \* \*"

Such a construction would also derogate from the professed purpose of the amendment and statute to provide a modicum of economic assistance to elderly and needy persons. Obviously a limitation of the benefits of the exemption only to United States citizens would not subserve the essential policy of this legislation. *Halaby v. Board of Directors of University*, *supra*; *In re Rueff's Estate*, 284 N.Y.S. 426, 430, 157 Misc. 680 (Sur. Ct. 1935), *aff'd* 292 N.Y.S. 183, 249 App. Div. 617 (Sup. Ct. 1936).

As indicated, state citizenship, in contrast to the established and settled meaning of United States citizenship, ordinarily involves the broad concepts of "domicile" or permanent "residence," the idea of a substantial and fixed connection or identification with the state and a participation in its functions *Harding v. Standard Oil Co.*, *supra*; *Halaby v. Board of Directors of University*, *supra*.

The term "citizen," as used in the statute in the sense of "State citizenship," is thus a broad, general term. Its meaning and understanding are encompassed and rendered more definite by the word with which it is juxtaposed, namely, "resident."

*Cf. Ford Motor Co. v. N. J. Dept. of Labor and Industry*, 5 N.J. 494 (1950); *D'Appolito v. Maguire*, 33 N.J. Super. 477 (App. Div. 1955). The statute defines "resident" to mean "one legally domiciled within the State of New Jersey for a period of 3 years immediately preceding October 1 of the pretax year." This definition comports with and embraces the common understanding of the word "citizen" as one who is a permanent resident or legal domiciliary of the State. In fact, the statute goes on to provide that:

"Mere seasonal or temporary residence within the State, of whatever duration, shall not constitute domicile within the State for the purposes of this act. Absence from this State for a period of 12 months shall be prima facie evidence of abandonment of domicile in this State."

Thus, a person who is a citizen of the State in the sense of being a permanent resident or domiciliary of the State may, nevertheless, fail to qualify for the exemption unless he is also a "resident" of the State in the precise manner specified by the statute, i.e., with a legal domicile within the State for at least 3 years immediately preceding October 1 of the pretax year.

For the foregoing reasons, we advise you that under constitutional amendment N.J. Const. (1947), Art. VIII, sec. 1, par. 4 and P.L. 1961, c. 9, a person who is not a United States citizen but who has been a domiciliary and resident for 3 or more years and is otherwise qualified under the statute, is entitled to the tax exemption provided therein.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: ALAN B. HANDLER  
*Deputy Attorney General*

JANUARY 23, 1961

FREDERICK C. MCCOY, *Secretary*  
*Morris County Board of Taxation*  
Hall of Records  
Morristown, New Jersey

MEMORANDUM OPINION—P-1

DEAR MR. MCCOY:

You have asked our opinion whether the statutory phrase, "the assessed value of [the taxpayer's] real property," which appears in the New Jersey Bank Stock Tax Act, R.S. 54:9-1 et seq., refers to the value fixed by the most recent real property assessment.

The New Jersey Bank Stock Tax Act imposes an annual tax on the "value" of each share of common stock of every bank having its principal place of business within this State. "Value" is defined by the statute to mean the amount of the "capital, surplus and undivided profits" of the bank, less certain deductions, including "the assessed value of its real property" and "the assessed value of all real property owned by a corporation, all the stock of which corporation is owned by such bank." R.S.54:9-4,

54:9-5 and 54:9-6. Although the Bank Stock Tax Act clearly indicates that a bank's "capital, surplus and undivided profits" should be assessed as of December 31st of the tax year, the statute does not expressly state what assessment date should be used to calculate the assessed value of the real property of a bank and of its wholly owned subsidiaries.

The value of the real property of a bank and its wholly owned subsidiaries as of either of two assessment dates could conceivably be used in computing the Bank Stock Tax. The assessed value of real property which is to be deducted from "capital" surplus and undivided profits" in order to calculate the Bank Stock Tax payable with respect to 1959 could be either the real property assessment made as of October 1, 1958 or as of October 1, 1959. By January 10, 1960, the date by which a bank must file its statement for purposes of computing the Bank Stock Tax payable with respect to the year ending December 31, 1959, the local assessor has already made an assessment for the value of the real property of the bank with respect to the tax year 1960. R.S. 54:4-23. Although the local assessor is not required to file his complete assessment list with the county board of taxation until the January 10th following (R.S. 54:4-35), he must at least ten days before that filing accord to any taxpayer the opportunity of inspecting the assessment list for the purpose of ascertaining what assessment has been made against him or his property (R.S. 54:4-38). On the other hand, the real property assessment referable to the year 1959, the same year with respect to which the Bank Stock Tax is payable, would be the assessment made as of October 1, 1958. No compelling reason has been suggested for preferring one assessment date over another for purposes of computing the Bank Stock Tax, but it is, of course, essential that a single rule be consistently followed.

In choosing between the two possible assessment dates, it is of some significance that the assessment as of October 1, 1959 will not have become final by January 10, 1960. R.S. 54:4-35; 54:4-55. Furthermore, it would seem preferable from the standpoint of logic, or at least of symmetry, to use for purposes of computing the Bank Stock Tax payable with respect to 1959 the real property assessment which is intended to be used for computing the real property tax payable with respect to 1959, that is the real property assessment as of October 1, 1958.

There is another significant consideration which leads to the same result. In Attorney General's Formal Opinion, 1960—No. 20, we pointed out that the Financial Business Tax Law, N.J.S.A. 54:10B-1 et seq. was adopted in 1946 to avoid discrimination against national banks and that the Bank Stock Tax Act should be construed so as not to impose any greater tax upon banks subject thereto than is imposed by the Financial Business Tax Law upon competing financial businesses. N.J.S.A. 54:10B-1 et seq. imposes a privilege tax measured by net worth. The tax is payable on or before April 15 of each year for the privilege of "doing a financial business in this State" during that calendar year. N.J.S.A. 54:10B-6 provides that in computing the tax base, "there may also be deducted from net worth the assessed value of real estate taxable in this State; but such deduction shall not exceed the amount of the taxpayer's equity in such real estate which is included in net worth." In computing the deduction under N.J.S.A. 54:10B-6 the Corporation Tax Bureau which administers the Financial Business Tax Law has consistently used the assessed value of real property as of the assessment date next preceding the April 15 due date upon which the tax is payable. For example, the Financial Business Tax payable with respect to the calendar year 1959 is due on April 15 of that year; the assessed value of real property to be deducted from the taxpayer's net worth would be that as of October

1, 1958. It is possible that the use of different assessment dates for computing the tax bases under the Bank Stock Tax Act and the Financial Business Tax Law would discriminate against state and national banks. This possibility can be avoided if county tax boards use the same assessed valuation date for the purposes of computing the Bank Stock Tax as the Corporation Tax Bureau uses for computing the Financial Business Tax. That would mean that to compute the Bank Stock Tax payable on January 10, 1960 with respect to the calendar year 1959, the assessed value of real property deducted should be the assessed value fixed for the tax year 1959 as of October 1, 1958.

You are, therefore, advised that the statutory phrase "the assessed value of [the taxpayer's] real property" which appears in R.S. 54:9-1 et seq. refers to the valuation as of the October 1 preceding the commencement of the year with respect to which the Bank Stock Tax is payable.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: MURRY BROCHIN  
*Deputy Attorney General*

JANUARY 26, 1961

HONORABLE JOHN A. KERVICK  
*State Treasurer*  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-2

DEAR MR. KERVICK:

You have sought our advice concerning the proper procedure in allowing interest upon excess contributions of all members belonging to the Teachers' Pension and Annuity Fund. N.J.S.A. 18:13-112.22. In order to avoid misunderstanding we shall also direct in part our remarks to the proper procedure concerning return of veterans' contributions. N.J.S.A. 18:13-112.72(a).

It is our understanding that at the time of the enactment of the Teachers' Pension and Annuity-Social Security Integration Act, the administrative burden in processing refund applications was so great that there necessarily resulted lengthy delays in the completion of the program. Therefore, the question has arisen as to the propriety of allocating interest upon delayed refunds. The Board desires our legal direction concerning their actions in this regard.

N.J.S.A. 18:13-112.22 provides, in pertinent part:

"Any [excess] contributions made by a member \* \* \* shall be refunded with regular interest to January 1, 1956 to the member \* \* \* or shall, at his request, be used at retirement with regular interest, to provide an annuity of equivalent actuarial value \* \* \*."

This provision was enacted to allow former members of the previous teachers' retirement system, R.S. 18:13-24, et seq., an adjustment in their new pension accounts, based upon past contributions and the revised actuarial computation for benefits under the new system created as of January 2, 1956. As can readily be seen, the moneys being refunded here were equitably payable to the members because they represented overpayment of the necessary contribution rates according to the actuarial criteria.

Concerning these sums it should be noted that if the member elected to leave them with the fund, they would continue to accumulate "regular interest." N.J.S.A. 18:13-112.4(n). In such a case the member received extra annuity "of equivalent actuarial value." See also N.J.S.A. 18:13-112.27. Upon withdrawal from the fund, the member would also be in a position to obtain such regular interest after the establishment of the new system, N.J.S.A. 18:13-112.26, .36, and furthermore, upon death of the member in active service, his beneficiary would also receive these funds with regular interest credited. N.J.S.A. 18:13-112.40(a). The annuity portion of the member's retirement allowance would also reflect the allowance of interest upon such sums. Compare N.J.S.A. 18:13-112.44(a), .46(a), with N.J.S.A. 43:3-1 (P.L. 1959, c. 101). It is clear that the Legislature contemplated two alternatives, i.e., immediate return of such excess contributions or retention in the fund with an interest earning equity.

Such moneys retained by the Board of Trustees, belonging to a member, were properly invested in accordance with the provisions of P.L. 1950, c. 270, N.J.S.A. 18:13-112.63 and could thus create additional earnings thereon, N.J.S.A. 18:13-112.26, .29. Because payment of these sums was not provided for absolutely but only upon the election of the individual members, there was no need to immediately freeze the amounts for use in investments and the Board properly had the use of that money upon which interest could be earned.

Interest is basically compensation for the use of money belonging to another. *Wilentz v. Hendrickson*, 135 N.J. Eq. 244 (E. & A. 1944). Hard and fast rules should not be followed considering the granting of interest but it should be granted in each case in accordance with justice and with consideration of fair dealing. *Jardine Estates v. Donna Brook Corp.*, 42 N.J. Super. 332, 340 (App. Div. 1956); *Dial Press, Inc. v. Phillips*, 23 N.J. Super. 543 (App. Div. 1952), cert. den., 12 N.J. 248 (1953); *Brown v. Home Development Co.*, 129 N.J. Eq. 172 (Ch. 1941); *Fidelity Mutual Life Insurance Co. v. Wilkes-Barre & Hazleton R. R. Co.*, 98 N.J.L. 507 (E. & A. 1922). See also *Consolidated Police, etc. Pension Fund Commission v. Passaic*, 23 N.J. 645 (1957). In view of the fact that the moneys withheld represented excess contributions of the members, we advise you that it was proper for the Board to allow interest for any fiscal year in which refund was delayed.

However, N.J.S.A. 18:13-112.72(a) states that:

"Each veteran member shall have returned to him \* \* \* his accumulated deductions as of January 1, 1956 \* \* \*."

Some former members (who were veterans) of the old teachers' retirement system had elected to contribute to the teachers' fund instead of merely relying upon the free Veterans' Pension Act, R.S. 43:4-1, et seq. Because N.J.S.A. 18:13-112.72 and .73 made membership in the new system mandatory for all teacher veterans, granting them free credit for all prior service, the Legislature returned contributions of the veteran members of the old fund. Therefore, the Legislature provided for the return

of these veterans' accumulated deductions which are specified in N.J.S.A. 18:13-112.4 (a) as:

"The sum of all amounts, deducted from the compensation of a member or contributed by him, including interest credited prior to January 1, 1956, standing to the credit of his individual account in the annuity savings fund."

It can be seen that this provision dealt more with a legislative grant than a return of moneys paid in excess of what the actuarial computations required. In such a situation it is our opinion that the legislative plan does not call for the addition of interest upon the grant. *Swede v. City of Clifton*, 22 N.J. 303 (1956); *Hoboken, Newark, etc. Assn. v. Hoboken*, 23 N.J. Misc. 334 (Sup. Ct. 1945); *Fletcher v. Board of Education*, 85 N.J.L. 1 (Sup. Ct. 1913); *Bourgeois v. Freeholders of Atlantic*, 82 N.J.L. 82, 86, 87 (Sup. Ct. 1911). It is apparent that the Legislature only provided for return of "accumulated deductions as of January 1, 1956" which by statutory definition includes "interest credited prior to January 1, 1956," N.J.S.A. 18:13-112.72 (a), 4(a). Nowhere in the legislative scheme are there provisions relating to veterans' refunds comparable to those concerning excess contributions whereby the moneys may be allowed to earn interest for the member at his election. It follows that since these sums were in effect a generous legislative grant "the plainest and simplest considerations of justice and fair dealing" do not allow payment of interest on such refunds. Cf. *Opinions of the Attorney General, Memorandum Opinions*, (2), dated June 30, 1959.

In conclusion we thus advise you that (1) in the discretion of the Board of Trustees, interest may be paid according to the usual procedures upon excess contributions which refunds were delayed because of administrative process, and (2) there is no authority for the payment of such interest upon delayed refunds of pre-1956 veterans' contributions.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: LEE A. HOLLEY  
Deputy Attorney General

JANUARY 31, 1961

HON. FRANCIS X. CRAHAY  
Deputy Attorney General in Charge  
Sussex County Prosecutor's Office  
Court House  
Newton, New Jersey

MEMORANDUM OPINION—P-3

DEAR MR. CRAHAY:

I am in receipt of your request for our opinion as to whether or not a defendant who had been convicted a second time for a violation of N.J.S. 39:4-50 is subject to a fine in addition to the mandatory sentence of imprisonment for a term of three months and forfeiture of the right to operate a motor vehicle for a period of ten years.

An examination of the authorities discloses that there are no decisions dealing with this precise point in New Jersey. N.J.S. 39:4-50 being a quasi criminal statute, strict construction must be applied. The omission by the Legislature of any mention of a fine for a subsequent offender, coupled with the severity of the penalty, leads me to the conclusion that a fine may not be imposed in addition to the mandatory sentence for a subsequent offender under this statute.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

FEBRUARY 28, 1961

MRS. EDWARD L. KATZENBACH  
*State Board of Education*  
175 West State Street  
Trenton, New Jersey

MEMORANDUM OPINION—P-4

DEAR MRS. KATZENBACH:

You have requested my opinion as to whether the Board of Governors of Rutgers, The State University, may fix the salary of the President of the Corporation and of the University without the approval of the State Board of Education. My conclusion is in the negative.

The provisions of Rutgers, The State University Act of 1956, L. 1956, c. 61, are controlling. The Board of Governors is vested with the appointment power over the President of the Corporation and of the University, with the advice and consent of the Board of Trustees (L. 1956, c. 61, sec. 27). The Board of Governors, in addition, is vested with the power to fix and determine the salaries of all corporate, official, educational and civil administrative personnel, subject to the approval of the State Board of Education (L. 1956, c. 61, sec. 18(8)).

The President of the Corporation and of the University is one of those designated whose salary is fixed and determined by the Board of Governors with the approval of the State Board of Education. Section 18 is limited by section 27, only as to the appointive power over the President. Confirmation by the Board of Trustees is required for this office but is not required for other corporate, official, educational and civil administrative personnel. Section 27 makes no provision for the fixing and determining of the salary of the President of the Corporation and of the University. The general provision of section 18 subjecting all salary schedules to the approval of the State Board of Education, therefore, applies to the salary fixed and determined for the President of the Corporation and of the University and necessitates approval by the State Board of Education.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

APRIL 12, 1961

HONORABLE JOHN A. KERVICK  
*State Treasurer*  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-5

DEAR MR. KERVICK:

You have asked us to review the question of allowing an employee member of the Teachers' Pension and Annuity Fund the right to make contributions to the retirement system at a percentage of his contractual salary rather than at a percentage of workmen's compensation benefits which he is receiving. In a memorandum opinion dated September 28, 1955 the Attorney General ruled that an employee continues as a member of the teachers' retirement system although, instead of receiving regular salary, he is receiving workmen's compensation benefits for injuries suffered in the course of his public employment. The Attorney General's opinion further held that such contributions to the retirement system should be a percentage of the compensation benefits being paid rather than a percentage of the employee's salary. We now specifically overrule the latter portion of that opinion.

The workmen's compensation award is based on a percentage of the employee's contractual salary. N.J.S.A. 34:15-12, 37, 38. To establish the amount of money a member employee must pay to the retirement system, the Legislature has authorized "the actuary of the Board" to determine for each member "the proportion of compensation" which should be sufficient to provide an annuity equal to one-half of retirement allowance. N.J.S.A. 18:13-112.31. The Board of Trustees is also directed to establish rules and regulations for employees' deductions which shall be a "proportion of each member's compensation." N.J.S.A. 18:13-112.33. "Compensation" is defined in the Teachers' Pension and Annuity-Social Security Integration Act as "the contractual salary." N.J.S.A. 18:13-112.4.

It follows that if members while receiving workmen's compensation are required to continue contributions, such contributions must be made in accordance with the "contractual salary" and not in accordance with the workmen's compensation award. There does not appear to be any statutory authority to allow contributions on a lesser or greater amount than contractual salary.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: LEE A. HOLLEY  
*Deputy Attorney General*

APRIL 25, 1961

HONORABLE JOHN A. KERVICK  
*State Treasurer*  
 State House  
 Trenton, New Jersey

## MEMORANDUM OPINION—P-6

DEAR MR. KERVICK:

You have asked for an opinion concerning L. 1960, c. 44. This Act authorizes the Director of the Division of Investment, with approval of the Board of Trustees of the Public Employees' Retirement System, to acquire real property in New Jersey on behalf of the System, upon which buildings are to be erected which are thereafter to be leased to the State of New Jersey for its use in accordance with the Act. The Division of Purchase and Property has been given the responsibility of planning and constructing the facility. The new facility will be leased to the State at an annual rental which will amortize the investment over a 20-year period with a 4% return to the System on its total investment.

Your particular inquiry concerns the interpretation to be given section 2 of the Act which provides:

"The total investment authorized pursuant to this act shall not exceed 3% of the book value of the total investments of such fund *at the time of the making of the investment.*" (Emphasis supplied.)

We are advised that the Public Employees' Retirement System and the Division of Purchase and Property have entered into an agreement authorizing the Division to acquire necessary lands and to construct a central office building complex to house the State Departments of Health and Agriculture. Under the terms of this agreement, funds advanced by the System will bear interest at the rate of 4% per annum from the date of any such advance. Further, this asset of the System will be reflected on the books of the Division of Investment at the time the State enters into occupancy under the terms of a leasing agreement to be executed following completion of construction.

In our opinion, the 3% of book value limitation should be interpreted so that the aggregate of all payments advanced by the System shall not exceed the statutory percentage at the time of making of any such payment. This interpretation is in harmony with the provisions in the Act which look toward making enlargements and further capital improvements after "the initial investment." L. 1960, c. 44, sec. 6. Thus, the 3% limitation "at the time of the making of the investment" should be interpreted as ambulatory in nature, looking toward payments at a future time. The limitation applies to the assets of the System at the time of each payment. The aggregate of all payments shall not exceed 3% of the total assets on the date of the last payment made by the System.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: THEODORE I. BOTTER  
*Assistant Attorney General*

MAY 15, 1961

HONORABLE DONALD M. ALTMAN  
*Deputy State Treasurer*  
 State House  
 Trenton, New Jersey

## MEMORANDUM OPINION—P-7

DEAR MR. ALTMAN:

You have requested our advice as to the eligibility of George D. Ziegler, a disabled public employee, for compensation pursuant to R.S. 43:5-1 et seq., known as the Heath Act. Mr. Ziegler was appointed an assistant court reporter in the 5th Judicial District of New Jersey in 1907. In 1912 he was appointed by a Justice of the New Jersey Supreme Court as shorthand reporter for the circuit in Union and Middlesex Counties (P.L. 1900, c. 149). In 1948 he was appointed by the present New Jersey Supreme Court as supervising shorthand reporter for the same counties and has continued in such position to the present day.

We are informed that Mr. Ziegler's employment from 1912 to the present date has been on a full-time basis. In other words, he has not been merely certified to appear before the courts, but his main labor has been to be in attendance before the New Jersey Courts while they were in session.

Mr. Ziegler seeks a pension under P.L. 1921, c. 134, R.S. 43:5-1 et seq. The purpose of that legislation as stated in the Statement attached to Senate Bill No. 152 was:

"To provide for the payment of 50 per centum of the salary of those who have or shall have been *in the service of the State* 25 years and have become incapacitated, who have or shall have reached the age of 60 years. It applies only to employees who have no fixed term \* \* \*." (Emphasis supplied.)

The Heath Act also provided that its benefits did not have application

"\* \* \* to any officer or employee of the State drawing a pension or who shall be entitled to do so under any law enacted prior to March thirty-first, one thousand nine hundred and twenty-one, which specifically names any class or classes of such officers or employees." N.J.S.A. 43:5-1.

Your question is basically two-fold: (1) whether Mr. Ziegler qualifies for 25 years of State service in his capacity as court reporter, and (2) whether any other law entitling him to benefits precludes application of the Heath Act to him.

The question of whether Mr. Ziegler's service as a court reporter had sufficient State characteristics to qualify him for pension rights under the Heath Act must be answered affirmatively. One of the principal tests is the degree of control and supervision exercised by the particular branch, department or agency of the State. See *Memorandum Opinion—P-27, 1954-55 Opinions of the Attorney General of New Jersey*, p. 254. Judicial control and supervision of court reporters have always existed. See P.L. 1900, c. 149; P.L. 1928, c. 249; P.L. 1929, c. 291; R.S. 2:16-20 et seq. In P.L. 1948, c. 376 the present basis of the court reporter system for the New Jersey judiciary was established (N.J.S. 2A:11-11 et seq.). The Legislature expressly declared that court reporters, except those theretofore belonging to a county retirement

system under P.L. 1943, c. 160, N.J.S.A. 43:10-18.1, are to be considered State employees for pension purposes.

For the sake of future clarity, we emphasize at this time that N.J.S. 2A:11-16(i) expresses an intent that court reporters be treated as State employees for the purpose of membership in the then existing State Employees' Retirement System. Cf. R.S. 43:14-1, 2(b). Prior to 1943, stenographic reporters had been treated under an independent statutory basis for the granting of pensions. Cf. P.L. 1922, c. 15 (later codified as part of the general pension plan for judicial officers in the State of New Jersey, see Chapter 6 of Title 43 of the Revised Statutes of 1937).

However, in 1943 the Legislature authorized counties of over 800,000 inhabitants to create a separate pension fund apart from those generally provided for county employees in the State of New Jersey. Cf. P.L. 1943, c. 160 with R.S. 43:10-1. Under this new legislation a county employee was defined as "including the official stenographic reporters and proxies of such official stenographic reporters of such county." R.S. 43:10-18.1. This legislation allowed, in addition to court reporters, county pension fund membership to county detectives, probation officers, sheriff's employees, sergeants at arms and court criers, also generally classified as State employees. R.S. 43:10-18.6(c). Stenographic reporters were given special consideration to join this pension fund, regardless of age (R.S. 43:10-18.1).

Because of his advanced age Mr. Ziegler until 1943 was generally ineligible to join any pension fund. Cf. R.S. 43:1-1. We are informed that Mr. Ziegler was not devoting his services for, or being directly compensated by, any county of a population in excess of 800,000 inhabitants. He did not or could not have become a member of any county retirement system under P.L. 1943, c. 160, and thus, would remain within the legislative direction for consideration as a State employee for pension purposes. N.J.S. 2A:11-16(i). This latter statutory provision is merely cumulative evidence of the legislative intent that court reporters working for the State judiciary be considered State employees. 1955 Memorandum Opinion P-27, *supra*.

The Heath Act forecloses application to any State employees for whom pension benefits were already provided "prior to March 31, 1921." It may be seen that the first pension system "which specifically names" the class of State employees consisting of court stenographers and reporters was enacted by P.L. 1922, c. 15 and amended by P.L. 1923, c. 129. Therefore, the prohibition of R.S. 43:5-1 does not apply to Mr. Ziegler.

It should be noted that Mr. Ziegler was entitled, at least from 1948, to membership in the State Employees' Retirement System. Cf. N.J.S. 2A:11-16(i). In such a case the Legislature has since provided for beneficial treatment in joining the present Public Employees' Retirement System. N.J.S.A. 43:15A-9. In view of Mr. Ziegler's 53 years of honorable State employment, it may be that economic considerations may favor his consideration of utilizing this benefit for former State employees, in lieu of application under the Heath Act.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: LEE A. HOLLEY  
Deputy Attorney General

MAY 15, 1961

HONORABLE JOHN A. KERVICK  
State Treasurer  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-8

DEAR MR. KERVICK:

You have requested our advice as to whether the provisions of N.J.S.A. 43:3-1 et seq. prohibit the receipt of salary or pension by the present Magistrate in Rockaway, New Jersey. The factual situation you present is as follows: a retired State policeman on a pension from the State Police Retirement Benevolent Fund is serving now as Magistrate in both Rockaway and Rockaway Township at annual salaries of \$1,500 each, either or both of which are less than his pension. At the time of his appointment to both terms, the population of the municipality served was less than 5,000 persons. However, since the promulgation of the 1960 census (P.L. 1961, c. 3; N.J.S.A. 52:4-1), the population of one of these municipalities will exceed that figure.

Must this individual waive either his salary or pension because of his service as Magistrate, for the remainder of his term, in a municipality achieving a population in excess of 5,000 persons during said term of office?

N.J.S.A. 43:3-1 provides that:

"Any person who is receiving \* \* \* any pension or subsidy from this \* \* \* State \* \* \* shall be ineligible to hold any public position or employment other than elective in this State \* \* \* unless he shall have previously notified and authorized the proper authorities \* \* \* that, for the duration of the term or office of his public position or employment he elects to receive (1) his pension or (2) his salary or compensation allotted to his office or employment. \* \* \* such person shall not accept both such pension or subsidy and salary or compensation for the time he held such position or employment."

However, this strict prohibition is modified by N.J.S.A. 43:3-5, insofar as is pertinent to the question you have raised, as follows:

"The provisions of this chapter shall not apply to \* \* \* any person who is appointed to the office of magistrate of any municipal court in any municipality having a population of less than 5,000 where the salary paid to such municipal magistrate is less than the amount of his pension."

The magistrate in question need not waive his salary or pension for services in a municipality having less than 5,000 persons. The sole question is whether he must elect to waive one of the aforesaid remunerations because during the term of his appointment the population in the other municipality officially rose to over 5,000 persons.

The individual in question was appointed magistrate while the population in the municipality was less than 5,000 persons. The terms of N.J.S.A. 43:3-1 et seq. imply that determinations of eligibility for receipt of both pension and compensation be made at the time of appointment or employment. The statute requires previous

notification of an election to waive either remuneration before he "shall be eligible to hold any public position or employment." Where a magistrate accepts employment and the obligations thereof, knowing that he is not required to waive his pension or salary, it would be unreasonable to force him to forfeit such position during his term of office because external circumstances changed during such term. However, if at the end of the present term he is reappointed, the magistrate will have to waive his pension.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: LEE A. HOLLEY  
*Deputy Attorney General*

MAY 16, 1961

COLONEL JOSEPH D. RUTTER, *Superintendent*  
Division of State Police  
West Trenton, New Jersey

MEMORANDUM OPINION—P-9

DEAR COLONEL RUTTER:

We have been asked whether a pension paid to a member of the State Police after retirement for longevity should continue to be paid to his dependent mother after the retiree's death without having left a widow or children. In our opinion, it should not.

R.S. 53:5-5 expressly provides for the payment of a pension to a widow or dependent parent after the death in service of a member of the State Police. The same statute also expressly provides for the continued payment of a pension to the widow of a member of the State Police who dies after retirement. However, it makes no provision for the continued payment of a pension to a dependent parent of a member of the State Police who dies after retirement: In this context, the failure of the Legislature to provide expressly for continued payment of a pension to a dependent parent of a member who dies after retirement must be interpreted as intending that no such payment be made.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: WILLIAM L. BOYAN  
*Deputy Attorney General*

JULY 19, 1961

MRS. KATHARINE E. WHITE  
*Acting State Treasurer*  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-10

DEAR MRS. WHITE:

You have sought our interpretation of the following statutory language found both in the Teachers' Pension Law, N.J.S.A. 18:13-112.44 and the Public Employees' Retirement Law, N.J.S.A. 43:15A-46:

"A member upon retirement for accident disability shall receive \* \* \* a retirement allowance which shall consist of:

\* \* \*

"(b) a pension, in addition to the annuity, of two-thirds of his actual *annual compensation* for which contributions were being made at the time of the occurrence of the accident." (Emphasis supplied.)

You have asked what interpretation should be given to the phrase "annual compensation" contained in the above provision on the basis of which accident disability retirement allowance is computed.

In the Teachers' Law, compensation is defined as "the contractual salary for services," N.J.S.A. 18:13-112.4(d). No comparable definition is contained in the Public Employees' Retirement Law. However, various benefits under the respective laws are based upon the phrase "final compensation" which is expressly defined (N.J.S.A. 43:15A-6(e) and N.J.S.A. 18:13-112.4(f)) or upon the phrase "compensation upon which \* \* \* contributions are based or received by the member in the last year of creditable service" (N.J.S.A. 18:13-112.4(b) and N.J.S.A. 43:15A-41(c)(2)).

The term "final compensation" is defined in both acts on the basis of the average annual compensation for which contributions are made by a member during a five year period. Ordinary disability retirement allowances and retirement allowances for age and service are computed in both systems upon a percentage of "final compensation." N.J.S.A. 18:13-112.43, 46(b); N.J.S.A. 43:15A-45(b), 48(b) and (c). However, if a member dies during ordinary disability retirement or retirement for service and age, death benefits are paid upon the basis of "compensation received by the member in the last year of creditable service." N.J.S.A. 18:13-112.43, 46(b); N.J.S.A. 43:15A-45(c), 48(d). Accidental death benefits, on the other hand, are based upon a percentage of "final compensation." N.J.S.A. 18:13-112.48; N.J.S.A. 43:15A-49.

Thus it is apparent that for each type of benefit the Legislature has expressly defined the basis for determining compensation.

As to accident disability retirement allowances, the Legislature has in clear terms defined annual compensation as "actual annual compensation for which contributions were being made *at the time of the occurrence of the accident.*" (Emphasis added.) We see no reason to incorporate for this type of benefit the definition given to the phrase "final compensation" because the word "final" does not appear in N.J.S.A. 18:13-112.44 and N.J.S.A. 43:15A-46. The phrase used is "*actual* annual

compensation" for which contributions were "being made at the time of the occurrence of the accident." Here, the phrase "were being made" imports the sense of current payments. This sense is also distinguishable from the concept of "last year of creditable service" referred to above for other types of benefits.

It is our opinion, therefore, that accident disability retirement allowances should be based upon the rate of compensation actually being paid to an employee at the time of the accident.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: ROBERT S. MILLER  
Deputy Attorney General

AUGUST 1, 1961

COLONEL JOSEPH D. RUTTER  
Superintendent State Police  
State Police Headquarters  
West Trenton, New Jersey

MEMORANDUM OPINION—P-11

DEAR COLONEL RUTTER:

You have sought my opinion as to whether independent insurance investigators and adjusters are subject to the licensing provisions of the Private Detective Act of 1939, R.S. 45:19-8 et seq.

The statutory definition of private detective business, insofar as pertinent, is as follows:

"(a) The term 'private detective business' shall mean the business of conducting a private detective agency or for the purpose of making for hire or reward any investigation or investigations for the purpose of obtaining information with reference to any of the following matters, notwithstanding the fact that other functions and services may also be performed by the same person, firm, association or corporation for fee, hire or reward, to wit: \* \* \* (6) the causes and origin of, or responsibility for, fires, libels, accidents, damage, injuries or losses to persons, firms, associations or corporations, or to real or personal property; \* \* \* provided, however, that the term shall not include \* \* \* any person, firm, association or corporation engaged in the business of making reports for insurance or credit purposes. \* \* \* The term shall not include and nothing in this act shall apply to any lawful activity of \* \* \* any person, firm, association or corporation licensed to do a business of insurance of any nature under the insurance laws of this State, nor to any employee or licensed agent thereof; nor to any person, firm, association or corporation conducting any investigation solely for its own account."

Under the facts you set forth various firms or associations, which are not affiliated with licensed insurance companies, are engaged in this State in the investigation of fires, accidents and other damage and in the adjustment of claims arising therefrom against various insurance carriers. A contract relationship exists between the investigating firm and the insurance carrier, with the compensation on an hourly basis.

The plain language of the statute reaches investigative activities of such claims investigators and adjusters. This construction is buttressed by the legislative policy of protecting the public against disreputable or incompetent investigators who might engage in blackmail or otherwise prey upon the public. See *Berardi v. Rutter*, 42 N.J. Super. 39, 50 (App. Div. 1956), aff'd sub nom, *In re Berardi*, 23 N.J. 485 (1957).

New York with a statute (General Business Law Sec. 70-89A) similar to R.S. 45:19-8 et seq. has a judicial construction that it encompasses activities by independent insurance investigators. *Cole v. State*, 179 Misc. 172, 37 N.Y.S. 2d 1002 (Ct. Cl. 1942). In *Schauder v. Weiss*, 88 N.Y.S. 2d 317, 321 (Sup. Ct., Kings County 1949) aff'd 276 App. Div. 967, 94 N.Y.S. 2d 748 (2d Dep't 1950), the Court ruled that the regulation of investigators:

"\* \* \* is designed primarily for the protection of the public against 'wilful, malicious and wrongful' acts of private detectives who, in the absence of stringent controls and the requirement of a bond, would be in a position to cause irreparable harm to other members of the community because of the very nature of their work."

In 1945, the New York Legislature overruled the *Cole* decision, *supra*, by statute, General Business Law §§ 71 and 72, by bringing independent insurance adjusters under the supervision of the Superintendent of Insurance.

The various statutory exceptions are not applicable under the facts presented. The firms which you describe are engaged in activities other than making reports for insurance or credit purposes, are not licensed insurance companies and are not conducting investigations solely on their own behalf.

My conclusion therefore is that the independent insurance adjusters and investigators must seek a private detective's license and comply with all other provisions of the Private Detective Act of 1939.

Sincerely,

DAVID D. FURMAN  
Attorney General

AUGUST 2, 1961

HONORABLE NED J. PARSEKIAN  
 Acting Director  
 Division of Motor Vehicles  
 State House  
 Trenton, New Jersey

## MEMORANDUM OPINION—P-12

DEAR DIRECTOR PARSEKIAN:

You have requested our opinion as to the extent of your discretionary power in administering the assessment provisions of the Unsatisfied Claim and Judgment Fund (hereinafter referred to as "U.C.J.F.") Law (*N.J.S.A. 39:6-61, et seq.*), as found in *N.J.S.A. 39:6-63(d)*. Specifically, you ask whether you are required to assess to the limit of subsection (1) thereof, imposing the U.S.J.F. fee on uninsured vehicle registrations, before applying subsection (2), imposing assessments up to a maximum on insurers, or whether your discretion can guide your actions in calling upon either, or both, of these assessments without priority.

Subsection (d) of *N.J.S.A. 39:6-63* reads as follows:

"(d) On December 30 in each year, beginning with 1956, the director shall calculate the probable amount which will be needed to carry out the provisions of this act during the ensuing registration license year. In such calculation, he shall take into consideration the amount presently reserved for pending claims, anticipated payments from the fund during said year, anticipated amounts to be reserved for claims pending during said year, and the desirability of maintaining a surplus over and above such anticipated payments and present and anticipated reserves, such surplus not to exceed the amount actually paid from the fund during the 12 full calendar months immediately preceding the date of calculation. If, in his judgment, the estimated balance of the fund at the beginning of the next registration license year will be insufficient to meet such needs, he shall

"(1) Determine the amount to be fixed as the Unsatisfied Claim and Judgment Fund Fee for such registration license year. Such fee shall in no case exceed \$15.00 and shall be paid by each person registering an uninsured motor vehicle during such ensuing year at the time of registration in addition to any other fee prescribed by any other law.

"(2) If the estimated total amount of Unsatisfied Claim and Judgment Fund Fees to be collected during the ensuing registration license year shall be insufficient, in the judgment of the director, to provide the estimated amount needed to carry out the provisions of this act during the said ensuing registration license year, he shall assess this estimated deficiency against insurers for such year's contribution to the fund. Such deficiency shall be apportioned among such insurers in the proportion that the net direct written premiums of each bears to the aggregate net direct written premiums of all insurers during the preceding calendar year as shown by the records of the commissioner. Such aggregate assessment, however, shall in no event exceed  $\frac{1}{2}$  of 1% of the aggregate net direct written premiums for such preceding

calendar year. Each insurer shall pay the sum so assessed to the treasurer on or before March 31, next following."

Originally, *N.J.S.A. 39:6-63* was enacted as part of *L. 1952, c. 174* creating the U.C.J.F. Section 3 of the act then provided for assessments similar in kind to those presently required. However, at that time, subsection (1) of section (d) provided that the Treasurer, at that time a member of the Board, was to survey the fund annually. If, in his judgment, an insufficiency was indicated in the fund for the ensuing year, he would assess the deficiency against the insurers to a maximum. Subsection (2) provided that if such assessment appeared to be insufficient, he would notify the Director of a fee charge to be required upon vehicle registrations, limited to \$1.00 for insured vehicles and \$2.00 for uninsured vehicles.

*L. 1955, c. 1* replaced the Treasurer with the Director, but did not otherwise affect this section.

In 1956, an amendment increased the maximum additional fee for uninsured vehicles to \$8.00, and relieved insured vehicle owners of any direct assessment whatever (*L. 1956, c. 22, § 2*). This did not however, change the existing structure of the section.

A significant and substantial amendment was enacted by the passage of *L. 1958, c. 99, § 1*. For the first time, specific standards for the Assessor's guidance in his annual survey were inserted in the body of subsection (d). The new subsection (d) (1) became the assessment upon uninsured vehicles, now known as the "Unsatisfied Claim and Judgment Fund Fee," and was increased to a \$15.00 limit. The assessment upon insurers now replaced subsection (d) (2), but remained unchanged in maximum limits.

The carriers are obliged by § 6 and § 7 of the U.C.J.F. Act (*N.J.S.A. 39:6-66* and *39:6-67*) to conduct investigations as assigned and to defend claims on behalf of uninsured motorists in litigation. Although these obligations are incurred at the carriers' expense initially, the burden of costs is ultimately reflected in premium charges to the insured motorists.

It is highly significant that the 1958 amendment reverses the order in which assessments are now to be made, that is, first upon the uninsureds and then upon the insurers. Real meaning is given to this change of sequence by the statement appended to the 1958 bill which so amends *N.J.S.A. 39:6-63*.

"The purpose of this bill is to increase payments to accident victims of uninsured drivers; to eliminate inequities and objectionable features that have appeared in the Unsatisfied Claim and Judgment Fund Law after three years of operation; to expedite payment of claims that have been settled; and to place on the uninsured motorist, who creates the problem, the principal burden of supporting the fund."

This statement indicates the purpose of the Legislature to limit the insurer's assessment (and, ultimately, the insured owner's share) to a position of a supporting, rather than a direct, source of contribution.

Manifestly, therefore, it follows that the uninsureds ought to provide funds to the legal limit of \$15.00 each before this support may be claimed as necessary by the Director.

It is our opinion that you are required to exact from uninsured motorists the maximum U.C.J.F. fee under N.J.S.A. 39:6-63(d)(1) as a condition precedent to your invocation of your right to assess carriers under subsection (d)(2) thereof.

Very truly yours,

DAVID D. FURMAN  
Attorney General

AUGUST 7, 1961

HONORABLE NED J. PARSEKIAN  
Acting Director  
Division of Motor Vehicles  
25 South Montgomery Street  
Trenton, New Jersey

MEMORANDUM OPINION—P-13

DEAR DIRECTOR PARSEKIAN:

You have requested our opinion as to whether R.S. 39:3-30, besides permitting transfers of vehicle registrations between weight classifications within the same category of vehicles, also permits transfers between differing categories of vehicles. For example, if a vehicle, which is registered commercially, is replaced by another vehicle not to be used for commercial purposes, may a transfer of registration to the non-commercial category be accomplished by payment of the \$1.00 transfer fee, provided for by R.S. 39:3-30.

In our opinion R.S. 39:3-30 only authorizes transfers within the category in which the preceding vehicle was registered. In pertinent part that statute provides as follows:

"Upon the transfer of ownership or the destruction of any motor vehicle its registration shall become void. If the motor vehicle is sold the original owner shall remove the license plates therefrom, and, within 48 hours, notify the director of the name and address of the purchaser.

"The original owner may, by proper sworn application on a form to be furnished by the division, register another motor vehicle for the unexpired portion of the registration period of the original vehicle, upon payment of a fee of \$1.00 if the vehicle is of a weight or other classification equal with or less than the one originally registered, or upon the payment of a fee of \$1.00 and the difference between the fee originally paid and that due of the new motor vehicle is properly registerable in a higher class. Unless the original license plates have been destroyed, the owner shall be assigned the license number previously issued to him and shall receive a new registration certificate. If the original license plates have been destroyed, replacement of the plates will be made under the provisions of section 39:3-32 of this Title \* \* \*"

We would limit the applicability of transfers under this statute within the classification of original registration. The sections providing fees and registration identification contain differing standards sufficient to indicate that extension of R.S. 39:3-30

between categories of vehicles was not intended by the Legislature. Passenger automobiles are in three categories, based only upon the weight of the vehicle (R.S. 39:3-8). Commercial vehicles are registered under numerous categories whose basis is "gross weight of vehicle and load," (R.S. 39:3-20). Omnibuses and taxicabs are registered according to passenger carrying capacity (R.S. 39:3-19).

In addition, the registration plates for certain categories of motor vehicles must display various identifying letters or words as follows:

Commercial	X	R.S. 39:3-20
Trailer	T	R.S. 39:3-20
Omnibus	O	R.S. 39:3-19
Dealers' and Manufacturers'	D	R.S. 39:3-18
Farmer	Farmer	R.S. 39:3-25
Constructor	Constructor	R.S. 39:3-20

We thus advise that transfers of registration to replacement motor vehicles may be done only within the category for which the original motor vehicle was registered and that shifting registrations between categories of motor vehicles, for example passenger to commercial, is outside the statutory authority.

Very truly yours,

DAVID D. FURMAN  
Attorney General

AUGUST 9, 1961

HONORABLE KATHARINE E. WHITE  
State Treasurer  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-14

DEAR MRS. WHITE:

You have requested our opinion as to the proper interpretation to be placed on specific sections of C. 143, P.L. 1958, N.J.S.A. 43:3B-1 et seq. P.L. 1958, C. 143 provides for an increase in the retirement allowance of certain retired public employees according to a legislative formula which is based on percentages determined by the calendar year in which the retirement became effective. The questions will be answered in the order asked.

1. In computing the years of service, may the Division base its computation on whole years of service and consider a fractional portion of six months or more equivalent to a full year of service, while disregarding any fractional portion of less than six months?

In computing years of service the retiree should be credited with the same credit which he has received from the system from which he is receiving his regular retirement allowance. In most systems the board of trustees is specifically empowered with the authority to fix and determine by appropriate rules and regulations how much service in any year shall equal a year of service and part of a year of service, e.g., N.J.S.A. 43:15-39 (Public Employees' Retirement System); N.J.S.A.

18:13-112.17 (Teachers' Pension and Annuity Fund). Since this increase is an increase in the regular retirement allowance, there is no reason to treat it in a manner different from that used to compute regular retirement credit. In other words, since the retirant is receiving a regular allowance based on a specific number of years of service, his increased allowance should be based on the same years of service.

2. If an individual who is eligible for an increased pension under this statute dies during the month, is the accrued portion of the increase payable to his estate or beneficiary?

You have advised that with respect to regular retirement allowances the accrued portion of an allowance of an individual who dies during the month is paid to the estate or beneficiary of the decedent. It is our opinion that the accrued portion of this increase should be paid to the estate or beneficiary of the decedent in accordance with the rules and regulations of the respective funds. As stated above, the increase provided for by Chapter 143, P.L. 1958 is an increase in the regular retirement allowance and consequently the same procedure should be followed in making payment of this increase as is followed in making payment of the regular retirement allowance.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: ROBERT S. MILLER  
*Deputy Attorney General*

AUGUST 9, 1961

HONORABLE NED J. PARSEKIAN  
*Acting Director*  
*Division of Motor Vehicles*  
25 South Montgomery Street  
Trenton, New Jersey

MEMORANDUM OPINION—P-15

DEAR DIRECTOR PARSEKIAN:

We have been asked whether constructor registration plates may be issued to tractors and semi-trailers as individual units, as well as in combinations known as "wedded units." R.S. 39:3-20 provides for the issuance of constructor registration plates for vehicles which may exceed the limitation on the weight of loaded commercial vehicles. The use of such plates is narrowly restricted. The Director must be satisfied by proof that the applicant is actually engaged in construction or supplying of material for construction. Vehicles so registered may not be operated more than 30 miles from the headquarters of the particular construction operation in which they are involved. Special restrictions are placed on their speed.

The law has always intended that a set of constructor plates be identified with a particular vehicle or a particular combination of vehicles. This is indicated by the statutory provision that the maximum lawful loaded weight of a particular vehicle or a particular combination of vehicles is limited by the gross weight recorded on its registration certificate, id., and by absence of any express provision for interchange

ability of constructor plates between constructor vehicles analogous to the provision for interchange ability made in the case of dealer plates by R.S. 39:3-18. Prior to March 30, 1960, R.S. 39:3-20 read in part as follows:

"\* \* \* the director shall issue registrations providing for the gross weight of vehicle and load of over forty thousand pounds but not exceeding seventy thousand pounds, upon application therefor and proof to the satisfaction of the director that the applicant is actually engaged in construction work or in the business of supplying material, transporting material, or using such registered vehicle for construction work. The license plate so issued shall be marked 'constructor' and shall be placed upon the vehicle or vehicles registered under this section."

While the statute so read you inform us that the Division of Motor Vehicles adopted a policy of permitting issuance of one set of constructor plates to be used for a particular combination of a tractor and a semi-trailer. Such a combination of vehicles so registered was commonly referred to as a "wedded unit." One plate of the set was displayed on the front of the tractor and the other on the rear of the semi-trailer. The components of the wedded unit have not been operated either separately or in combination with vehicles other than each other.

On March 30, 1960, L. 1960, c. 12, became effective. This statute amended the part of R.S. 39:3-20 quoted above by inserting the following italicized language:

"\* \* \* the director shall issue registrations for *automobile commercial vehicles, trailers, semi-trailers, and tractors* \* \* \*"

This amendment is clear authority for the issuance of a set of constructor plates to a tractor and for the issuance of a set of constructor plates to a semi-trailer. But the maximum lawful weight even of a combination of a tractor and a semi-trailer individually registered as constructor vehicles remains seventy thousand pounds. This was made clear by the insertion of the following new language in R.S. 39:3-20 by the 1960 Act:

"In no event shall a vehicle or combination of vehicles, operating as a unit, registered under this section and using 'constructor' registration plates exceed a maximum gross weight, inclusive of load, of seventy thousand pounds."

If a person applies for registration of a tractor or a semi-trailer individually, it is our opinion that it is your duty to issue a registration to each vehicle if all other conditions of the law are met. Either may then be used in a combination with any other vehicle individually registered as a constructor vehicle where the combined loaded weight is less than seventy thousand pounds and all other conditions of the law are met. It is also our opinion that the italicized language quoted above, inserted in the law by the 1960 Act, and the implication of the weight limitation now applicable to "a vehicle or combination of vehicles," was not intended to terminate your authority to issue a single set of plates to a "wedded unit" according to prior practice where a person makes application therefor and intends to use each component of the "wedded unit" exclusively in combination with the other—neither alone nor with another vehicle.

Of course, constructor registration of any vehicle only authorizes use of the vehicle bearing the plates for the purposes specified in the law. If a tractor is indi-

vidually registered only as a constructor vehicle, it may only be used for constructor purposes and may not be used to draw a semi-trailer bearing commercial plates and engaged in ordinary commercial purposes; a semi-trailer individually registered only as a constructor vehicle may not be used for ordinary commercial purposes. Cf. *State v. Tucker*, 61 N.J. Super. 161 (App. Div. 1960).

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: WILLIAM L. BOYAN  
*Deputy Attorney General*

AUGUST 10, 1961

HONORABLE KATHARINE E. WHITE  
*Acting State Treasurer*  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-16

DEAR MRS. WHITE:

Former State Treasurer Kervick has asked whether the administrator of the estate of a deceased prison officer, who was an active member of the Prison Officers Pension Fund at the time of his death, is entitled to a refund of contributions in the event that the officer died leaving no widow, no minor children and no dependents.

We are of the opinion that the statute does not authorize a refund of contributions and therefore none can be paid. R.S. 43:7-15 provides for refunds whenever a prison officer is suspended, resigned, dropped or discharged from his employment. However, the statute specifically provides that "No other refund of assessments collected from the salaries of such pension [sic] officers shall be made."

R.S. 43:7-9 covers the situation where a prison officer dies in the performance of his duties. It provides certain pension benefits for the widow and children of the officer. It then goes on to state that "In the event that there is no widow and no children under the age of 16 years, at the time of the death of such prison officer, then such pension shall be paid to the dependent parent or parents, if any, of such deceased prison officer." This is all that the statute provides. There is no authority whatsoever for authorizing payment to the administrator of the estate in the event that there is no widow, dependent children or dependent parents.

This result differs from the result in the Public Employees' Retirement System, where, under N.J.S.A. 43:15A-49 and N.J.S.A. 43:15A-41(c), express provision is made for payment to the estate under these circumstances. The Prison Officers Pension Commission, however, has no statutory authority to comply with the administrator's request.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: ROBERT S. MILLER  
*Deputy Attorney General*

AUGUST 15, 1961

HON. STANLEY E. RUTKOWSKI  
*Prosecutor, Mercer County*  
Mercer County Court House  
Trenton, New Jersey

MEMORANDUM OPINION—P-17

DEAR PROSECUTOR RUTKOWSKI:

You have asked whether you may, under R.S. 43:10-23, compel the retirement for disability of a member of your staff of detectives.

R.S. 43:10-23 reads as follows:

"Any county detective who shall have received a permanent disability by reason of injury, accident or sickness, incurred at any time in the service, which shall permanently incapacitate him from further duty, shall, upon the certification of the fact of such disability by three physicians designated as hereinafter provided, be retired upon one-half pay."

This statute was originally enacted by L. 1921, c. 140, § 5. L. 1921, c. 140, R.S. 43:10-19 to 29, provided a comprehensive scheme for retirement of detectives in certain counties for service, age and disability. Consideration of other sections of the 1921 act indicates that it intended to provide for retirement only where application for retirement is initiated by the employee. Section 4, R.S. 43:10-22, provides in part as follows:

"Any county detective who shall have served as such for a continuous period of 20 years \* \* \* who shall be found \* \* \* to be physically unfit for further service, shall, upon application in writing to the prosecutor of the pleas of his county, be retired upon one-half pay." (Emphasis added.)

Section 6 of the 1921 act, R.S. 43:10-24, reads in part as follows:

"\* \* \* The three physicians shall examine the county *detective applying* for retirement upon one-half pay because of physical unfitness or incapacity for further duty \* \* \*." (Emphasis added.)

Other retirement statutes—namely, R.S. 43:16-2 and N.J.S.A. 43:16A-7 (Police and Firemen's Retirement System); N.J.S.A. 43:15A-42 and N.J.S.A. 43:15A-43 (Public Employees' Retirement System); and N.J.S.A. 18:13-112.41 (Teachers' Pension and Annuity Fund)—specifically provide for retirement on the initiative of the employer, whereas R.S. 43:10-23 excludes all mention of retirement by application of the employer.

Statutes should be interpreted according to the most natural import of the language, and omitted words or provisions should not be supplied by administrative or judicial interpretation unless clearly implied. *Publix Asbury Corp., Inc. v. City of Asbury Park*, 18 N.J. Super. 286, 293 (Ch. Div. 1952), aff'd 18 N.J. Super. 192 (App. Div. 1952); 82 C.J.S. *Statutes*, § 328, p. 635.

For these reasons you are hereby advised that you are unable to compel the retirement of a county detective under R.S. 43:10-23.

County detectives are in the classified civil service and may be removed where the fact of physical disability is established after notice and hearing pursuant to R.S. 11:22-38 and Rule 59(c) of the Department of Civil Service.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: ROBERT S. MILLER  
Deputy Attorney General

AUGUST 15, 1961

HON. NED J. PARSEKIAN  
Acting Director  
Division of Motor Vehicles  
25 South Montgomery Street  
Trenton, New Jersey

MEMORANDUM OPINION—P-18

DEAR DIRECTOR PARSEKIAN:

We have been asked whether the overlength (i.e., the length in excess of 50 feet but not in excess of 70 feet) authorized by R.S. 39:3-84 in the case of "a vehicle or combination of vehicles transporting poles, pilings, structural units or other articles incapable of dismemberment" applies only to the load or also to the vehicle or combination of vehicles where the load does not extend beyond it or them.

L. 1921, c. 208, appears to be the earliest statute limiting the length of motor vehicles which may be operated on the public highways of this State. Paragraph (1) of §21 of this act forbade combinations of more than two vehicles with the following proviso:

"Any municipality while operating municipally owned vehicle or vehicles under contract over any highway maintained wholly by such municipality may use more than one motor-drawn vehicle, but not exceeding three motor-drawn vehicles in the aggregate while such municipality is engaged in the collection of garbage, ashes, or street repairs."

Paragraph (4) of §21 generally limited the "extreme over-length" of any vehicle to 28 feet. But it contained the following proviso:

"Where more than one vehicle or trailer is operated, the length of such vehicles may exceed twenty-eight feet; but in no event shall all such vehicles or trailers so drawn or operated exceed eighty-five feet in length over all."

The extreme limit in the proviso of 85 feet appears to have been intended to govern combinations of vehicles utilized by municipalities in the collection of garbage, ashes or street repairs pursuant to paragraph (1) of §21. No specific limitation of the combined length of a truck and trailer or a tractor and semitrailer was contained in the 1921 act.

The final sentence of paragraph (4) of §21, applicable both to the general limitation of length and to the proviso read as follows:

"All of the aforesaid dimensions shall be inclusive of the load."

L. 1935, c. 265, amended the 1921 act in several important respects. It made the 28 feet limitation applicable to a two-axle vehicle, but extended the limit for a three-axle vehicle to 35 feet. §1. It provided specific limitations for truck-trailer and tractor-semitrailer combinations, of 50 feet and 45 feet respectively. *Id.* It also enacted the operative language of the present text of R.S. 39:3-84, with which this opinion is concerned, authorizing:

"a vehicle or a combination of vehicles transporting poles, pilings, structural units or other articles incapable of dismemberment the total overall length of which shall not exceed seventy (70) feet." *Id.*

The language of the 1921 act that all stated dimensions be inclusive of load was repeated.

The 1935 act did not become fully effective upon enactment. A grace period was permitted to vehicles then in operation or probably in the process of manufacture. Section 3 of the 1935 act read as follows:

"This act shall take effect immediately; *provided*, that the limitations as to *combined weights and lengths of vehicle and load* as applied to vehicles now in operation or manufactured or constructed prior to the first day of January, one thousand nine hundred and thirty-six, shall not be effective until the first day of January, one thousand nine hundred and forty-one." (Emphasis added.)

By L. 1942, c. 268, the permissible length of two-axle vehicles was increased to 35 feet, the same as for three-axle vehicles, and the power to limit the length of buses was delegated to the Board of Public Utility Commissioners. The other provisions of the 1935 act were unchanged by the 1942 act.

L. 1950, c. 142, §2, increased the permissible height of vehicles from 12½ to 13½ feet, but left unchanged the length limitations.

L. 1955, c. 198, did not change the specific height or weight limits. But it deleted the sentence providing that generally the stated dimensions of length shall be inclusive of load, but inserted the qualification "inclusive of load" before the 45 feet limitation on tractor-semitrailer combinations, before the 50 feet limitation on truck-trailer combinations, and before the 70 feet limitation on vehicles or combinations of vehicles transporting structural units. This appears to be a change of style, and not of substance.

L. 1957, c. 161, continued the pattern of the 1955 act, and all the length limitations in the 1955 act except that the 1957 act increased the permissible length of tractor-semitrailer combinations to "a total overall length, inclusive of load, of 50 feet \* \* \*"

The foregoing statutory history shows a legislative intent to make the length limits generally measurable from that part of the load or vehicle most extended in one direction to that part of the load or vehicle most extended in the opposite direction.

The contention has been made, however, that the 70 feet limitation applies only to vehicles *while in the act* of transporting poles, pilings, structural units or other articles incapable of dismemberment. A practical consequence of such an interpretation is either to limit the length of the vehicle or combination of vehicles to 50 feet, even though permitting the load to extend an additional 20 feet beyond the vehicle

or combination of vehicles, or to induce the transportation of poles, pilings, girders and other structural units which cannot be carried on 50 foot vehicles with their front supported by a conventional truck or semitrailer and the rear supported by a small special vehicle consisting almost entirely of an axle or set of axles to which the load is temporarily affixed and with the load supporting itself between these two points of support and beyond the rear axle or set of axles. We have been advised by the Chief Engineer of the Highway Department that these alternatives present in some respects a greater hazard to other users of the highways than does the operation of overlength vehicles where the overlength results from the vehicle itself.

For these reasons it is our opinion that a vehicle or combination of vehicles may have an overall length of not more than 70 feet measured from the part of the vehicle or load most extended in one direction to the part of the vehicle or load most extended in the opposite direction under any one or more of the following circumstances:

(1) where it is actually engaged in transporting poles, pilings, structural units or other articles incapable of dismemberment which cannot be safely carried on a vehicle or combination of vehicles meeting the 50 feet limit; or

(2) where it is engaged in activity ancillary to such transportation, such as being operated unloaded to a point at which it is to be loaded with one or more of the enumerated categories of materials, being operated unloaded from the point at which it was unloaded to its origin or to the point of loading for another load, and otherwise where the operation is directly incidental to the mode of operation described in paragraph 1 of this sentence.

To cite a specific example, it might be lawful for a truck-trailer combination measuring 65 feet in length to transport a bridge beam resting on the trailer with the most rearward point of the beam 56 feet from the front bumper of the truck and 9 feet forward of the most rearward part of the trailer. It would be lawful for such a combination to return empty after being unloaded.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

AUGUST 16, 1961

HONORABLE KATHARINE E. WHITE  
*Acting State Treasurer*  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-19

DEAR MRS. WHITE:

You have sought our advice as to the scope of P.L. 1959, c. 101 in determining what constitutes the annuity portion of a member's retirement allowance. Specifically, you ask what statutory pension systems, if any, are excepted from the application of Chapter 3 of Title 43 by reason of the 1959 amendment (P.L. 1959, c. 101), which provides in pertinent part:

"As used in this chapter, the term 'pension,' when applied to a retirement allowance, shall include only that portion of the retirement allowance which is derived from appropriations made by the employer or by the State."

The question arises because only certain of the various statutory retirement systems distinguish between "pension," "annuity," and "retirement allowance." Under the Public Employees' Retirement System, Teachers' Pension and Annuity Fund, and the Police and Firemen's Retirement System, such a distinction is expressly made. See N.J.S.A. 43:15A-6(b), (g) and (k); N.J.S.A. 43:16A-1(11), (12) and (13); and N.J.S.A. 18:13-112.4(b), (h) and (n).

On the contrary, in the statutes establishing the Consolidated Police and Firemen's Pension Fund (R.S. 43:16-1 to 16-21), the Prison Officers' Pension Fund (R.S. 43:7-7 to 7-27), and the State Police Retirement and Benevolent Fund (R.S. 53:5-1 to 5-7) there is no distinction made between "retirement allowance," "pension," and "annuity." Indeed, where reference is made to "pension" it is used in a broad, generic sense rather than in the technical sense of the first three statutes above-mentioned. For example, in R.S. 43:16-17(8), "pension" is defined as meaning "the amount payable to a member or his beneficiary under the provisions of this act." Furthermore, we are informed that with reference to the administration of the latter three systems there has never been a distinction made between that portion of the member's allowance which is derived from his own contributions ("annuity") and that portion which is derived from employer contributions ("pension").

In sum, prior to the advent of the modern annuity-type retirement systems, all payments to retired employees were generally denominated "pensions." The terms "retirement allowance" and "annuity" have been utilized only in the more modern pension systems. By the very wording of the 1959 amendment "the term 'pension'" is only involved "when applied to a retirement allowance."

Thus, the effect of Chapter 101 of P.L. 1959 is limited to those retirement systems—namely, the Public Employees' Retirement System, Teachers' Pension and Annuity Fund, and the Police and Firemen's Retirement System—where the terms "retirement allowance," "pension," and "annuity" are differentiated by statutory definition.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: ROBERT S. MILLER  
*Deputy Attorney General*

AUGUST 16, 1961

HONORABLE ROSCOE P. KANDLE, M.D.  
*State Commissioner of Health*  
129 East Hanover Street  
Trenton, New Jersey

MEMORANDUM OPINION—P-20

DEAR DOCTOR KANDLE:

You have requested our opinion as to the proper interpretation to be given to R.S. 58:11-18.13 and R.S. 58:11-18.19, insofar as they apply to the renewal of li-

censes for operators of public water treatment plants, public sewerage treatment plants and public water supply systems which are privately owned or maintained. The pertinent portions of these statutes provide:

R.S. 58:11-18.13:

"\* \* \* Licensees shall apply for renewal on or before the thirtieth day of September of each year. *Renewal may be effected at any time during the month of September by the payment of a fee of five dollars (\$5.00) \* \* \**" (Emphasis added.)

R.S. 58:11-18.19:

"Licensees employed in the operation of public water treatment plants, public sewerage treatment plants, or public water supply systems, *privately owned or maintained by any person or corporation*, shall be exempt from the payment of the annual renewal fee provided in this act except the fee of one dollar (\$1.00) for every three months or fraction thereof that the application for renewal be delinquent; *provided, however, that all licenses issued without the payment of the renewal fee shall be valid only at the utility at which the licensee is employed at the time of the issuance of the license. \* \* \**" (Emphasis added.)

Specifically, you ask how the above-mentioned statutes apply to the following situation:

A licensee applies to the department for a renewal of his license. The application form provides a section for the applicant to indicate whether he is presently employed at a facility which is publicly owned or maintained, or one which is privately owned or maintained. At the bottom of the application it is stated that a person employed at a facility which is publicly owned or maintained is required to pay a five dollar renewal fee. The applicant indicates on the form that presently he is employed at a facility which is privately owned or maintained. Nevertheless, with his application he submits five dollars.

The exemption granted in R.S. 58:11-18.19, while excluding the operators of privately owned or maintained facilities from the payment of the renewal fee also provides that all licenses issued without the payment of the renewal fee shall be valid *only* at the utility at which the licensee is employed at the time of the issuance of the license. Therefore, while benefiting a licensee to the extent that he is not required to pay a fee, it also restricts him in the use he can make of the license. A licensee realizing the restriction inherent in such a renewal may desire to have an unrestricted license although this requires the payment of a fee. For example, a licensee, although presently employed privately, may anticipate working at a publicly owned or maintained facility or he may anticipate operating two plants. It would be to his advantage to have an unrestricted license, although he is not required under those circumstances to take a new examination.

Our opinion is, therefore, that when a licensee employed at a privately owned or maintained public water treatment plant, public sewerage treatment plant or public water supply system files an application for renewal of his license and pays a five-

dollar fee, the State Department of Health may issue him an unrestricted license valid for any publicly or privately owned facility.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: THOMAS F. TANSEY  
*Deputy Attorney General*

AUGUST 17, 1961

HONORABLE KATHARINE E. WHITE  
*Acting State Treasurer*  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-21

DEAR MRS. WHITE:

You have asked our opinion as to the amount of funds a member may borrow from the Teachers' Retirement System pursuant to N.J.S.A. 18:13-112.37. That section allows a member with over three years of creditable service to borrow from the system "an amount equal to not more than 50% of the amount of his accumulated deductions." Specifically, you desire to know whether the term "accumulated deductions" for the purpose of making loans includes contributions on behalf of an employee by an employer during a term of military service.

The case of *Bruder v. Teachers' Pension and Annuity Fund*, 27 N.J. 266, 274-277 (1958) has already determined this question. Such employer contributions may not be considered as a part of a member's accumulated deductions.

The New Jersey Supreme Court distinguished between the contributions for an employee as opposed to contributions by such an individual. It should be noted that the loan provision utilizing the term "accumulated deductions" does not encompass the broader definition in N.J.S.A. 18:13-112.36 applicable to funds subject to withdrawal, i.e., accumulated deductions standing to the credit of a member's individual account in the annuity savings fund. The additional phrase "standing to his credit" was considered a decisive distinction by the Supreme Court in the *Bruder* case in holding as follows:

"If the Legislature intended to include contributions by employers during wartime service within the term 'accumulated deductions' as utilized in N.J.S.A. 18:13-112.72(a), it had only to so specify in language comparable to that utilized in N.J.S.A. 18:13-112.36."

The aforesaid loans, it is noted further, may be made to a member from either of two sources: (1) from the annuity savings fund (N.J.S.A. 18:13-112.21), or (2) from moneys which have been set aside by the Board of Trustees for this purpose in the contingent reserve fund (N.J.S.A. 18:13-112.20). See the final paragraph in N.J.S.A. 18:13-112.37. In either event, however, members of the system may borrow

only to the extent of 50% of the amount they have contributed in addition to the applicable interest.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: ROBERT S. MILLER  
Deputy Attorney General

AUGUST 23, 1961

COLONEL JOSEPH D. RUTTER  
Superintendent of State Police  
West Trenton, New Jersey

MEMORANDUM OPINION—P-22

DEAR COLONEL RUTTER:

You have asked me for advice as to whether a State Trooper who resigns after less than two years of service is entitled to a refund of his contributions to the State Police Retirement and Benevolent Fund. My answer is in the negative.

The applicable statute is R.S. 53:5-6, which authorizes refunds only to members who are thus terminating their services after two years or more membership in the State Police Force. R.S. 53:5-6 provides in part as follows:

"Any person who is a member of the state police retirement and benevolent fund and who for a period of at least two years has made the payments required to be made to such fund, shall upon the termination of his service, prior to retirement as authorized by this chapter, be entitled to have and receive from the state treasurer the total sum of his said payments with interest thereon at the rate of two per cent per annum."

The State Trooper who resigns after less than two years service has no statutory or constitutional claim to a refund of his employee contributions to the State Police Retirement and Benevolent Fund with or without interest. According to Justice Heher in *Passaic National Bank & Co. v. Eelman*, 116 N.J.L. 279, 284 (Sup. Ct. 1936), the Court said:

"The rule is that compulsory deductions from the salaries of governmental employees, by the authority of the government, for the support of a pension fund, create no contractual or vested right between such employees and the government, and neither the employees, nor those claiming under them, have any rights except such as are conferred by the statute creating and governing the fund."

Very truly yours,

DAVID D. FURMAN  
Attorney General

SEPTEMBER 20, 1961

HON. NED J. PARSEKIAN  
Acting Director  
Division of Motor Vehicles  
25 South Montgomery Street  
Trenton, New Jersey

MEMORANDUM OPINION—P-23

DEAR DIRECTOR PARSEKIAN:

You have requested our opinion as to the effect of the enactment of L. 1959, c. 145 on revenues derived from certain motor vehicle sources listed below. Chapter 145 amended R.S. 39:3-3 and R.S. 39:10-25, and became effective July 1, 1959.

The cited sources about which you have inquired are the following:

Interstate Bus Excise Tax—R.S. 48:4-20 et seq.  
Fines—R.S. 39:4-47, R.S. 39:5-40, R.S. 39:8-9(g), R.S. 39:9-4(g),  
R.S. 39:11-11(g), R.S. 39:12-12(g)  
Junk Yard License Fees—R.S. 39:11-8  
Auto Race Track Fees—R.S. 5:7-8 et seq.  
Driver School and Instructor Licenses—R.S. 39:12-2, R.S. 39:12-5  
Service of Process on Non-Residents—R.S. 39:7-2.2, R.S. 39:7-5  
Certificate of Drivers Record—R.S. 39:6-42  
Oversized Vehicle Permits—R.S. 39:4-26  
Transfer of Registration—R.S. 39:3-30  
Certified Copy of Regulations and Directives—Division Directive

Chapter 145 of the Laws of 1959 amended the two statutes above cited, i.e., R.S. 39:3-3 and R.S. 39:10-25, in the following manner. Originally, when the statutes were enacted, the purpose for which they were passed was to provide a method for licensing drivers and for registering and providing title certificates for motor vehicles. Agents of the then Commissioner were appointed throughout the State. These agents collected moneys for drivers' licenses, motor vehicle registrations and certificates of title and paid them to the Commissioner, who, upon receipt, remitted to the agent a percentage thereof in an amount which his regulation had provided.

Chapter 145 revises this. Under it all moneys received by Motor Vehicle agents are to be deposited directly to the credit of the State Treasurer in such depository as he directs, and the commission to which the agents are entitled is paid over to them from the general assets of the State Treasury.

The intent of this enactment was to establish a central fiscal control conforming with the general statute relative to collection of moneys, namely, N.J.S.A. 52:18A-8. This statute, enacted in 1948 (L. 1948, c. 92) was part of the reorganization of the State Treasury Department subsequent to the adoption of the Constitution of 1947. The State Treasurer's Office was reconstituted as the Department of the Treasury. This revision provided the following procedure, which is applicable to all revenues collected by the State except as specifically provided otherwise by any statute.

"All State revenue collected by any department, institution, commission, board, committee or official of this State shall, except as otherwise provided by law, be deposited, in the method prescribed by the director of the Division of Budget and Accounting, to the credit of the State of New Jersey in such depositories as the State Treasurer shall designate. A report of such moneys collected shall be submitted to such director and the State Treasurer in such form as the director shall prescribe \* \* \*."

Until the passage of Chapter 145, R.S. 39:3-3 and R.S. 39:10-25 were specific provisions of law under which the Director, then Commissioner, was required to deal separately with the moneys collected for license and registration fees (R.S. 39:3-3) and for certificates of title (R.S. 39:10-25). As described above, not all of the amount of the fees was subject to deposit with the Treasurer, but only that part remaining after payment by the Commissioner of the agent's commission. Thus, these two statutes stood outside the framework which was provided generally for State revenues by Title 52.

The revenues provided by the other statutes or regulations you have listed are governed as to their disposition by you as Director by N.J.S.A. 52:18A-8 and not by R.S. 39:3-3 and R.S. 39:10-25. The specific statutes vary in their terms. Most specify that the Director (Commissioner) of Motor Vehicles hold temporary or limited custody or receive payment of the funds and remit to the State Treasury, sometimes for dedicated purposes. A few make no provision for remission to the State Treasury (R.S. 39:11-8; R.S. 39:12-5; R.S. 39:7-5; R.S. 39:6-42; R.S. 5:7-18; see also R.S. 39:3-84.3; R.S. 39:4-26; R.S. 39:3-28). All should be deposited by the Director of the Division of Motor Vehicles to the credit of the State of New Jersey, General Treasury, in accordance with the method prescribed by the Director of the Division of Budget and Accounting under N.J.S.A. 52:18A-8, with a code number identification of the specific account. The transmittal of income form and a copy of the deposit slip should be held for the Department of the Treasury.

In summary, you are advised that Chapter 145 of the Laws of 1959 has no direct effect upon the other statutes listed. Since the question has been raised, the subsidiary point is dealt with as well. It is proper for you, administratively, to continue to comply in all cases with the method of payment into the State Treasury established pursuant to N.J.S.A. 52:18A-8.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

SEPTEMBER 20, 1961

HONORABLE NED J. PARSEKIAN  
*Acting Director*  
*Division of Motor Vehicles*  
25 S. Montgomery Street  
Trenton, New Jersey

MEMORANDUM OPINION—P-24

DEAR DIRECTOR PARSEKIAN:

You have sought my opinion as to whether a truck bearing dealer's plates and hauling a commercial load is in violation of the commercial registration (R.S. 39:3-20)

or overweight (R.S. 39:3-84) statutes, under the circumstance that it is on loan from a motor vehicle dealer, the title owner, for demonstration purposes and not for hire.

My opinion is that the use of dealer's plates is lawful and that no motor vehicle violation exists on the facts stated. Formal Opinion 1960—No. 15 is squarely in point and its statutory analysis of R.S. 39:3-18 is incorporated herein.

A truck cannot be reliably tested for performance without a load. Whether a truck on trial or demonstration run hauls a dummy load or a commercial load is immaterial. A truck which is hired or purchased from a dealer, however, must display commercial plates, and its operation on a public highway with dealer plates would constitute a motor vehicle violation. Similarly, use by a dealer or his employee in another commercial enterprise of the dealer has been held by the courts to require commercial, not dealer, plates. *State v. Tucker*, 61 N.J. Super. 161 (App. Div. 1960).

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

SEPTEMBER 20, 1961

HONORABLE KATHARINE E. WHITE  
*Acting State Treasurer*  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-25

DEAR MRS. WHITE:

You have asked our opinion with respect to the effect of N.J.S.A. 18:13-112.51 on N.J.S.A. 18:13-112.70 and R.S. 43:3-1 et seq.

N.J.S.A. 18:13-112.51 describes the benefits payable to members of the former Teachers' Retirement Fund. It reads:

"Any member or beneficiary of the Teachers' Pension and Annuity Fund who was a member of the Teachers' Retirement Fund as created by L. 1896, c. 32; L. 1899, c. 178; L. 1900, c. 96; L. 1902, c. 36; L. 1903 (2nd Sp. Sess.), c. 1; L. 1905, c. 95; L. 1906, c. 314; L. 1907, c. 139; and the amendments thereof and supplements thereto, prior to his becoming a member of the Teachers' Pension and Annuity Fund, shall receive in addition to his retirement allowance otherwise payable a pension which shall be the actuarial equivalent of the contributions, without interest, which he paid to the Teachers' Retirement Fund prior to September 1, 1919, which he has not otherwise received."

N.J.S.A. 18:13-112.70 requires that the retirement allowance of a member who reaches 65 years of age shall be reduced "by the amount of the old age insurance benefit under Title II of the Social Security Act paid or payable to him whether received or not." It provides, however, that "the retirement allowance shall not be reduced below the amount of the annuity portion of the retirement allowance fixed at the time of the member's retirement \* \* \*." In short, when the Social Security

offset is applicable, it can be applied only against the "pension" part of the member's retirement allowance.

The question, therefore, can be phrased as follows: should the Social Security offset be applied against the "pension" benefits payable under N.J.S.A. 18:13-112.51? We are of the opinion that it should not. The word "pension" in the latter statute is not used in a technical sense. It is expressly made to mean "the actuarial equivalent of the contributions, without interest, which he [the member] paid to the Teachers' Retirement Fund \* \* \*." Cf. the definition of "pension" found in N.J.S.A. 18:13-112.4(h):

"'Pension' means payments for life derived from appropriations made by the State to the Teachers' Pension and Annuity Fund."

In sum, the word "pension" in N.J.S.A. 18:13-112.51 is equivalent to "the annuity portion of the retirement allowance" found in N.J.S.A. 18:13-112.70. Thus, the Social Security offset should not apply to it. The offset should be applied only to the pension portion of the retirement allowance otherwise payable to the member.

For the reasons expressed above, we also hold that R.S. 43:3-1 et seq. does not require that the benefits payable under N.J.S.A. 18:13-112.51 be suspended on account of earnings in public employment. R.S. 43:3-1 provides that a person who receives a governmental pension is ineligible to hold any public position or employment other than elective and receive both the "pension" and the salary or compensation allotted to his office or employment; if he wishes to retain the salary of the position, he must waive his "pension." The statute, however, expressly provides that:

"The term 'pension,' when applied to a retirement allowance, shall include only that portion of the retirement allowance which is derived from appropriations made by the employer or by the State."

Since the benefits payable under N.J.S.A. 18:13-112.51 clearly do not come within this definition, R.S. 43:3-1 is not applicable.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: ROBERT S. MILLER  
*Deputy Attorney General*

SEPTEMBER 20, 1961

HONORABLE KATHARINE E. WHITE  
*Acting State Treasurer*  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-26

DEAR MRS. WHITE:

You have asked our opinion with respect to the amount of the disability retirement allowance, if any, payable to an individual who retired on a disability retirement allowance under N.J.S.A. 43:15A-44 but subsequently returned to public employment.

N.J.S.A. 43:15A-44 provides that a disability retiree shall be re-examined periodically and if he is, upon such re-examination, found to be engaged in or capable of engaging in a gainful occupation "then the amount of his pension shall be reduced to an amount which, when added to the amount then earnable by him, shall not exceed the amount of his final compensation." On the other hand, R.S. 43:3-1 requires that a pensioner who returns to public employment must waive either (1) his pension or (2) the salary or compensation allotted to his office or employment. In pertinent part the latter statute reads:

"Any person who is receiving or who shall be entitled to receive any pension or subsidy from this or any other State \* \* \* shall be ineligible to hold any public position or employment other than elective in the State \* \* \* unless he shall have previously notified and authorized the proper authorities of said State \* \* \* from which he is receiving or entitled to receive the pension that, for the duration of the term of office of his public position or employment he elects to receive (1) his pension or (2) the salary or compensation allotted to his office or employment."

In sum, the question becomes: which of these statutory provisions takes precedence when a disability retiree subsequently becomes engaged in public employment in this State? Is the retiree to be required to waive the entire pension pursuant to R.S. 43:3-1 et seq. or is he rather subjected to the reduced disability retirement allowance in accordance with the provisions of N.J.S.A. 43:15A-44?

It is important to note that the statutes governing the major pension fund systems make provisions of a similar nature to that found in N.J.S.A. 43:15A-44. In the Consolidated Police and Firemen's Pension Fund Commission, R.S. 43:16-2, a disability retiree who "is able to perform either his former usual duties, if such be available, or such other available duties in the department which his employer shall assign to him \* \* \* shall report for such duty within ten days \* \* \* and thereupon his pension payments shall cease." Under N.J.S.A. 43:16A-8 (Police and Firemen's Retirement System), when a policeman or fireman is "engaged in or is able to engage in a gainful occupation paying more than the difference between his retirement allowance and his average final compensation \* \* \* then the amount of his pension shall be reduced to an amount which, together with his annuity and the amount earnable by him, shall equal the amount of his average final compensation." Additionally, under N.J.S.A. 18:13-112.42 (Teachers' Pension and Annuity Fund), the "amount of pension shall be reduced to the amount which, when added to the amount then earned by him, shall not exceed the amount of his final compensation."

We note first that policemen and firemen who retire on disability pensions for service-connected disabilities and then return to public employment are not subject to R.S. 43:3-1. R.S. 43:3-5 specifically exempts such persons. In applicable part it reads:

"\* \* \* nor shall the provisions of this chapter apply to \* \* \* any person who has or who may hereafter receive permanent disability in the performance of his duty while serving as a member of the Armed Forces of the United States, the New Jersey State Police, or the police department, or the fire department of any county or municipality of this State."

With respect to members belonging to the Teachers' Pension and Annuity Fund and the Public Employees' Retirement System, however, a contrary result must be

reached. R.S. 43:3-1.1, R.S. 43:3-5, R.S. 43:3-5.1 and R.S. 43:3-5.2 expressly exclude from the operation of R.S. 43:3-1 various employees, offices and positions. By so doing the Legislature has indicated its intention to make R.S. 43:3-1 applicable to all other people. *Expressio unius est exclusio alterius.*

R.S. 43:3-2 further manifests this intention: "The pensions from or the public positions or employment with the state referred to in section 43:3-1 of this title shall affect all officers, employees or persons under the government of this state, even though they may not be paid directly from the state treasury, but are paid from proceeds derived from appropriations, license fees or other sources." (Emphasis supplied.)

Additionally, it must be observed that R.S. 43:3-1 has been amended as recently as 1959 (*See: Laws of 1959, c. 101*), whereas N.J.S.A. 43:15A-44 has not been amended at all since its original enactment and N.J.S.A. 18:13-112.42 was last amended in 1956 (*See: Laws of 1956, c. 145, § 10*). It is a fundamental rule of statutory construction that the later expression of legislative will prevails over the former to the extent of any inconsistency. *Two Guys from Harrison, Inc. v. Furman*, 32 N.J. 199, 223, 225 (1960).

In sum, the particular employee in question, and all members of the Teachers' Pension and Annuity Fund and Public Employees' Retirement System who retire on a disability retirement allowance are subject to the provisions of R.S. 43:3-1 upon securing public reemployment except as permitted by R.S. 43:3-1.1, R.S. 43:3-5, R.S. 43:3-5.1 and R.S. 43:3-5.2. Upon a return to private employment, R.S. 43:15A-44 is specifically applicable and must be enforced.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: ROBERT S. MILLER  
*Deputy Attorney General*

SEPTEMBER 29, 1961

HONORABLE KATHARINE E. WHITE  
*Acting State Treasurer*  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-27

DEAR MRS. WHITE:

We have been asked to determine whether the Pension Increase Act, L. 1958, c. 143, N.J.S.A. 43:3B-1 et seq., applies to employees of terminated pension funds (such as the Board of Education Employees' Pension Fund of Hudson County, and the Municipal Employees' Pension Fund of the Village of South Orange) who retired between 1915 and 1951, inclusive, and are now receiving their pension allowances from the Public Employees' Retirement System (*see* N.J.S.A. 43:15A-111).

In applicable part (N.J.S.A. 43:3B-1) Chapter 143 reads as follows:

"As used in this act 'retirant' means any person who was employed by the State of New Jersey, any of its instrumentalities, any of its political subdivisions or any of the instrumentalities of its political subdivisions, retired from such employment in any of the calendar years set forth in this act and, as a result of such employment, is receiving a retirement allowance from a retirement system or pension fund supported in part or in whole by the State of New Jersey, or is receiving a retirement allowance under any law, the financial support of which comes solely from the State of New Jersey."

The Act then provides generally for increases in the amount of pensions payable to "retirants," the increases being calculated in accordance with a stated list of percentages for the years 1915 through 1951, inclusive.

The individuals in question fall within the aforesaid Act and are entitled to the increases stated therein. These persons fit the definition of "retirant" mentioned above: they have been employed by an instrumentality of one of the State's political subdivisions; they have retired from such employment in the calendar years 1915 through 1951; and, as a result of such employment, they are receiving a retirement allowance through the Public Employees' Retirement System. Additionally, the statement of purpose appended to the bill which subsequently became L. 1958, c. 143, provides: "This bill is intended to meet in some part the situation that exists for certain former public employees who, having retired on pensions based on the salary levels of many years ago, now face varying degrees of hardship because of serious increases in the cost of living since their retirement. \* \* \*" The Legislature clearly intended to help these persons if they are receiving a retirement allowance from the Public Employees' Retirement System or any other pension fund supported in part or in whole by the State of New Jersey. It is immaterial that these persons were not paid their retirement allowances through the Public Employees' Retirement System prior to the effective date of the Pension Increase Act of 1958 so long as they are receiving such allowances now. Upon the assumption of the pension obligation by the Public Employees' Retirement System such retirants qualified for the pension increases provided by L. 1958, c. 143. We are constrained to interpret the pension laws in the light of the goals of the humane social legislation of which they are a part. *Roth v. Board of Trustees, etc.*, 49 N.J. Super. 309, 320 (App. Div. 1958).

Therefore, we advise you that the individuals in question are entitled to the benefit of L. 1958, c. 143 as of the time when they first began receiving their pensions from the Public Employees' Retirement System.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: ROBERT S. MILLER  
*Deputy Attorney General*

SEPTEMBER 29, 1961

HONORABLE KATHARINE E. WHITE  
*Acting State Treasurer*  
 State House  
 Trenton, New Jersey

## MEMORANDUM OPINION—P-28

DEAR MRS. WHITE:

You have asked our opinion as to the eligibility of persons serving part-time and on an hourly salary as municipal special policemen, school crossing guards and parking violations officers to participate in either the Public Employees' Retirement System or the Police and Firemen's Retirement System.

We are informed that some of the employees in question are veterans, while others are not, and that some of the employees are in the classified service of the Civil Service while others are unclassified. All of them, however, are considered hourly, part-time employees.

It is our opinion that none of these employees are eligible to participate in the Police and Firemen's Retirement System inasmuch as they do not come within the definition of "policeman or fireman" found in N.J.S.A. 43:16A-1(2). The latter reads as follows:

"'Policeman or fireman' shall mean any *permanent and full time* active uniformed employee, and any active permanent and full time employee who is a detective, lineman, fire alarm operator or inspector of combustibles, of any police or fire department of a municipality or a fire department of a fire district located in a township or a county police department." (Emphasis supplied.)

See also N.J.S.A. 43:16A-3(3) which provides in pertinent part that:

"The board of trustees \* \* \* shall deny it [the right to become members] to those who are serving in a temporary or other than a per annum basis \* \* \*."

With respect to membership in the Public Employees' Retirement System, however, a different result must be reached. Under N.J.S.A. 43:15A-7 the membership of the Public Employees' Retirement System is established. In applicable part the statute reads:

"The membership of the retirement system shall include:

\* \* \*

"(b) Any person becoming a permanent employee of the State after the effective date of this section; and

"(c) Every State employee veteran in the employ of the State on the effective date of this section who is not a member of any other retirement system supported wholly or partly by the State; \* \* \*."

"The board may deny the right to become members of the retirement system to any class of elected officials or to any class of persons other than veterans not within the classified civil service \* \* \*. Notwithstanding any

other law to the contrary all other persons accepting permanent employment in the classified service of the State shall be required to enroll in the retirement system as a condition of their employment, regardless of age. No person in employment, office or position, for which the annual salary or remuneration is fixed at less than \$500, shall be eligible to become a member of the retirement system."

The above statute, taken in conjunction with N.J.S.A. 43:15A-62 and N.J.S.A. 43:15A-63 (requiring that veteran employees of a county or municipality, among others, must become members of the Public Employees' Retirement System unless they are in a position covered by another contributory pension system) manifestly requires that all of the veteran employees in question must be accepted into the Public Employees' Retirement System, except those in positions covered by a contributory pension system other than the Public Employees' Retirement System.

The nonveteran employees fall into two categories: those in the classified service of the Civil Service and those in the unclassified service or without Civil Service status at all. Under N.J.S.A. 43:15A-7, the Board of Trustees may deny the right of membership to the latter, for by the express terms of the statute the Board may deny this right "to any class of persons other than veterans not within the classified Civil Service." In short, in the case of nonveterans in the unclassified service or employed in municipalities not covered by Civil Service, the Board has the discretion to deny membership under regulations in accordance with the statute, based upon administrative and actuarial consideration.

With respect to the nonveteran employees who are in the classified service, however, a different situation prevails. N.J.S.A. 43:15A-7 provides that any person who becomes a permanent employee of the State after the effective date of the section must become a member of the Public Employees' Retirement System. N.J.S.A. 43:15A-62 confers the same obligation upon employees of any county or municipality of the State which has been previously covered by the former State Employees' Retirement System. Furthermore, N.J.S.A. 43:15A-74 and 43:15A-75 state that membership in the Public Employees' Retirement System is compulsory for all employees entering the service of a municipality or a county after the act becomes effective provided that, by referendum, a majority of the voters have voted in favor of the adoption of the provisions of the Public Employees' Retirement-Social Security Integration Act so as to cover its employees. Thus, if the above conditions are met, those employees in the classified service must become members of the Public Employees' Retirement System.

The foregoing discussion presupposes the fact that the employee in question has been earning an annual salary or remuneration of \$500 or more. See N.J.S.A. 43:15A-7 ("\* \* \* no person in employment, office or position, for which the annual salary or remuneration is fixed at less than \$500, shall be eligible to become a member of the retirement system.").

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: ROBERT S. MILLER  
*Deputy Attorney General*

OCTOBER 9, 1961

COLONEL JOSEPH D. RUTTER  
 Superintendent of State Police  
 Department of Law and Public Safety  
 West Trenton, New Jersey

## MEMORANDUM OPINION—P-29

DEAR COLONEL RUTTER:

You have asked whether five years' experience as an undersheriff qualifies an applicant for a private detective's license under the Private Detective Act of 1939. (N.J.S.A. 45:19-8 *et seq.*) The section of the act covering qualifications for licensure (N.J.S.A. 45:19-12) provides in pertinent part as follows:

"No license shall be issued to a person under the age of twenty-five years nor to any person, firm, association or corporation unless such person or at least one member of the firm and one officer or director of the association or corporation has had at least five years' experience as an investigator or as a police officer with an organized police department of the State or a county or municipality thereof, or with an investigative agency of the United States of America or any State, county or municipality thereof."

The sheriff is a constitutional elective officer (Article VII, Sec. 2, para. 2) serving the State within a county. *Doyle v. County of Warren*, 15 N.J. Misc. 434 (Cty. Cir. Ct. 1937). He retains his common law powers and duties except as they are specifically removed by statute. Cf. *Wilentz v. Hendrickson*, 133 N.J. Eq. 447, 455 (Chan. 1943), *aff'd*, 135 N.J. Eq. 244 (E. & A. 1944); *Public Utility Commissioners v. Lehigh Valley Railroad Co.*, 106 N.J.L. 411, 418 (E. & A. 1930); *State v. DeLorenzo*, 81 N.J.L. 613, 623 (E. & A. 1911). The undersheriff is vested with the common law and statutory authority of the sheriff, subordinate to him and qualified to act in his stead in his absence. *State v. Lombardo*, 18 N.J. Super. 511, 520 (Law Div. 1952); *Allen v. Smith*, 12 N.J.L. 159, 163 (Sup. Ct. 1831).

The most recent extensive discussion of the sheriff's powers and duties is in *State v. Winne*, 12 N.J. 152 (1953) at 167, 168, 185 and 186. Contrasting the primary responsibility of the county prosecutor with the diminished responsibility of the sheriff in law enforcement, Chief Justice Vanderbilt wrote in *State v. Winne*:

"In contrast, the sheriff, although he possesses by the common law broad powers of law enforcement in his county, is not given the right to incur expenses in the prosecution of criminals that has been granted to the county prosecutor. The inevitable result of this is that his work as a law enforcement officer has been rendered less effective than that of the county prosecutor, without, however, any diminution of his powers or responsibilities."

The office of sheriff thus has declined in law enforcement responsibility in this State. Despite the anomaly of the survival of all the sheriff's common law duties, except as expressly divested by statute, most of the counties of New Jersey have failed to include any appropriation in sheriff's budgets for investigative or other law enforcement activity. That responsibility has been entrusted to the county prosecutor, the county detectives and investigators subordinate to the county prosecutor, and State and local police. See also *Morse v. Forbes*, 24 N.J. 341 (1957).

The sheriff retains manifold duties, most of them unrelated to investigation in connection with law enforcement. He is responsible for, for example, service of process, for the levy of execution and conduct of sheriff's sales, for the seizure of chattels to aid a distraint for rent and for other activities in conjunction with the administration of civil justice. A major segment of his responsibility is in the safeguarding of prisoners, their transportation to the State Prison and the custody of the county jails. Another surviving responsibility is to restrain riots and unlawful assemblies by the reading of the Riot Act and to arrest those who disobey the Riot Act.

My opinion must be, therefore, that an undersheriff is not per se entitled to a private detective's license based upon his experience in that office; his services and functions may have been wholly unrelated to investigative work in law enforcement. He must establish that he has been predominantly engaged in criminal or related investigative work in order to meet the statutory standards set forth in N.J.S.A. 45:19-12. The absence of any appropriations for such activities by the sheriff and his subordinates within a county would be conclusive evidence that the undersheriff in question was not eligible based upon his experience as an undersheriff for a private detective's license.

Very truly yours,

DAVID D. FURMAN  
 Attorney General

OCTOBER 25, 1961

MR. GEORGE C. SKILLMAN  
 Director of Local Government  
 Department of the Treasury  
 State House  
 Trenton, New Jersey

## MEMORANDUM OPINION—P-30

DEAR DIRECTOR SKILLMAN:

We have been asked whether a member of a municipal sewerage authority forfeits his office under N.J.S. 2A:135-9 because of his conviction for bribery and conspiracy to commit bribery or whether it is necessary that the incumbent be removed from office under R.S. 40:14A-5(c).

N.J.S. 2A:135-9 provides as follows:

"Any person holding an office or position, elective or appointive, under the government of this state or of any agency or political subdivision thereof, who is convicted upon, or pleads guilty, non vult or nolo contendere to, an indictment, accusation or complaint charging him with the commission of a misdemeanor or high misdemeanor touching the administration of his office or position, or which involves moral turpitude, shall forfeit his office or position and cease to hold it from the date of this conviction or entry of plea."

R.S. 40:14A-5(c) is, in part, as follows:

"A member of a sewerage authority may be removed only by the governing body by which he was appointed and only for inefficiency or neglect of duty or misconduct in office and after he shall have been given a copy of the charges against him and, not sooner than ten days thereafter, had opportunity in person or by counsel to be heard thereon by such governing body."

It is our opinion that the two cited statutes are not inconsistent with one another, but, rather, that they provide separate remedies. N.J.S. 2A:135-9 has to do with the commission of a crime; R.S. 40:14A-5(c) applies to circumstances justifying removal from office, among which may be, but need not exclusively be, actions which also constitute criminal conduct. In this regard see *Beggans v. Civil Service Commission*, 10 N.J. Misc. 1142 (Sup. Ct. 1932) and *Walter v. Police and Fire, etc. Trenton*, 120 N.J.L. 39 (Sup. Ct. 1938).

Removal under R.S. 40:14A-5(c) requires action to be initiated by the appointing authority. Forfeiture under 2A:135-9 arises from the fact of conviction without regard to action of the appointing authority; it is automatic upon conviction. Cf. *State Board of Medical Examiners v. Weiner*, 68 N.J. Super. 468 (App. Div. 1961).

N.J.S. 2A:135-9 is self-executing. Neither notice nor hearing need be given to the guilty employee before he is ousted under this section. The antecedent to N.J.S. 2A:135-9, L. 1913, c. 74, was so construed in *Mulsoff v. Sloat*, 8 N.J. Misc. 554 (Sup. Ct. 1930). In *Newark v. Dep't of Civil Service*, 68 N.J. Super. 416 (App. Div. 1961), the court considered a section of the Faulkner Act, R.S. 40:69A-166, providing for forfeiture of public employment on conviction of a crime of moral turpitude. It held that an employee may not be ousted under that section except after notice and hearing. However, it expressly distinguished *Mulsoff v. Sloat*. It noted that the Faulkner Act forfeiture section lacks the language of N.J.S. 2A:135-9 that the guilty employee shall "cease to hold the same [his employment] from the date of such conviction or entry of such plea [of guilty, non vult or nolo contendere] \* \* \*." 68 N.J. Super. at 432.

The crimes of which the incumbent was convicted involved "the administration of his office or position." We note in passing that bribery is, in addition, a crime "which involves moral turpitude." *Huff v. Anderson*, 212 Ga. 32, 90 S.E. 2d 329, 52 A.L.R. 2d 1310 (Sup. Ct. 1955); *Baker v. Miller*, 236 Ind. 20, 138 N.E. 2d 145, 59 A.L.R. 2d 1393 (Sup. Ct. 1956); *People v. McGuane*, 13 Ill. 2d 520, 150 N.E. 2d 168, 71 A.L.R. 2d 580 (Sup. Ct. 1958); Cf. *City of Newark v. Department of Civil Service, supra* (holding that an employee who pleaded nolo contendere to a charge of federal income tax evasion is entitled to a hearing to determine if the offense involved moral turpitude under the forfeiture provision of the Faulkner Act, R.S. 40:69A-166). See also *State Board of Medical Examiners v. Weiner*, 68 N.J. Super. 468 (App. Div. 1961). There can be no question, therefore, that N.J.S. 2A:135-9 requires forfeiture upon conviction for the crime of bribery.

As stated by Chief Justice Brogan in *Schireson v. State Board of Medical Examiners*, 130 N.J.L. 570 (E. & A. 1943):

"A conviction in ordinary legal language consists of a plea of 'guilty' or a verdict of guilty and it is immaterial whether final judgment has been rendered thereon. Bishop on *Statutory Crimes* § 348." See also 14 Am. Jur. 759, *Criminal Law* § 8.

We conclude that upon conviction of the crimes charged the incumbent immediately forfeited his position and from that date a vacancy existed.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: PATRICK J. MCGANN, JR.  
*Deputy Attorney General*

NOVEMBER 8, 1961

HONORABLE KATHARINE E. WHITE  
*Acting State Treasurer*  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-31

DEAR MRS. WHITE:

You have asked whether a widow of a deceased member of the Prison Officers' Pension Fund may receive a refund of contributions when the deceased member had less than five years' service in the employ of the State and where his death resulted from injuries incurred in other than the performance of his duties.

We are of the opinion that the statute does not authorize a refund of contributions and therefore none can be paid. R.S. 43:7-9 covers the situation where a prison officer dies in the performance of his duties. Clearly this section is not applicable to the instant situation where the prison officer died in an activity other than the performance of his duties.

R.S. 43:7-10 states that in the event of the death of a prison officer from causes other than those received or incurred in the performance of his duties, a pension shall be paid to his beneficiaries provided that the deceased had served in the employ of the State for five years. This section is also not applicable to the present situation where the prison officer had served less than five years in the employment of the State.

R.S. 43:7-15 provides for refunds whenever a prison officer is suspended, resigned, dropped or discharged from his employment. However, the statute specifically provides that "No other refund of assessments collected from the salaries of such pension [sic] officers shall be made."

Consistent with this opinion is the Attorney General's opinion of August 10, 1961, which held that where a refund of contributions to the administrator of an estate was not provided for in the Prison Officers' Pension Fund statutes, the Board may not authorize payment.

This result differs from the result in the Public Employees' Retirement System, where under N.J.S.A. 43:15A-41(c), express provision is made for payment to the widow under these circumstances. The Prison Officers' Pension Fund Commission, however, has no authority to refund contributions to a widow where the deceased

member had less than five years' membership in the Fund and where his death resulted from injuries incurred in other than the performance of his duties.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: STEVEN S. RADIN  
*Deputy Attorney General*

NOVEMBER 29, 1961

HONORABLE KATHARINE ELKUS WHITE  
*Acting State Treasurer*  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-32

DEAR MRS. WHITE:

You have requested our opinion as to whether the United States Coast Guard Exchange in Cape May, New Jersey, which sells beer, wine and liquor to officers and enlisted men of the Coast Guard for on-premises consumption, is entitled to an exemption from payment of the New Jersey alcoholic beverage tax, imposed by Chapter 43 of Title 54 of the Revised Statutes. The Exchange is situated on property owned by the United States.

The alcoholic beverage tax is imposed upon any sale of alcoholic beverages made within this State or upon any delivery of alcoholic beverages made within or into this State. N.J.S.A. 54:43-1. Beer is an alcoholic beverage within the meaning of this statute. N.J.S.A. 54:43-1(a).

In order to be entitled to an exemption from this tax, the United States Coast Guard Exchange must come within the purview of N.J.S.A. 54:43-2.1. This statute states:

"No tax imposed by chapter forty-three of Title 54 of the Revised Statutes shall be payable on any sale of alcoholic beverages by any person holding a valid and unrevoked license to sell alcoholic beverages, issued pursuant to the provisions of section 33:1-10 or section 33:1-11 of the Revised Statutes, to a voluntary unincorporated organization of army, air force or navy personnel operating a place for the sale of goods pursuant to regulations promulgated by the Secretary of the Army, the Secretary of the Air Force or the Secretary of the Navy, or, if the consent of the State Department of Defense shall have been obtained, under the State National Guard regulations, when said sale is accompanied by the delivery of such beverages to any such organization."

In accordance with the quoted section, the Coast Guard Exchange would be entitled to an exemption if it were (1) "a voluntary unincorporated organization of army, air force or navy personnel" and (2) "operating a place for the sale of goods pursuant to regulations promulgated by the Secretary of the Army, the Secretary

of the Air Force or the Secretary of the Navy" or regulations of the State National Guard.

The status of the United States Coast Guard is determined by Federal law. The pertinent Federal statute provides that:

"The Coast Guard as established January 28, 1915, shall be a military service and a branch of the armed forces of the United States at all times. The Coast Guard shall be a service in the Treasury Department, except when operating as a service in the Navy." 14 U.S.C. § 1, Aug. 4, 1949, c. 393, § 1, 63 Stat. 496.

It is to be observed, that while the above-quoted section provides that the United States Coast Guard "shall be a military service and a branch of the armed forces of the United States at all times," it "shall be a service in the Treasury Department, except when operating as a service in the Navy."

It is further provided by Federal statute that:

"Upon the declaration of war or when the President directs, the Coast Guard shall operate as a service in the Navy, and shall so continue until the President, by executive order, transfers the Coast Guard back to the Treasury Department. While operating as a service in the Navy, the Coast Guard shall be subject to the orders of the Secretary of the Navy who may order changes in Coast Guard operations to render them uniform, to the extent he deems advisable, with Navy operations." 14 U.S.C. § 3, Aug. 4, 1949, c. 393, § 1, 63 Stat. 496.

On November 1, 1941, by Executive Order No. 8929, 6 F.R. 5581, the United States Coast Guard commenced to operate as a service in the Navy, subject to the Secretary of the Navy. On December 29, 1945, this Executive Order was revoked by Executive Order No. 9666, 11 F.R. 1, which provided that the United States Coast Guard should resume operations under the Treasury Department on and after January 1, 1946. The status of the United States Coast Guard as a service in the Treasury Department has not been disturbed since the issuance of Executive Order No. 9666, and the United States Coast Guard at the present time operates under the jurisdiction of the Secretary of the Treasury. It should be noted parenthetically that all functions and officers of the Department of the Treasury and all functions of all agencies and employees of the Department of the Treasury, including the United States Coast Guard, were transferred to the Secretary of the Treasury by the 1950 Reorganization Plan No. 26, §§ 1, 2, effective July 31, 1950, 15 F.R. 4935, 64 Stat. 1280, 5 U.S.C. § 241, note.

The United States Coast Guard at the present time is not a service or organizational part of either the Army, Air Force or Navy. Consequently it follows that the Coast Guard Exchange cannot be considered "a voluntary unincorporated organization of army, air force or navy personnel" within the language of N.J.S.A. 54:43-2.1. Moreover, it is equally clear that the Coast Guard Exchange is not presently "operating a place for the sale of goods pursuant to regulations promulgated by the Secretary of the Army, the Secretary of the Air Force or the Secretary of the Navy," nor "under the State National Guard regulations."

The distinction between the United States Coast Guard, when operated under the jurisdiction of the Secretary of the Treasury, and the United States Coast Guard

when serving under the Secretary of the Navy in time of war was drawn sharply in the case of *Louisville & N.R. Co. v. United States*, 258 U.S. 374, 42 S. Ct. 337 (1922). There the United States Supreme Court held that the United States Coast Guard, while serving under the Secretary of Navy in time of war, were troops within the meaning of a railroad land grant requiring the transportation of troops without charge, but were not troops while operating under the jurisdiction of the Secretary of the Treasury in time of peace. The court stated at page 375 of 258 U.S. and 337 and 338 of 42 Sup. Ct.:

"The Coast Guard was established by Act of January 28, 1915, c. 20, 38 Stat. 800 (Comp. St. § 8459 1/2a [1/6]), in lieu of the then existing Revenue Cutter Service and Life-Saving Service, and was composed of those organizations. The Revenue Cutter Service had been considered a civil service. 15 Op. Attys. Gen. 396; 16 Op. Attys. Gen. 288; 8 Comp. Dec. 852; 15 Comp. Dec. 807. But to its primary function of an armed police force some characteristics of a military force had always been attached; and from time to time Congress had conferred upon it additional incidents of the military service. See 28 Op. Attys. Gen. 543, 547; 30 Op. Attys. Gen. 75. When the Coast Guard was established it was constituted 'a part of the military forces of the United States'; and section 1 provides that—It 'shall operate under the Treasury Department in time of peace and operate as a part of the Navy, \* \* \* in time of war or when the President shall so direct. When subject to the Secretary of the Navy in time of war the expense of the Coast Guard shall be paid by the Navy Department.'

"Congress further manifested its intention to class the Coast Guard with the Army, Navy and Marine Corps by the provisions in the Acts of August 29, 1916, c. 417, 39 Stat. 556, 600, 601 (Comp. St. § 8459 1/2a [7-14]), and chapter 418, § 1, 39 Stat. 619, 639.

"The military force of the United States is, and always has been, a unit, although divided for purposes of administration into several branches; and there is nothing in the land grant acts to indicate an intention on the part of Congress to differentiate between the several branches in respect to transportation charges. We are of the opinion that the term 'troops' is not confined to land forces, and that it includes men and officers in every branch. Since those in the Navy and Marine Corps are to be deemed troops within the meaning of those acts, members of the Coast Guard should also be deemed such when serving as part of the Navy. *But at other times members of the Coast Guard are not troops; for then it operates under, and at the expense of, the Treasury Department.*" (Emphasis added.)

We conclude, therefore, that the Legislature has not by the enactment of N.J.S.A. 54:43-2.1 provided for the United States Coast Guard Exchange an exemption from the taxes imposed by Chapter 43 of Title 54 of the Revised Statutes while it is operating as a service of the Treasury Department. While we are cognizant that there may exist adequate policy reasons for providing the United States Coast Guard Exchange the same exemption now accorded to such organizations of the Army, Air Force or Navy under N.J.S.A. 54:43-2.1, we are also mindful that N.J.S.A. 54:43-2.1 is an exemption statute to be construed strictly and not expanded beyond its clear terms. *Princeton Univ. Press v. Princeton*, 35 N.J. 209, 214 (1961); *Township of Teaneck v. Lutheran Bible Institute*, 20 N.J. 86, 90 (1955); *Julius Roehrs Co. v. Divi-*

*sion of Tax Appeals*, 16 N.J. 493, 497-98 (1954); *Trenton v. State Bd. of Tax Appeals*, 127 N.J.L. 105, 106 (Sup. Ct. 1941), *affirmed sub nom. Trenton v. Rider College*, 128 N.J.L. 320 (E. & A. 1942).

We advise you, therefore, that the United States Coast Guard Exchange is not entitled to an exemption from the payment of the New Jersey alcoholic beverage tax at the present time.

Very truly yours,

DAVID D. FURMAN  
Attorney General

By: ALAN B. HANDLER  
Deputy Attorney General

NOVEMBER 29, 1961

HONORABLE KATHARINE E. WHITE  
Acting State Treasurer  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-33

DEAR MRS. WHITE:

You have asked my opinion whether a State employee veteran, who was in public employment on January 2, 1955, may purchase prior service credit from the Public Employees' Retirement System under the terms of Chapter 188, L. 1960 for years during which he earned (1) \$300 or more per year and (2) less than \$300 per year. The significance of the minimum salary of \$300 per year is that veteran members were not granted free prior service credit under Chapter 84, L. 1954, for years during which their annual salary was less than the figure of \$300.

Chapter 188, L. 1960 provides in pertinent part as follows:

"Notwithstanding any other provision of law, a member of the Public Employees' Retirement System of New Jersey, who is in the State service and who, prior to entering the State service, was the holder of office, position or employment in the service of a county or of a municipality, or both, shall be entitled to purchase prior service credit for the years of such county and municipal service or either thereof; but the said county or municipality shall not be liable for any payment to the system by reason of the said member's purchase of benefits under this act and any and all contributions required hereunder shall be made by the member. Proof of such prior county and municipal service shall be furnished by the affidavit of the member, supported by other evidence if required by the board of trustees of the said retirement system, and the said board may prescribe rules and regulations to effectuate the purposes of this act. Any such member desiring to acquire such credits for prior service shall be required to contribute either in a lump sum or by installment payments an amount calculated in accordance with the rules and regulations of the board of trustees to cover the required contribution for his acquisition of such prior service credits."

My conclusion to the first inquiry is that a State employee with veteran status may purchase prior service credit for years of county or municipal service or both in which he earned a minimum salary of \$300 under the circumstance that he did not receive free prior service credit under Chapter 84, L. 1954, for such years (N.J.S.A. 43:15A-60). The failure to grant such prior service credit to a State employee veteran in public employment on January 2, 1955, who did not waive membership in the new system, was presumably attributable to his not having presented evidence of such prior service to the Board of Trustees within six months after January 2, 1955 (N.J.S.A. 43:15A-60). The 1960 enactment is obviously intended *inter alia* to enable the State employee veteran to rectify such omission by purchasing at his own expense the prior service credit.

While you have not raised this specific question, I presume that the State employee veteran in this situation has purchased prior service credit for State employment starting January 2, 1955 or is chargeable with such obligation to the system upon his enrolling formally as a member. Chapter 188, L. 1960 has no applicability to the purchase of prior service credit for State service.

I likewise conclude that the State employee veteran may purchase prior service credit for years of county or municipal service during which his annual salary was less than \$300. By its express terms Chapter 188, L. 1960 is to prevail "notwithstanding any other provision of law." The statutory provision in Chapter 84, L. 1954 (N.J.S.A. 43:15A-39) fixing a \$300 minimum salary for service credit for veterans is thus superseded. The statutory scheme of Chapter 188, L. 1960 is unique among the pension laws in imposing the entire liability for the purchase of prior service credit upon the employee. Compare the free prior service credit provision in N.J.S.A. 43:15A-60 and the provision for full pension credit without expense to a non-veteran who enrolls and pays arrearages into the annuity savings fund in N.J.S.A. 43:15A-9.

I am advised that the consulting actuary of the Board of Trustees has ruled that the lump sum payment required to be paid by the member under Chapter 188, L. 1960 should be computed on the basis of salary and age at the time of purchase and double in amount the arrearage obligation payable to the annuity savings fund pursuant to N.J.S.A. 43:15A-9. This is a valid determination in the exercise of the discretion vested in the Board of Trustees to fix the amount of required contributions for the acquisition of prior service credits, under the specific terms of the 1960 enactment.

This result is in no way inconsistent with the holding in *Watt v. Mayor & Council of Borough of Franklin*, 21 N.J. 274 (1956). In the latter case the plaintiff was denied a pension under the Veterans Pension Act (R.S. 43:4-1 *et seq.*), which requires 20 years' service, since the plaintiff included as part of his 20 years, six years of service as an unpaid member of the Borough Common Council. The Court said that R.S. 43:4-1 *et seq.*, particularly R.S. 43:4-3, which states that an eligible veteran shall receive "one-half of the compensation then being received by him," contemplates a *paid* position; to hold otherwise would result in gross inequity and unfairness. The Court stated, at 21 N.J. page 278, that a literal interpretation of R.S. 43:4-1 *et seq.* would create "a manifestly absurd result, contrary to public policy, which the Legislature could not have reasonably intended." Therefore, the Court construed the statute to require that the prior service be "paid career service."

The literal construction of Chapter 188, L. 1960, however, produces no manifestly absurd result, nor is there anything in its terms which contravenes public policy or which the Legislature could not have reasonably intended. Under these circumstances

the statute "is not open to construction or interpretation. . . . Such a statute is clear in its meaning and no one need look beyond the literal dictates of the words and phrases used for the true intent and purpose in its creation." *Watt v. Mayor & Council of Borough of Franklin, supra*, 21 N.J. at 277.

Very truly yours,

DAVID D. FURMAN  
Attorney General

DECEMBER 12, 1961

HONORABLE CLYDE C. JEFFERSON  
Prosecutor, Hunterdon County  
Court House  
Flemington, New Jersey

MEMORANDUM OPINION—P-34

DEAR PROSECUTOR:

You have asked for a further clarification of the recent supplement to the Lottery Law (Chapter 39, L. 1961; N.J.S. 2A:121-1 *et seq.*). Formal Opinion 1961—No. 17 rules that box top contests and contests open to patrons of a theater or store are not exempted from the lottery law by the 1961 enactment but that contests open to all members of the public through general distribution of entry blanks may be legal under circumstances specified in the formal opinion.

As you realize, the State Constitution prohibits gambling unless approved by a majority of the voters at a referendum. The construction of Chapter 39, L. 1961 must be such as to render it constitutional if possible, in accordance with a settled principle of statutory construction. The conclusion of Formal Opinion 1961—No. 17, therefore, is that Chapter 39, L. 1961 exempts from the lottery law only giveaway contests without consideration or actual inconvenience. Such giveaway contests constituted statutory offenses and not common law gambling offenses. See *Lucky Calendar v. Cohen*, 19 N.J. 399, 412 (1955).

The particular facts you inquire about are the following. A contest is open to all members of the public through a general distribution of entry blanks. The contestant need not be present at the drawing to win but he must deposit his entry in a "jackpot box" which is in the store.

It is obvious that the requirement of depositing an entry blank in the store constitutes an actual inconvenience to the contestant. Although unnecessary for this opinion, such requirement may in addition be construed to constitute consideration in view of the benefit derived by the merchant from attendance at his store. Extra trade is foreseeable when a participant is brought to the store and exposed there to the display of merchandise and notices of bargains and other advertising appeals. Cf. *Lucky Calendar v. Cohen, supra*, at p. 416; cases cited in Formal Opinion 1961, No. 17.

I advise you, therefore, that the contest described in your opinion request is illegal as a violation of the Lottery Law, N.J.S. 2A:121-1 *et seq.*

Very truly yours,

DAVID D. FURMAN  
Attorney General

JUNE 6, 1962

HONORABLE JOHN A. KERVICK  
 State Treasurer  
 State House  
 Trenton, New Jersey

## FORMAL OPINION 1962—No. 1

DEAR MR. KERVICK:

You have requested our opinion with respect to certain questions which have arisen in connection with "The Emergency Transportation Tax Act," Chapter 32, Laws of 1961. These questions have arisen as a result of the enactment of Chapter 70, Laws of 1962 and as the result of the recent accord between the State of New Jersey and the State of New York concerning the application of income tax laws of both states. Specifically, you have asked whether New Jersey residents earning income in or derived from sources within the State of New York are subject to the Personal Income Tax Law of New York; if so, whether such New Jersey residents are required to file returns and pay taxes to the State of New Jersey under The Emergency Transportation Tax Act. The opinion of the Attorney General is required under section 6(b) of L. 1962, c. 70 as the basis for relevant regulations which may be enacted by the Division of Taxation.

The New York Personal Income Tax Law imposes a tax upon the "taxable income" of "a resident individual" with respect to income earned anywhere (McKinney's New York Tax Law, §§ 611 through 616). A tax is also imposed by this law upon the "taxable income" of a "nonresident individual" with respect to income "derived from or connected with New York sources" (McKinney's New York Tax Law, §§ 631, 632). This latter provision by its terms is applicable to a resident of New Jersey earning income within the State of New York.

These provisions of the New York law are unquestionably a valid exercise of that State's taxing powers. The plenary power of a state to levy an income tax upon its own residents is undoubted. *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 52 S. Ct. 556 (1932); *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 57 S. Ct. 466 (1937); *Opinion to the Governor*, 170 A. 2d 908 (R.I. Sup. Ct. 1961).

It has also been long recognized that a state has the power to tax nonresidents upon their income derived from property or activities within the taxing state. In *Shaffer v. Carter*, 252 U.S. 37, 50, 51, 40 Sup. Ct. 221, 224, 225 (1920), the United States Supreme Court confirmed the power of a state to impose a tax upon incomes of nonresidents earned from sources within the state:

"In our system of government the states have general dominion, and, saving as restricted by particular provisions of the federal Constitution, complete dominion over all persons, property, and business transaction within their borders; they assume and perform the duty of preserving and protecting all such persons, property, and business, and, in consequence, have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray the governmental expenses. Certainly they are not restricted to property taxation, nor to any particular form of excises. \* \* \* That the state, from whose laws property and business and

industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement. \* \* \*"

In *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 40 S. Ct. 228 (1920), the United States Supreme Court considered specifically the question of the validity of the New York State income tax as imposed upon incomes of nonresidents. While holding that the New York Income Tax Law (Laws of New York, 1919, c. 627) discriminated against nonresidents in that it denied to nonresidents a personal exemption granted to residents, the Court recognized the essential validity of the income tax upon nonresidents. It stated:

"That the state of New York has jurisdiction to impose a tax of this kind upon the incomes of nonresidents arising from any business, trade, profession, or occupation carried on within its borders, enforcing payment so far as it can by the exercise of a just control over persons and property within the state, as by garnishment of credits (of which the withholding provision of the New York law is the practical equivalent), and that such a tax, so enforced, does not violate the due process of law provision of the Fourteenth Amendment, is settled \* \* \*." 252 U.S. at p. 75, 40 S. Ct. at p. 230.

An issue involving the question of discrimination between residents and nonresidents subject to the New York Personal Income Tax Law was considered in *Goodwin v. State Tax Commission*, 286 App. Div. 694, 146 N.Y.S. 2d 172 (App. Div. 1955), *aff'd*, 150 N.Y.S. 2d 203, 133 N.E. 2d 711 (Ct. of App. 1956), *appeal dismissed for want of a substantial federal question*, 352 U.S. 805, 77 S. Ct. 47 (1956). Specifically involved was a New Jersey resident working in New York. The New York Court affirmed the principles enunciated in the *Travis* and *Shaffer* cases. The validity and scope of the New York income tax as applied to New Jersey residents was affirmed recently in *Tremble v. Bragalini*, 15 App. Div. 2d 208, 222 N.Y.S. 2d 107 (App. Div. 1961).

It is clear, therefore, that without regard to The Emergency Transportation Tax Act of New Jersey, the explicit terms of the New York Personal Income Tax Law and pertinent court decisions do subject New Jersey residents earning income in the State of New York to the New York State income tax.

The tax liability of New Jersey residents to the State of New York was affected significantly, however, by the enactment of The Emergency Transportation Tax Act of the State of New Jersey on May 29, 1961. This law imposed a tax upon every resident of New Jersey, who was not a resident of "another critical area state," based upon income derived from sources "within a critical area state" other than New Jersey. L. 1961, c. 32, § 2(a). A similar tax was imposed upon and with respect to the entire income derived from sources within New Jersey by persons who were not residents of this State and who were residents of "another critical area state." L. 1961, c. 32, § 2(b). The Act defined "Critical area State" to mean New Jersey and "such other State bordering thereon within which there exists part of an area, another part of which is in this State, and within which area there is, as of January 1 of any year, a critical transportation problem in respect to the transporta-

tion of persons and property interstate." L. 1961, c. 32, § 5(a). The Act contained a legislative finding as to when "a critical transportation problem" may arise in connection with interstate transportation between New Jersey and bordering states (L. 1961, c. 32, § 5(b)) and further provided that the State Highway Commissioner shall certify to the State Treasurer his findings with respect to the existence of such a "critical transportation problem" and "the identity of any states" which constitute such a "critical area state." L. 1961, c. 32, § 5(c). Since the inception of The Emergency Transportation Act, the State Highway Commissioner has, in accordance with its terms and pursuant to the standards set forth therein, certified that the State of New York is a "critical area state," thus bringing New York residents working in New Jersey and New Jersey residents working in New York within the ambit of the Act.

When the Emergency Transportation Act was enacted, the New York Personal Income Tax Law then afforded nonresidents a credit against taxes payable to the State of New York based upon any income tax imposed by another state of which the taxpayer was a resident. This credit was not allowed unless the state of which the taxpayer was a resident either granted a substantially similar credit to residents of New York or imposed an income tax on its own residents with respect to income earned in New York and exempted from taxation the income of New York residents. (McKinney's New York Tax Law, § 640(a), (c)). Under Section 16 of The Emergency Transportation Tax Act, as amended by L. 1961, c. 129, § 9, nonresidents of New Jersey were accorded a credit substantially similar to that provided by Section 640 of the New York Personal Income Tax Law. Thus, New Jersey residents earning income in New York and otherwise subject to the New York income tax could, under the New York law, claim the credit against the New York income tax based upon the tax imposed by New Jersey under The Emergency Transportation Tax Act.

In addition, The Emergency Transportation Tax Act provided that every taxpayer subject to tax "in some other jurisdiction" for income "derived from sources within such other jurisdiction," who was taxable under The Emergency Transportation Tax Act and who had in such other jurisdiction been subject to deduction and withholding for the purpose of crediting such amounts to the payment of the tax of such other jurisdiction, could satisfy his obligation to pay the New Jersey tax by executing an assignment to the State of New Jersey of his claim for refund of money so paid, deducted or withheld on account of the taxes of such other state. L. 1961, c. 32, § 19.

Thus, by the interaction of Sections 16 and 19 of the New Jersey Emergency Transportation Tax and Section 640 of the New York Personal Income Tax, a New Jersey resident, otherwise taxable by the State of New York on income earned in New York, would be entitled to make a claim for refund because of the credit against his New York income taxes attributable to his New Jersey tax liability; and such a New Jersey resident could satisfy his tax liability to New Jersey by assigning to New Jersey this claim for a refund of moneys paid, deducted or withheld by the State of New York on account of the New York personal income tax.

This result was changed, however, when on January 15, 1962, the New York State Legislature enacted Chapter 2, 1962 Laws of New York. This statute repealed Section 640 of the New York Personal Income Tax Law. By this repeal of Section 640, a New Jersey resident working in New York could no longer claim a refund of any taxes paid, deducted or withheld by the State of New York based upon a credit for income taxes paid to the State of New Jersey. Since the credit was elim-

inated and no refund could be claimed, Section 19 of The Emergency Transportation Tax Act, providing for an assignment of such a refund claim to the State of New Jersey, became nugatory. The repeal of Section 640 still obtains. Thus, at the present time, New Jersey residents earning their incomes in the State of New York continue to be subject to the New York Personal Income Tax Law. Since such residents are no longer entitled to any offsetting credits attributable to the New Jersey income tax, they must file their New York tax returns and pay in full their New York income taxes.

The question remains whether New Jersey residents otherwise liable for the New York income tax are subject to The Emergency Transportation Tax Act of New Jersey. Recent executive action taken by both New York and New Jersey and the enactment of Chapter 70 of the Laws of 1962 by the New Jersey State Legislature lead to the conclusion that such New Jersey residents are not required to file returns or pay taxes to New Jersey under The Emergency Transportation Tax Act.

On May 6, 1962, the State of New York and the State of New Jersey, by their respective Governors, issued publicly the following executive statement:

"Governor Richard J. Hughes of New Jersey and Governor Nelson A. Rockefeller of New York announced today that they had reached an understanding in regard to the administration and enforcement of the personal income tax laws of their respective States as they affect residents of the other State.

"Governor Rockefeller announced that New York, under legislation enacted at the 1962 legislative session, will allow its residents a credit against their New York State personal income taxes for income taxes paid to New Jersey under the New Jersey Emergency Transportation Act enacted in 1961, as amended.

"Governor Hughes announced that he would submit to the New Jersey Legislature on Monday legislation which will grant to New Jersey residents a credit against the New Jersey Emergency Transportation Tax for income taxes paid to the State of New York under New York's personal income tax law, as amended in 1962.

"In addition, it was agreed that neither State would contest nor participate in contesting the right of the other to levy and collect the taxes imposed by the two laws on residents of the other; and that each State would assist and cooperate with the other in the administration and enforcement thereof so as to assure to the citizens of each who are directly involved the greatest degree of certainty as to their responsibilities under the two laws.

"The Governors expressed the belief that this agreement will clarify for the New York and New Jersey commuters their status in regard to the income tax laws of the two States and will insure certainty in the application and administration of such laws.

"The Governors stated that they are taking this action in the interest of promoting inter-state cooperation and pledged their continued cooperation in other matters affecting their citizens who live in one state and work in the other. Noting the progress that has been made recently in such matters as the Hudson and Manhattan Railroad, the World Trade Center, and the

program for an integrated regional transportation network, the Governors expressed their confidence of still further progress through similar joint action, conducted in a spirit of harmony, cooperation and good will."

Thus, the State of New York will allow its residents earning incomes in New Jersey a credit against their New York personal income taxes based upon the taxes paid by such residents to the State of New Jersey under The Emergency Transportation Tax Act. This executive decision gives recognition to Section 2(b) of The Emergency Transportation Act imposing a tax upon persons not residents of the State of New Jersey, but residents of "another critical area state" whose incomes are derived from sources within the State of New Jersey. The decision, likewise, recognizes Section 620 of the Personal Income Tax Law of New York, as recently amended by Section 2, Chapter 2, 1962 Laws of New York, allowing to residents of New York a credit against taxes otherwise due "for any income tax imposed for the taxable year by another state \* \* \* upon income both derived therefrom and subject to tax."

Another problem which was resolved concerned the validity of the repeal of Section 640 insofar as it was intended to apply retroactively. In the enactment of Chapter 2, 1962 Laws of New York, the New York State Legislature made the repeal of Section 640 and the elimination of the tax credit to which New Jersey residents would have been entitled expressly retroactive to cover all taxable years from and after January 1, 1961. A question arose as to the validity of the retroactive application of this New York law to cover the taxable year commencing on or after January 1, 1961 since the statutory elimination of the credit was enacted in 1962. Reflecting the executive accord between the states, the State of New Jersey determined not to contest the validity of New York's repeal of Section 640 with respect to its retroactive features.

Following this executive action, the New Jersey State Legislature, on June 5, 1962, enacted Chapter 70 of the Laws of 1962, which is now effective and which was made expressly retroactive to all taxable years including taxable years of less than 12 months beginning on or after January 1, 1961. This statute relieves New Jersey residents paying income taxes to the State of New York from any tax liability under The Emergency Transportation Tax Act. The statute accomplishes this by amending Section 16 of The Emergency Transportation Tax Act to provide that a New Jersey resident shall be allowed a credit against the tax otherwise due under the New Jersey law for any income tax imposed for the taxable year by another "critical area state" upon income earned within the "critical area state" which is subject to the New Jersey tax. L. 1962, c. 70, § 4.

At this juncture it is pertinent to observe that Section 620 of the New York Personal Income Tax Law and Section 16(B) of The Emergency Transportation Tax Act, as amended, given specific effect and implemented by the executive accord between the two states, recognize the right of resident taxpayers of each state respectively to claim income taxes paid to the state where income is earned as a credit against the taxes which would otherwise be due the state of residence. The granting of such a credit against state income taxes has been upheld. *Miller v. McColgan*, 17 Cal. 2d 432, 110 P. 2d, 419, 134 A.L.R. 1424 (Sup. Ct. 1941); see also: *Burnham v. Franchise Tax Board*, 172 Cal. App. 2d 438, 341 P. 2d 833 (Dist. Ct. of App. 1959); *Keves v. Chambers*, 209 Ore. 640, 307 P. 2d 498 (Sup. Ct. 1957); *Cook v. Walters Dry Goods Co.*, 212 Ark. 485, 206 S.W. 2d 742 (Sup. Ct. 1947).

L. 1962, c. 70 further provides relief by amending Section 19 of The Emergency Transportation Tax Act. This section had required the assignment by New Jersey residents to the State of New Jersey of their claims for refunds of tax moneys paid to the State of New York. As amended, Section 19 still provides that New Jersey residents may satisfy their obligations to pay the New Jersey tax by assigning and transferring to the State of New Jersey their claims for refunds of tax moneys paid to and held by another taxing state. L. 1962, c. 70, § 6. It is now provided, however, that if any residents or class of residents of the State of New Jersey, who are taxable under The Emergency Transportation Tax Act, are liable for a tax upon the same income by "another critical area state" and are thereby entitled to the credit allowed by Section 16(B) of the Act against the tax otherwise due, and if the credit would be substantially sufficient in amount to offset such taxes, such New Jersey residents may be relieved from filing any returns under The Emergency Transportation Tax Act. Specific authorization to excuse the filing of returns shall be made by regulation of the Division of Taxation based upon an opinion of the Attorney General of this State indicating the residents or class of residents who might be relieved from the filing requirements of The Emergency Transportation Tax Act. L. 1962, c. 70, § 6(b).

Accordingly, we advise you that New Jersey residents earning their income within the State of New York, at the present time, are subject to the New York Personal Income Tax Law and are not entitled to any credit or offset against that tax by virtue of any tax liability under New Jersey law; that since such New Jersey residents are liable for and must pay the tax imposed by the State of New York under its Personal Income Tax Law, which tax is substantially similar in amount to that of New Jersey, such New Jersey residents are entitled to credit their New York income taxes against their tax liability to the State of New Jersey under The Emergency Transportation Tax Act. Therefore, by an appropriate regulation promulgated by the Division of Taxation, such New Jersey residents who actually pay the income taxes imposed by the State of New York may be relieved from filing any tax returns with the State of New Jersey.

Very truly yours,

ARTHUR J. SILLS  
*Attorney General*

By: ALAN B. HANDLER  
*Deputy Attorney General*

AUGUST 23, 1962

HONORABLE FREDERICK M. RAUBINGER  
*Commissioner, Department of Education*  
175 West State Street  
Trenton, New Jersey

FORMAL OPINION 1962—No. 2

DEAR COMMISSIONER RAUBINGER:

You have asked whether local boards of education are empowered by statute to enter into contracts with an educational television station to receive programs

within a given school at a proposed per pupil cost of fifty cents. The facts which we have been able to obtain indicate the following:

WNBT, Channel 13, in the immediate future will broadcast its programs on an open circuit so that anyone with a television set may tune in. The station intends to broadcast programs which may be used by both elementary and secondary school pupils. Participating school districts would use the programs broadcast by Channel 13 as a supplement to classroom study. The programing is set up by WNBT with the co-operation and guidance of educational consultants. Although a tentative schedule of programs is available, the final schedule has not yet been determined.

Representatives of WNBT have indicated that manuals will be furnished to classroom teachers in contracting school districts for use in guiding students during the programs. These manuals will not be available unless the school district has contracted with the station to receive the programs. We have not been able to obtain the manuals for inspection, having been advised by WNBT that they are not yet in print but are expected to be in print during the first week in September.

In addition, the station will supply to participating school districts kinescope recordings of programs for use on school projectors. There is no assurance that these films will be available to all participating school districts. In fact, our information is that the films will deal only with high school level subjects.

From a review of Title 18 it would appear that an implied power exists for boards of education under appropriate circumstances to enter into contracts with a television station for educational programs.

Art. IV, § 7, par. 11 of the 1947 Constitution of New Jersey provides:

"The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law."

Although this section of the Constitution does not expressly mention school districts, the reasoning behind it applies to boards of education which are autonomous bodies on a municipal level. *Botkin v. Westwood*, 52 N.J. Super. 416 (App. Div. 1958), aff'd, 28 N.J. 218 (1958); *Merry v. Board of Education of the City of Paterson*, 100 N.J.L. 273 (Sup. Ct. 1924); R.S. 18:6-21; R.S. 18:7-54. Therefore, in determining whether or not school boards are authorized to enter into a contract with an educational television station, not only the express powers granted under Title 18 should be considered, but also those powers which may be fairly implied from or incidental to the powers expressly conferred.

School districts operating under chapter 6 of the school laws are authorized to "do all acts and things necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district." R.S. 18:6-17. Moreover, R.S. 18:6-18 provides that the board of education shall have the supervision, control and management of the public schools and public school property in the district. It may purchase, lease or sell real or personal property in its corporate name. N.J.S.A. 18:6-24. Boards of education are authorized to make rules and regulations for the government and management of the public schools and public school property. R.S.

18:6-19. No course of study may be adopted or altered nor textbooks selected without a majority vote of the whole number of the board. R.S. 18:6-20.

School districts operating under chapter 7 of Title 18 are likewise authorized to make rules and regulations for the government of the public schools and public school property in the district. N.J.S.A. 18:7-56. A board may receive, lease and hold in trust for the district any and all real or personal property. N.J.S.A. 18:7-76. R.S. 18:7-57 deals with the miscellaneous powers of the board. Subsections (c) and (d) authorize the board to:

"(c) select the textbooks and provide the textbooks and other necessary school supplies;

"(d) prescribe, in connection with the county superintendent of schools, the course of study to be pursued in the schools."

R.S. 18:7-58 prohibits the adoption or alteration of any course of study and the selection of any textbooks without a majority vote of the whole number of the members of the board.

Regional boards of education generally have the same powers as are possessed by the boards of chapter 7 school districts. R.S. 18:8-14.

What is sought to be accomplished here is the adoption or alteration of a course of study as a supplement to classroom work in the schools. Since there is a clearly expressed power to prescribe the course of study, there necessarily exists the concomitant power to enter into agreements to effectuate the course of study adopted in accordance with the statutes. Cf. *Citizens to Protect Public Funds v. Board of Education of Parsippany-Troy Hills*, 13 N.J. 172, 179 (1953); *Sleight v. Board of Education of Paterson*, 112 N.J.L. 422, 426 (E. & A. 1933); *Hankin v. Board of Education of Hamilton Township*, 47 N.J. Super. 70, 78 (App. Div. 1957), *per cert. denied*, 25 N.J. 489 (1957); *Merry v. Board of Education of City of Paterson*, *supra*. In each of the foregoing cases cited, the courts found implied powers existing in boards of education.

In *Citizens to Protect Public Funds v. Board of Education of Parsippany-Troy Hills*, *supra*, Justice Brennan held that a board of education had an implied power to make reasonable expenditures for the purpose of giving voters relevant facts to aid them in reaching an informed judgment when voting upon a proposal concerning the building of new schools. The court said that this power was implied from R.S. 18:7-77.1(b) which permitted the board to include in its annual budget the "building, enlarging, repairing or furnishing of a schoolhouse or schoolhouses." However, the court found that the board failed to make a fair presentation of the advantages and disadvantages in the proposed building program so that the expenditure of funds by the board was not within the implied power and, therefore, was not lawful.

In *Hankin v. Board of Education of Hamilton Township*, *supra*, the court found that there was an implied authority for the board of education to incur reasonable expenses for obtaining such expert opinion as was necessary to furnish a basis for an accurate estimate of the costs of two proposed elementary schools. Thus, the board had acted properly when it employed architects to do the sketches and cost study for new schools prior to the submission of the proposition to the voters. This was true even though the voters later rejected the proposal. The court reasoned that in order for the voters to intelligently exercise their suffrage, it was necessary that they be properly informed by way of having an estimate of the costs and models

of the proposed buildings available. The court stated that the board of education had an implied power to contract for these preliminary services, citing *Sleight v. Board of Education of Paterson, supra*, which also concerned the payment by a board of architects' fees for drawing plans and specifications for a new school building.

In *Merry v. Board of Education of Paterson, supra*, the court found that a board of education had an implied power to employ counsel to prosecute and defend cases in view of the express statutory authority of the board to sue and be sued.

Should a school board desire to enter into an agreement for educational television, consideration should be given to the prohibitions found in Art. VIII, § 3, par. 2 and par. 3 of the New Jersey Constitution of 1947. There are, respectively:

"2. No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation, or become security for, or be directly or indirectly the owner of, any stock or bonds of any association or corporation."

"3. No donation of land or appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association or corporation whatever."

Moreover, in *Commissioners of Public Instruction v. Fell*, 52 N.J. Eq. 689 (Ch. 1894), the court in holding that school districts were included within the statutory phase "other municipalities," stated at p. 691:

"The fact that towns and townships are classified as municipal corporations goes very far towards including school districts. A school district is a part of the machinery of government, as much so, to all intents and purposes, as a town or township. When the moral and intellectual interests of the people are considered, a school district may well be regarded as ranking as high in importance as that of any other territorial division. Through its agents it deals both with the property and the liberty of citizens; more than this, towns and townships do not do."

See also *State v. Troth*, 34 N.J.L. 377, 386 (Sup. Ct. 1871), *rev'd* on other grounds, 36 N.J.L. 422 (E. & A. 1872).

These prohibitions must be noted because the programs in question will be broadcast on open circuit television and may be picked up by anyone with a television set whether or not he has contracted for the services. The school district should determine factually whether or not adequate consideration is offered by WNBT to support this use of public funds. *Wilentz v. Hendrickson*, 133 N.J. Eq. 447 (Ch. 1943), *aff'd*, 135 N.J. Eq. 244 (E. & A. 1944).

In this opinion we are not concerned with the wisdom of adopting a televised course of study since this is essentially a matter for the discretion of the school board and the State Department of Education and is not a legal question. Nor have we considered when or how moneys to pay for the services will be allocated by the local board of education. From the data available to us it would appear that, besides the per capita cost outlined in the form contract submitted by WNBT (50c per pupil, grades K-12), costs for television sets and their maintenance will be considerable for many school districts. These and many other considerations must be taken into account by the local board of education before entering into a contract with WNBT.

It is to be noted that elements of control by way of supervision or prescription are retained by the Commissioner of Education through statutory authority contained in Title 18. For example, with the advice and consent of the State Board he may prescribe a minimum course of study for the elementary schools and for high schools. N.J.S.A. 18:3-17. In the past the Commissioner has exercised this power in regard to secondary schools only. However, the Commissioner could require that educational programs which will be carried into classrooms as part of a "course of study" be approved by him initially.

The question answered in this opinion differs from a question dealing with educational television which was raised some time ago. It is our understanding that at that time the question was whether various boards of education could participate in the organization, operation and maintenance of a noncommercial, nonprofit educational television station in order to utilize its services. Assembly Bill No. 300 of 1962 was aimed at expressly permitting school districts to do this. This Opinion only concerns the power of a local school board to utilize under contract the services of an educational television station in the manner previously described.

Very truly yours,

ARTHUR J. SILLS  
Attorney General

By: THOMAS F. TANSEY  
Deputy Attorney General

DECEMBER 10, 1962

HONORABLE JOHN A. KERVICK  
State Treasurer  
State House  
Trenton, New Jersey

FORMAL OPINION 1962—No. 3

DEAR MR. KERVICK:

You have requested our opinion with respect to the effect of the recent decision of the New Jersey Supreme Court in *Switz v. Kingsley*, 37 N.J. 566 (1962) upon certain existing property tax exemptions, specifically the exemptions now accorded to veterans, senior citizens, household property and parsonages. We have concluded that the Supreme Court's decision requires that these exemptions be computed by deducting the amount of the exemptions from the true value of the taxable property. Our reasons follow.

#### I. VETERANS' EXEMPTION

The recent *Switz* case involved the constitutionality of Chapter 51, Laws of 1960. This statute relates to the taxation of real and personal property for the use of local government. It provides, *inter alia*, that all real property subject to assessment and taxation for local use shall be assessed according to "the same standard of value, which shall be the true value," but that the assessment shall be expressed in terms of the "taxable value." The "taxable value" is defined as that "percentage" of true value which each county board of taxation may establish for the taxing districts

within the county (L. 1960, c. 51, § 1; N.J.S.A. 54:4-2.25). The percentage must be a multiple of 10 and may be no lower than 20 or higher than 100 (L. 1960, c. 51, § 2; N.J.S.A. 54:4-2.26), and the percentage shall be 50 if the county board fails to fix a different one (L. 1960, c. 51, § 3; N.J.S.A. 54:4-2.27). The Court held that this statute was constitutional in all respects with one exception not here pertinent.

The argument was made by the plaintiff in that case that Chapter 51 was unconstitutional because it would result in inequality with respect to the veterans' exemption provided by Art. VIII, sec. 1, par. 3 of the 1947 Constitution. This constitutional provision exempts veterans "from taxation on real and personal property to an aggregate assessed valuation not exceeding five hundred dollars (\$500.00)." The Supreme Court rejected this argument, stating at pages 573 and 574 of 37 N.J.:

"This is an inaccurate view of the *Constitution* and *Chapter 51*. The *Constitution* provides that the exemption shall not be 'altered.' The Legislature can neither enhance nor reduce the worth of the exemption. It cannot, by the use, let us say, of 10% of the standard of value, enlarge the exemption to \$5,000, nor by the use of 200%, cut it to \$250. If the Legislature provides for taxation on a percentage other than 100% of value, then the first \$500 of value is excluded from the true value of a veteran's property and the remainder is subjected to the percentage which the statute prescribes. Thus if a veteran's property is worth \$10,000, the sum of \$500 is first deducted, leaving \$9,500 to be treated in the same way as the property of a non-veteran. Nothing in *Chapter 51* speaks to the contrary. Hence the value of the exemption remains constant throughout the State, notwithstanding differences in the percentages as among the several counties."

The Supreme Court in the *Switz* decision was concerned with the potential effect of Chapter 51 upon the value of veterans' exemptions. Chapter 51 is not operative at the present time and will not go into effect until the tax year 1964 (with the exception of *Section 13* thereof). L. 1962, c. 20. The decision raises the question, however, as to the proper determination of veterans' exemptions under existing law.

The present law governing assessments of real and personal property for purposes of taxation states:

"All property real and personal within the jurisdiction of this State not expressly exempted from taxation or expressly excluded from the operation of this chapter shall be subject to taxation annually under this chapter at its true value \* \* \*." R.S. 54:4-1; L. 1918, c. 236, § 202, as amended.

The statute implementing the constitutional provision for veterans' exemptions provides:

"Every person a citizen and resident of this State now or hereafter honorably discharged or released under honorable circumstances from active service in time of war in any branch of the Armed Forces of the United States and a widow as defined herein, during her widowhood and while a resident of this State, shall be entitled, on proper claim being made therefor, to exemption from taxation on real and personal property to an assessed valuation not exceeding five hundred dollars (\$500.00) in the aggregate." N.J.S.A. 54:4-3.12j, L. 1951, c. 184, § 2, as amended.

Under present law, true value assessments are the only lawful assessments now recognized by the Legislature. *Switz v. Middletown Twp.*, 23 N.J. 580 (1957); *Ridgefield Park v. Bergen Co. Bd. of Taxation*, 31 N.J. 420 (1960), *appeal dismissed*, 365 U.S. 698, 81 S. Ct. 834 (1961). The constitutional and statutory term "assessed valuation" used in connection with the veterans' exemption should, therefore, be construed with reference to the long-standing statutory provision that property be assessed at true value. Cf. *Key Agency v. Continental Cas. Co.*, 31 N.J. 98 (1959); *West Shore R.R. Co. v. State Bd. of Taxes*, 92 N.J.L. 332 (Sup. Ct. 1918), *aff'd*, 92 N.J.L. 648 (E. & A. 1919); *Duke Power Co. v. Hillsborough Twp.*, 20 N.J. Misc. 240 (State Bd. of Tax App. 1942), *reversed on other grounds*, 129 N.J.L. 449 (Sup. Ct. 1943). So construed, there is no conflict between the "true value" of a veteran's property and its "aggregate assessed value," as provided by the constitutional and statutory provisions for veterans' exemptions.

It is clear, therefore, and the Supreme Court has so indicated, that the statutory provision that veterans be accorded a partial exemption from taxation on real and personal property to an "assessed valuation" not exceeding \$500 means that the \$500 exemption must be referable to the true value of taxable property. Accordingly, we advise you that under present law, since there is no legal basis for the assessment of real and personal property except at its true value, the \$500 veterans' exemption must be computed as a deduction from the lawful assessed valuation of the property, its true value.

## II. SENIOR CITIZENS' EXEMPTION

Provision for an exemption for senior citizens was made by an amendment to the Constitution adopted in the general election held in November 1960. The amendment added paragraph 4 to sec. I of Art. VIII of the 1947 Constitution. It provides:

"The Legislature may, from time to time, enact laws granting exemption from taxation on the real property of any citizen and resident of this State of the age of 65 or more years residing in a dwelling house owned by him which is a constituent part of such real property but no such exemption shall be in excess of \$800.00 in the assessed valuation of such property and such exemption shall be restricted to owners having an income not in excess of \$5,000.00 per year. Any such exemption when so granted by law shall be granted so that it will not be in addition to any other exemption to which the said citizen and resident may be entitled."

The Legislature implemented this constitutional amendment by enacting L. 1961, c. 9. In pertinent part this statute provides:

"Every person, a citizen and resident of this State of the age of 65 or more years, having an income not in excess of \$5,000.00 per year and residing in a dwelling house owned by him which is a constituent part of his real property, shall be entitled, on proper claim being made therefor, to exemption from taxation on such real property to an assessed valuation not exceeding \$800.00 in the aggregate, but no such exemption shall be in addition to any other exemption to which said person may be entitled." L. 1961, c. 9, § 2.

The precise question is whether or not the Supreme Court's determination in the *Switz* case, as it affects the proper computation of veterans' exemptions under present law, also applies to the determination of the senior citizens' exemption.

There is no material difference in the essential constitutional and statutory language providing for the veterans' and the senior citizens' exemptions. The respective constitutional and statutory provisions utilize the term "assessed valuation." Both statutes and constitutional provisions deal with the same subject matter. They establish similar exemptions. Both exemptions are personal, are partial rather than total, and are predicated upon constitutional imprimatur. Moreover, both exemptions were intended to be applied consistently. Paragraph 4 of sec. 1 of Art. VII of the Constitution provides specifically that:

"Any such exemption [for senior citizens] when so granted by law shall be granted so that it will not be in addition to any other exemption to which the said citizen and resident may be entitled."

It was determined in a previous opinion of the Attorney General, Formal Opinion 1961—No. 12, that these exemptions were interrelated.

Since the statutes deal with the same subject matter and are interrelated, they should be construed in *pari materia*. *City of Clifton v. Passaic County Board of Taxation*, 28 N.J. 411 (1958); *Nordell v. Mantua Twp.*, 45 N.J. Super. 253 (Ch. Div. 1957); *State v. Brown*, 22 N.J. 405 (1956). The respective constitutional provisions should likewise be so construed since the rules for statutory interpretation are applicable in construing constitutional materials. *Lloyd v. Vermeulen*, 22 N.J. 200 (1956); *State v. Mursda*, 116 N.J.L. 219, 222 (E. & A. 1936); *In re Hudson County*, 106 N.J.L. 62 (E. & A. 1928); *DeCrescenzi v. Veritas, Political Club*, 24 N.J. Misc. 246 (Cir. Ct. 1946).

These considerations strongly dictate that the identical words "assessed valuation" used in each statute and constitutional provision should be given a consistent interpretation. The term "assessed valuation" as used in L. 1961, c. 9 and Art. VIII, sec. 1, par. 4 of the Constitution providing for the senior citizens' exemption should, therefore, be deemed to mean lawful assessed valuation or true valuation, which is the meaning ascribed to it with respect to the veterans' exemption.

It may be noted parenthetically that at the time the senior citizens' exemption was propounded most taxing districts did not in fact assess property at true value. Such assessment practices, however, were in disregard of the categorical statutory directive that property be assessed only at true value (*Switz v. Middletown Twp.*, *supra*) and cannot serve to dislodge or alter the meaning of "assessed value" as established by the Legislature in plain and unambiguous terms. Cf. *Weinacht v. Bd. of Chosen Freeholders of County of Bergen*, 3 N.J. 330, 335 (1949); *Loveladies Property, etc. v. Barnegat City, etc., Co.*, 60 N.J. Super. 491, 504 (App. Div. 1960), *pet. for cert. denied*, 33 N.J. 118 (1960).

Moreover, while it appears that the drafters of this constitutional amendment thought that "assessed valuations" could mean assessments at less than true value, (Senate Committee on Revision and Amendment of Laws, *Public Hearings on Senate Concurrent Resolutions Nos. 4, 12 and 13* (1960)) their intention should not govern or influence the proper interpretation of the senior citizens' exemption. It must be assumed that the people of the State of New Jersey, in adopting the constitutional amendment providing for senior citizens' exemptions, intended that this amendment have the same general interpretation and application as the veterans' exemption since the two are correlated. The intention of the people in adopting this constitutional amendment, not the intention of the framers of the amendment, is paramount and

dispositive of the proper interpretation to be accorded its provisions. Cf. *Gangemi v. Berry*, 25 N.J. 1, 16 (1957); *State v. Lanza*, 27 N.J. 516, 527 (1958); cf. *Kervick v. Bontempo*, 29 N.J. 469 (1959).

It may also be observed that the veterans' exemption must be computed by deducting \$500 from the true value of property. A construction of the senior citizens' exemption which would permit a deduction of \$800 from an assessed valuation other than true value would produce inequitable and disparate results. Such a construction is not dictated by the Constitution or the statute and should be avoided. *City of Clifton v. Passaic County Board of Taxation*, *supra*; *Elizabeth Federal Savings & Loan Ass'n v. Howell*, 24 N.J. 488, 508 (1957); *Schierstead v. Brigantine*, 29 N.J. 220 (1959); *Giordano v. City Commission of the City of Newark*, 2 N.J. 585, 594 (1949).

By way of conclusion, we express the opinion that the Supreme Court's decision in *Switz* compels a consistent treatment of both the senior citizens' exemption and the veterans' exemption. We advise you, therefore, that the senior citizens' exemption must be computed in the same manner as the veterans' exemption, namely, by deducting the amount of the exemption from the lawful assessed value of property, which is true value.

### III. HOUSEHOLD GOODS EXEMPTION

The exemption of household goods is provided in R.S. 54:4-3.16, N.J.S.A., as follows:

"Household furniture and effects to a value not exceeding one hundred dollars (\$100.00) in amount, when located and used in the residence of the owner thereof, shall be exempt from taxation under this chapter."<sup>1</sup>

There is no constitutional provision for the exemption of household goods.

The exemption for household goods was first provided by statute in 1918 by L. 1918, c. 236, § 203; R.S. 54:4-3.16, N.J.S.A. At that time, the Constitution of New Jersey provided for the assessment of real property "according to true value" and the statute providing for the assessment of real property provided that property be assessed at true value. L. 1918, c. 236, § 202; R.S. 54:4-1. Applying basic canons of statutory construction, R.S. 54:4-3.16 and R.S. 54:4-1 should be interpreted in *pari materia*. *City of Clifton v. Passaic County Board of Taxation*, *supra*; *Nordell v. Mantua Twp.*, *supra*; *State v. Brown*, *supra*. So construed, it is reasonable to

<sup>1</sup> L. 1960, c. 51, § 13 (N.J.S.A. 54:4-9.2) provides for the taxation of household goods and personally according to fair value, expressed as the same percentage of fair value which is established as the percentage level for taxation of real property within the county. Such household personally, however, may be made completely exempt from taxation upon the adoption by the governing body of the particular municipality of an ordinance providing for such exemption. Section 37 of Chapter 51 (N.J.S.A. 54:4-2.33) provided for the specific repeal of R. S. 54:4-3.16, N.J.S.A., for the year 1962 and thereafter and Section 38 of Chapter 51 (N.J.S.A. 54:4-2.34) provided generally that Chapter 51 shall apply to taxes due and payable in the year 1962 and thereafter. The operative effect of Chapter 51, however, was postponed to the year 1964, with the exception of Section 13 (N.J.S.A. 54:4-9.2) relating to taxation of household personally (L. 1962, c. 20). Chapter 20 of L. 1962 also postponed until 1964 the repealer of R. S. 54:4-3.16, N.J.S.A., as provided in Section 38 of Chapter 51. Consequently, although Section 13 of Chapter 51 (N.J.S.A. 54:4-9.2) is now operative with respect to the taxation of household personally, it is still subject to the partial exemption provided by R.S. 54:4-3.16, N.J.S.A. The purpose for permitting Section 13 to be operative was to enable those municipalities (in excess of 500) which have already adopted ordinances providing for the total exemption of household personally under Section 13 (N.J.S.A. 54:4-9.2) to continue these exemptions. Since, however, the operative effect of the remaining provisions of Chapter 51 has been postponed until 1964, no enforceable county-wide assessment ratios or percentages can be established legally by county boards of taxation pursuant to Section 3 of Chapter 51 (N.J.S.A. 54:2-2.27). Therefore, at the present time, household personally which is not exempt must continue to be assessed for purposes of taxation "at true value" under R.S. 54:4-1, N.J.S.A.

conclude that the Legislature intended that the household goods exemption be computed by deducting the \$100 exemption from the lawful assessed value of property, namely, true value.

After the enactment of the 1918 tax revisions, the Legislature passed several amendments to the exemption provisions of the 1918 Act (L. 1918, c. 236, §203). None of the subsequent amendments were intended to modify or change the original provision for the household goods exemption. Cf. *Garifine v. Monmouth Park Jockey Club*, 29 N.J. 47, 58 (1959); *State v. DeGennaro*, 147 Conn. 296, 160 A. 2d 480, 484 (Sup. Ct. of Err. 1960), cert. denied, 364 U.S. 873, 81 S. Ct. 116 (1960).

The enactment of Chapter 51, Laws of 1960 would not alter the conclusion that the household exemption must be computed by deducting the statutory amount from the true value of the property. The meaning of "value" as used in R.S. 54:4-3.16 became fixed at the time of its enactment in 1918. *Yanow v. Seven Oaks Park, Inc.*, 11 N.J. 341, 348 (1953); *Crater v. County of Somerset*, 123 N.J.L. 407, 413 (E. & A. 1939). At that time this term unquestionably meant "true value." The Legislature did not intend to alter the household exemption unless and until the provisions of section 13 of Chapter 51 (N.J.S.A. 54:4-9.2) become operative, at which time R.S. 54:4-3.16 will be repealed in toto. Presently, however, household goods, not totally exempt from taxation under section 13, must be assessed at true value under L. 1918, c. 236, §202; R.S. 54:4-1.<sup>2</sup>

We advise you, therefore, that in computing the exemption for household goods, the \$100 exemption should be deducted from the true value of the household property.

#### IV. PARSONAGE EXEMPTION

The exemption from property taxation of parsonages is provided by statute rather than by constitution. N.J.S.A. 54:4-3.6 provides:

"The following property shall be exempt from taxation under this chapter: \* \* \* the building actually occupied as a parsonage by the officiating clergymen of any religious corporation of this State, to an amount not exceeding \$5,000.00."

This exemption was recently amended by L. 1962, c. 154, which increased the exemption "to an amount not exceeding \$25,000.00."

Unlike the other statutory exemptions provided for by N.J.S.A. 54:4-3.6, as amended, the parsonage exemption is not a total exemption but rather only a partial one. The question is suggested by the *Switz* decision, therefore, as to the proper method for computing this exemption, and specifically whether it should be computed by deducting \$25,000 from the true value of property or from its assessed value.

At the outset it must be observed that the parsonage exemption does not contain the words "value," "assessed value," "true value," or the like. It merely provides that a parsonage shall be exempt "to an amount" not exceeding \$25,000. It is obvious, however, that the Legislature did not intend that such an exemption be taken as a flat deduction from the final tax bill since it is unlikely in the extreme that property taxes on parsonage property would equal or surpass \$25,000. It is also unlikely that the Legislature could have intended that the \$25,000 be deducted from assessed value since many taxing districts assess at very low percentages of true value.

<sup>2</sup> See footnote 1.

The statutory exemption for parsonages is one of long standing. It first appeared in 1863 when the Legislature provided for a parsonage exemption not to exceed \$5,000 in value. L. 1863, c. 278, §2. Shortly thereafter, in 1866, the parsonage exemption was repealed. L. 1866, c. 437, §32. It was re-established, however, in 1893 in the same amount. L. 1893, c. 122, §1. By this time the New Jersey Constitution of 1844 had been amended to provide that property shall be assessed "according to its true value." In 1903, the Legislature provided explicitly that all property shall be subject to annual taxation "at its true value." L. 1903, c. 208, §2. The 1903 Act also continued without any significant change the exemption for parsonages to an amount not exceeding \$5,000. L. 1903, c. 208, §3(4).

It is reasonable to infer therefrom that the Legislature did intend that the parsonage exemption provisions be referable to and be applied consistently with the prevailing statutory provisions for the assessment of property for taxation and that the amount of the parsonage exemption should, therefore, be taken as a deduction from the lawful assessed value of property, namely, its true value.

This legislative approach was continued and incorporated without substantive change in the general tax revisions of 1918. L. 1918, c. 236, §§202, 203(4). Parenthetically, it might be noted that the revision of 1918 also provided for the veterans' exemption "to a valuation not exceeding in the aggregate five hundred dollars" (L. 1918, c. 236, section 203; R.S. 54:4-3.12<sup>3</sup> as well as the household and parsonage exemptions. Subsequent legislative amendments of section 203 of chapter 236 of the Laws of 1918 did not alter or change the essential provisions for these exemptions. The exemptions for veterans, parsonages and household goods were obviously considered by the Legislature to be fundamentally similar (although predicated upon different policy considerations). Each exemption is a partial exemption from property taxation rather than a total exemption, and consequently, each exemption must be computed as a deduction from the valuation of the underlying taxable property. It is not reasonable to infer that the Legislature intended that these exemptions be computed or applied in a disparate or non-uniform manner. It is clear, therefore, that the Legislature did intend that each of these exemptions, including the parsonage exemption, be computed consistently and uniformly with reference to the lawful assessed value of property as determined under L. 1918, c. 236, §202; R.S. 54:4-1, namely, true value.

The most recent amendment increasing the parsonage exemption to \$25,000 (L. 1962, c. 154) was enacted subsequent to the passage of Chapter 51 of the Laws of 1960. In increasing the parsonage exemption in 1962 it does not appear that the Legislature intended to change the method of computing this exemption. The parsonage exemption was merely increased by the 1962 Law, predicated upon the prior statutory provision in L. 1918, c. 236, §202. Significantly, however, in enacting L. 1962, c. 87, authorizing a partial exemption for blast or fallout shelters, the Legislature provided that this exemption "shall not exceed \$1,000.00 of the assessed value of such a property based at 100% of true value." In enacting this new exemption,

<sup>3</sup> The veterans' exemption was originally statutory. It was enacted in 1918 despite the important decision of *Tippett v. McGrath, Collector*, 70 N.J.L. 110 (Sup. Ct. 1903), *aff'd*, 71 N.J.L. 338 (E. & A. 1904), which held that exemptions from property taxation that are not based upon any unique characteristic of the property itself are void. The framers of the 1947 Constitution recognized the infirmity of the statutory personal exemptions and thus drafted a specific constitutional provision for veterans' exemptions (Vol. I Constitutional Convention of 1947, pp. 745-758). In the statute implementing the veterans' exemption under the Constitution, the Legislature recognized that "personal" exemptions could not be predicated upon legislation alone. N.J.S.A. 54:4-3.12i, Historical Note.

the Legislature has taken cognizance of the Supreme Court decision in *Switz v. Kingsley, supra*.

You are advised, therefore, that the proper mode or method for computing the parsonage exemption provided by N.J.S.A. 54:4-3.6, as amended, is by deducting the amount of the exemption from the true value of the taxable property.

In concluding, it is not inappropriate to observe that to use varying, non-uniform standards for computing the present partial exemptions based upon the failure of assessors to assess taxable property uniformly at true value may raise serious questions under the Federal as well as our State Constitution, which questions we do not consider necessary to resolve in view of our present analysis. Suffice to say, the effect of the Supreme Court's decision in the *Switz* case is to compel consistency and uniformity in the treatment of the present partial exemptions from property taxation and that the exemptions for veterans, senior citizens, household goods and parsonages must each be computed with reference to the true value of the underlying taxable property.

Very truly yours,

ARTHUR J. SILLS  
*Attorney General*

By: ALAN B. HANDLER  
*Deputy Attorney General*

MARCH 12, 1963

HONORABLE JOHN A. KERVICK  
*State Treasurer*  
State House  
Trenton, New Jersey

FORMAL OPINION 1963—No. 1

DEAR MR. KERVICK:

You have requested our opinion whether the issuing officials, being the Governor, yourself, the State Treasurer, and the Comptroller of the Treasury, may lawfully provide for and cause the issuance and delivery of \$32,000,000 State Recreation and Conservation Land Acquisition Bonds (Series B) under the "New Jersey Green Acres Bond Act of 1961," Chapter 46 of the Laws of 1961, in view of the fact that there exists litigation which apparently questions the constitutionality of a companion statute, the "New Jersey Green Acres Land Acquisition Act of 1961," Chapter 45 of the Laws of 1961, N.J.S.A. 13:8A-1, *et seq.* Your inquiry is prompted by the fact that the State has on February 19, 1963 accepted a bid for the purchase of the foregoing bonds pursuant to a public Notice of Bond Sale. The Notice of Bond Sale, pursuant to which bids were submitted, provided that before the successful bidder would be required to accept and pay for the bonds, he would be furnished satisfactory certificates to the effect that "there is no litigation pending or (to the knowledge of the signer or signers thereof) threatened affecting the validity or payment of the Bonds."

The litigation to which you have referred is entitled *State of New Jersey, et c. v. New Jersey Zinc Co., et al.* (Superior Court, Law Division, Docket No. L-23109-61).

This litigation was instituted by the State of New Jersey, acting by and through H. Mat Adams, Commissioner of the Department of Conservation and Economic Development, to condemn property situate in the County of Sussex for purposes of acquiring this land under the "New Jersey Green Acres Land Acquisition Act of 1961," (L. 1961, c. 45). The defendants in the action include the County of Sussex, the property owner, as well as a party who held an option to purchase the property at the time the condemnation proceedings were instituted.

With respect to the option holder, an order was entered by the Superior Court, Law Division that he had no interest in the property sufficient to give him standing in the condemnation proceeding. This party has instituted an appeal. In this appeal the option holder raises the question as to his standing to be made a proper and necessary party in the condemnation proceeding. In the brief filed by this appellant, he also made the statement that if he were a party, he would have advanced the argument that N.J.S.A. 13:8A-1 *et seq.*, known as the Green Acres Act, is unconstitutional for delegating legislative and administrative discretion without setting up adequate standards. Upon motion brought by the State of New Jersey, the Appellate Division on March 11, 1963 ordered that the foregoing contention be deleted from the pending appeal without prejudice and in the event of a reversal, the right to that defense be reserved.

With respect to the other defendants in the condemnation proceeding, no appeal has at the present time been taken from the judgment of the Superior Court, Law Division which was entered on February 18, 1963. It is to be noted, however, that time for appeal has not yet expired. The defendant, County of Sussex, in its Answer filed in the proceedings before the Superior Court, Law Division raised the defense that the "New Jersey Green Acres Land Acquisition Act of 1961," L. 1961, c. 45, N.J.S.A. 13:8A-1 *et seq.* was unconstitutional. The Superior Court, Law Division, on this issue, ruled adversely to the defendant County of Sussex and held that this statute was constitutional. The County of Sussex has taken official action by an appropriate resolution adopted by its Board of Chosen Freeholders that in the event an appeal will be taken from the determination of the Superior Court, Law Division it will assert on such appeal that Chapter 45 of the Laws of 1961 is unconstitutional but does not and shall not contend in said appeal that Chapter 46 of the Laws of 1961 is unconstitutional or invalid. Thus, this litigation does not present an attack or threat of attack on the "New Jersey Green Acres Bond Act of 1961," Chapter 46 of the Laws of 1961.

After having given due consideration to the various legal and factual aspects of the litigation heretofore described, we have reached the opinion that this present litigation cannot affect the validity or payment of the bonds issued pursuant to Chapter 46, the "New Jersey Green Acres Bond Act of 1961," L. 1961, c. 46.

At the threshold of this analysis, it is imperative to note the differences between Chapters 45 and 46 of the Laws of 1961. Chapter 46, the "New Jersey Green Acres Bond Act," is the statute which authorizes the creation of a debt of the State of New Jersey by the issuance of bonds of the State in the aggregate amount of \$60,000,000.00. Chapter 46 was adopted by the people of the State of New Jersey in a referendum in the General Election held in November 1961. The act contains legislative recitals of fact that there exists an increasing need for lands for public recreation and for the conservation of natural resources; that the State must act now to acquire, and to assist local governments to acquire, substantial quantities of such lands as are now available; and that appropriations for such purposes in the

sum of \$60,000,000.00 are needed now to make such acquisition possible. The statute further states that "Bonds of the State of New Jersey in the sum of \$60,000,000.00 are hereby authorized to provide money to meet the cost of public acquisition of lands for recreation and conservation purposes." (L. 1961, c. 46, § 3). The Green Acres Bond Act further provides that the bonds "shall be issued from time to time as money is required for the purpose aforesaid, as the issuing officials herein named shall determine" and that the issuing officials "are hereby authorized to carry out the provisions of this act relating to the issuance of said bonds, and shall determine all matters in connection therewith subject to provisions hereof." (L. 1961, c. 46, §§ 6 and 7). Chapter 46 contains additional provisions with respect to the details of the bonds, including title, maturities, execution, issuance, etc. The statute also leaves to the determination of the issuing officials the matter of denominations of bonds, form thereof and whether bonds shall be coupon or registered as to both principal and interest. (L. 1961, c. 46, §§ 9-12). The power, thus granted, to issue bonds is in no way limited or made contingent upon any separate act of the Legislature.

In contrast to Chapter 46, Chapter 45, the "Green Acres Acquisition Land Act," is a statute designed to establish administrative authority, under legislative standards, to implement the Green Acres program and to appropriate for its purposes the moneys obtained from the separately authorized bond issue. The purpose and effect of Chapter 45 are to appropriate and expend the proceeds of the bonds to be issued and sold under Chapter 46. Chapter 45 specifically recites that such moneys "will be made available by the sale of bonds authorized by the New Jersey Green Acres Bond Act of 1961 \* \* \*" (L. 1961, c. 45, § 2(f)). It further provides that the Commissioner of Conservation and Economic Development "shall use the sum appropriated by this act from the proceeds of the sale of bonds under the New Jersey Green Acres Bond Act of 1961, and such other sums as may be appropriated from time to time for like purposes, to acquire lands for recreation and conservation purposes and to make grants to assist local units to acquire lands for such purposes, subject to the conditions and limitations prescribed by this act" (L. 1961, c. 45, § 4). It is further provided that "the money in the State Recreation and Conservation Land Acquisition Fund created by the New Jersey Green Acres Bond Act of 1961 is hereby appropriated to the Department of Conservation and Economic Development for use in executing the provisions of this act \* \* \*" (L. 1961, c. 45, § 17).

It thus clearly emerges that Chapter 46 of the Laws of 1961 is a statute which authorizes the State of New Jersey to create a debt of the State by the issuance of State bonds. Chapter 45 of the Laws of 1961, on the other hand, is a statute which merely appropriates and provides for the specific expenditures of the sums of money made available by the sale of such bonds. They are clearly independent enactments. Cf. *In re Application of McGlynn*, 58 N.J. Super. 1, 21-24 (App. Div. 1959). It is settled law that bonds issued by a state for a lawful purpose will be considered valid if such bonds have been issued pursuant to all constitutional and statutory requirements. 81 C.J.S. *States*, § 179 *et seq.* It cannot be questioned that the issuance of state bonds for the purpose of raising moneys for the acquisition of lands for public recreational and conservation uses is a lawful purpose and an appropriate exercise of governmental power. Cf. *Fishblatt v. Atlantic City*, 78 N.J.L. 134 (Sup. Ct. 1909), *aff'd*, 80 N.J.L. 269 (E. & A. 1910); *Bew v. Ventnor City*, 81 N.J.L. 207 (Sup. Ct. 1911).

The requirements imposed by the Constitution for the creation of a State debt or liability are that it must be authorized by a law for a single object, that such law

shall provide the ways and means, exclusive of loans to pay the interest of such debt or liability as it falls due, and also to pay and discharge the principal thereof within thirty-five years from the time it is contracted and that "No such law shall take effect until it shall have been submitted to the people at a general election and approved by a majority of the legal qualified voters of the State voting thereon." N.J. Const. 1947, *Art. VIII, Sec. 2, par. 3*. It is not questioned that Chapter 46 complies with these constitutional requirements and has been adopted pursuant thereto. Additional statutory prerequisites for the issuance of the Green Acres Bonds are recited in the text of Chapter 46 of the Laws of 1961 (L. 1961, c. 46, § 12) and the issuing officials have complied with these requirements.

Chapter 46, as has been noted, does not impose as a requirement for the valid issuance of Green Acres Bonds, the prior or simultaneous adoption by the Legislature of a valid appropriations act. It is provided under Chapter 46 that "the proceeds from the sale of bonds shall be paid to the State Treasurer and be held by him in a separate fund, and be deposited in such depositories as may be selected by him to the credit of the fund, which shall be known as the 'State Recreation and Conservation Land Acquisition Fund'" (L. 1961, c. 46, § 14). Most significantly, Chapter 46 provides:

"The moneys in the said State Recreation and Conservation Land Acquisition Fund are hereby specifically dedicated to meeting the cost of public acquisition of lands for recreation and conservation purposes and shall not be expended except in accordance with appropriations from said fund made by law.

"At any time prior to the issuance and sale of bonds under this act, the State Treasurer is hereby authorized to transfer from any available money in the treasury of the State to the credit of the State Recreation and Conservation Land Acquisition Fund such sum as may be deemed necessary for the purposes of this act by the State House Commission, which said sum so transferred shall be returned to the treasury of this State by the treasurer thereof from the proceeds of the sale of the first issue of bonds.

"Pending their application to the purposes provided in this act, moneys in the State Recreation and Conservation Land Acquisition Fund may be invested and reinvested as other trust funds in the custody of the State Treasurer in the manner provided by law \* \* \*." L. 1961, c. 46, § 15.

We are aware of the Attorney General's Formal Opinion 1952—No. 15. This opinion held that L. 1951, c. 340, which authorized the creation of a debt of the State of New Jersey by the issuance of State bonds in the sum of \$15,000,000 for State Teachers' College buildings and other purposes did not contemplate the issuance of bonds prior to an actual legislative appropriation. The statute therein considered by the Attorney General did, in our opinion, evince an intent on the part of the Legislature that the bonds could not be issued without a prior legislative appropriation. The Legislature has already expressed its intent by its enactment of Chapter 45, to effectuate the Green Acres program and has empowered State officials to take measures within their discretion to fulfill this program. The issuing officials have acted within the discretion granted and provided for in the Green Acres Bond Act. Although there is an attack upon Chapter 45, L. 1961, it has already been upheld as constitutional and, in our opinion, an attack upon this statute does not constitute an attack upon Chapter 46, L. 1961. There was and is no legal impediment to the

course of action the issuing officials have taken. Thus we conclude that Formal Opinion 1952—No. 15 is not here applicable.

In view of the foregoing, we have reached the conclusion that the pending litigation which questions the constitutionality of Chapter 45 of the Laws of 1961 will not affect the validity or payment of the bonds authorized pursuant to Chapter 46 of the Laws of 1961. We advise you, therefore, that the issuing officials may lawfully provide for and cause the issuance and delivery of the bonds in question.

Very truly yours,

ARTHUR J. SILLS  
*Attorney General*

By: ALAN B. HANDLER  
*Deputy Attorney General*

JUNE 26, 1963

DR. F. W. RAUBINGER  
*Commissioner of Education*  
225 West State Street  
Trenton 25, New Jersey

FORMAL OPINION 1963—No. 2

DEAR DR. RAUBINGER:

You have asked our opinion as to whether the Supreme Court's decision in *School District of Abington Township v. Schempp* and *Murray v. Curlett*, Nos. 142 and 119 (Supreme Court June 17, 1963) affects the New Jersey statutes relating to the reading of five verses of the Old Testament and the recitation of the Lord's Prayer at the opening of each school day (R.S. 18:14-77 and 78).

The United States Supreme Court in the above decision held unconstitutional a Pennsylvania statute and a Rule adopted by the Board of School Commissioners of Baltimore City, Maryland, pursuant to Maryland law, which required readings from the Holy Bible in the public schools. The Pennsylvania law stated as follows:

"At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian."

The Baltimore Rule was similar.

"Each school, either collectively or in classes, shall be opened by the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer. The Douay version may be used by those pupils who prefer it. . . . Any child shall be excused from participating in the opening exercises upon written request of his parent or guardian."

It was the decision of the Supreme Court that these statutes violated the First and Fourteenth Amendments of the United States Constitution. The issue is whether the holding and rationale of this decision applies to the following New Jersey statutes.

R.S. 18:14-77:

"At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day . . ."

R.S. 18:14-78:

"No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

Although not stated in express terms it has always been the practice in all school districts of this State to excuse those children who did not wish to participate in these practices.

It is our opinion that the *Abington* case renders these statutes unconstitutional and prohibits the practices authorized thereunder.

Although the laws challenged in the Supreme Court were somewhat distinguishable from the New Jersey statutes in that the New Testament was included in the former yet expressly excluded in the latter, we think the decision is broad enough to erase this distinction. There is no question but that the decision prohibits the use of the Lord's Prayer as a compulsory religious ceremony in the public schools. The thrust of the majority opinion is that the Government must maintain a position of neutrality in religious matters. The test which the Court set down by which legislation is measured against the Establishment Clause of the First Amendment is "that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." That the reading of the Bible and the recitation of the Lord's Prayer fulfills neither of these requirements necessarily follows from the proscription of the First Amendment as delineated and interpreted by the Supreme Court. The Court's rationale does not depend upon the number of verses to be read, the choice of Testament permitted, the version of the Bible utilized, or the voluntary character of the ceremony, but rather that these ceremonies when presented in the context of a secular program of education "are religious exercises, required by the states in violation of the commandment of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion."

In 1950 the Supreme Court of New Jersey found that the Old Testament, because of its antiquity, its content, and its wide acceptance, was not a sectarian book when read without comment. *Doremus v. Board of Education of Hawthorne*, 5 N.J. 435 (1950), appeal dismissed, 342 U.S. 429 (1952). This precedent is no longer binding. Justice Brennan makes this clear in his concurring opinion in the *Abington* case:

"The sectarian character of the Holy Bible has been at the core of the whole controversy over religious practices in the public schools throughout its long and often bitter history. To vary the version as the Abington and Baltimore schools have done may well be less offensive than to read from the King James version every day, as once was the practice. But the result even of this relatively benign procedure is that majority sects are preferred in approximate proportion to their representation in the community and in the

student body, while the smaller sects suffer commensurate discrimination. So long as the subject matter of the exercise is sectarian in character, these consequences cannot be avoided."

The neutrality mandated by the high Court's interpretation of the First Amendment is violated by the required use of the Bible, which is unalterably, "an instrument of religion" in the public schools. It might also be noted that the case of *Engel v. Vitale*, 370 U.S. 421 is authority for the principle that nonsectarian religious practices, as well as sectarian practices, violate the Establishment Clause.

It is, therefore, our opinion that the provisions of R.S. 18:14-77 and 78 are unconstitutional by virtue of the decision in *Abington v. Schempp*, and that the practice authorized thereunder should no longer be enforced, required or continued under the auspices of the State Department of Education.

Sincerely yours,

ARTHUR J. SILLS  
*Attorney General*

JULY 19, 1963

HONORABLE JOHN A. KERVICK  
*State Treasurer*  
State House  
Trenton, New Jersey

FORMAL OPINION 1963—No. 3

DEAR MR. KERVICK:

You have requested our opinion as to whether the Consul General of the General Consulate of Switzerland in Philadelphia, Pennsylvania is entitled to an exemption from or refund of the tax imposed upon the sale of motor fuels pursuant to N.J.S.A. 54:39-1 et seq. We conclude below that consular personnel are not entitled to the claimed exemption or refund.

This tax is imposed upon "distributors" of motor fuels. N.J.S.A. 54:39-27 states:

"Every distributor shall \* \* \* render a report to the commissioner \* \* \* stating the number of gallons of fuel sold or used in this State by him \* \* \*. A tax of \$0.05 per gallon on each gallon so reported shall be paid by each distributor, \* \* \*. If any distributor shall fail, neglect or refuse to file the report within the time prescribed by this section, the commissioner shall note such failure, neglect or refusal upon his records, and shall estimate the sales, distribution and use of said distributor, assessing the tax thereon, adding to said tax a penalty of 20% thereof for failure, neglect or refusal to report, and such estimate shall be prima facie evidence of the true amount of tax due to the commissioner from such distributor \* \* \*." (Emphasis added)

A "distributor" is defined by the statute to mean and include every person who imports into the State motor fuels for use, distribution, storage or sale in the State. N.J.S.A. 54:39-3.

The Consul General does not claim an exemption by virtue of the statute itself. There are certain enumerated exemptions from the motor fuels tax specified by the

statute. N.J.S.A. 54:39-65 and 66. None of the statutory exemptions by its terms is applicable to a consular officer.

Rather, the Consul General of Switzerland as a purchaser or ultimate consumer of motor fuels contends that the tax imposed upon a distributor under N.J.S.A. 54:39-1 et seq. is reflected or included in the price which he pays for gasoline. He claims that he is entitled to a refund of this tax by virtue of the "most-favored-nation clause" contained in the Treaty of Friendship of 1850 between the United States and Switzerland. 11 Stat. (1855-1866). The Treaty of Friendship does not provide expressly for the exemption of consular officers from taxes. Article VII of the Treaty, the "most-favored nation clause," states:

"The contracting parties give to each other the privilege of having, each, in the larger cities and important commercial places of their respective States, consuls and vice-consuls of their own appointment, who shall enjoy the same privileges and powers in the discharge of their duties, as that of the most-favored nation."

The United States Department of State has construed the "most-favored-nation clause" of the Treaty of Friendship between the United States and Switzerland to be conditioned upon principles of reciprocity. It was thus expressed:

"Prior to the negotiation of the Treaty of Friendship, Commerce and Consular Rights between the United States and Germany signed on December 8, 1923, it was the general practice of this Government to regard the most-favored-nation clause in treaties to which it was a party as conditional [i.e., conditioned on reciprocity], regardless of whether the clause related to rights of consular officers or commercial matters. Beginning with the negotiation of the treaty of 1923 with Germany this Government adopted the unconditional form of the most-favored-nation clause as regards commercial matters but there was no change of policy with respect to the interpretation of the most-favored-nation clause as applied to the rights of consular officers.

\* \* \*

"In the absence of information as to the exact nature of the declaration which is said to have been made by the American Agent and as to what may have been made the understanding between the negotiators of the two Governments regarding the right of consular officers to claim administration of the property falling to their absent nationals, the Department could not, in view of its long established policy of regarding the most-favored-nation clause concerning rights of consular officers as conditional, assume that in the negotiation of the treaty with Switzerland of 1850 it was the intention of this Government that the most-favored-nation clause in Article VII should be regarded as unconditional in its application." Under Secretary Castle to Minister Wilson, No. 1398, May 9, 1931, MS. Department of State, file 711.5421/24, (as quoted in IV Hackworth, Digest of International Law (1942), p. 702).

The General Consul's claim for exemption from the motor fuel tax is predicated upon the alleged existence of comparable tax exemptions granted to United States consular officers in Switzerland. It is asserted, therefore, that the reciprocal conditions of the "most-favored-nation clause" of the Treaty of Friendship between the

United States and Switzerland would require the State of New Jersey to accord a similar exemption to the Swiss General Consul.

It has not been established, however, that American consulate personnel are in fact granted exemptions from taxes comparable to the New Jersey motor fuels tax. According to documents furnished to the United Nations organization by the permanent observer assigned by Switzerland to the United Nations,

"The [Swiss Federal Government] exempts under reserve of reciprocity \* \* \* [consular officers] \* \* \* from \* \* \* prepaid federal taxes and recommends to cantons to do the same as to all direct taxes \* \* \*. In fact the great majority of cantons exempt consulate personnel from direct cantonal taxes." Law and Regulations Regarding Diplomatic And Consular Privileges And Immunities, *United Nations Legislative Series*, Vol. VII, United Nations (1958).

Several observations are pertinent. First, the New Jersey motor fuels tax is not a "prepaid federal tax." Second, Swiss cantons which are comparable to our states, are only recommended to exempt consulate personnel from taxes. Third, not all cantons have complied with this recommendation to exempt consulate personnel. Fourth, the recommendation of tax exemption applies only to "direct cantonal taxes."

It is to be emphasized that the motor fuel tax imposed by N.J.S.A. 54:39-1 *et seq.* is not a direct tax upon a consumer. It is an indirect tax. *Arneson v. W. H. Barber Co.*, 210 Minn. 42, 297 N.W. 335 (S. Ct. 1941); *State v. City of El Paso*, 135 Tex. 359, 143 S.W. 2d 366 (1940); *Trinityfarm Const. Co. v. Grosjean*, 291 U.S. 466, 54 S. Ct. 469 (1934), *rehearing denied* 292 U.S. 604, 54 S. Ct. 712 (1935); *Monamotor Oil Co. v. Johnson*, 292 U.S. 86, 54 S. Ct. 575 (1935); *In re Wiloil Corp.*, 50 F. Supp. 535 (D.C. Pa. 1941).

As previously stated, N.J.S.A. 54:39-27 imposes the motor fuels tax upon the "distributor" of such motor fuel. While the motor fuels tax thus imposed upon a distributor may ultimately be reflected or included in the cost to the consumer and, in that sense, be paid indirectly by the consumer, such a tax is not considered to be a direct tax but rather an "excise" or "indirect" tax. Compare *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429, 15 S. Ct. 673 (1895) and *Flint v. Stone Tracy Co.*, 220 U.S. 107, 31 S. Ct. 342 (1910) with *Patton v. Brady*, 184 U.S. 608, 22 S. Ct. 493 (1902), *Arneson v. W. H. Barber Co.*, *supra*, and *State v. City of El Paso*, *supra*. Any increase in the ultimate cost of gasoline attributable to the tax imposed upon distributors imposes only an indirect economic burden upon purchasers or users of motor fuels. Such increased economic burdens are not tantamount to taxes. Cf., *James v. Dravo Contracting Co.*, 302 U.S. 134, 58 S. Ct. 208 (1937); *Alabama v. King & Boozer*, 314 U.S. 1, 62 S. Ct. 43 (1941); *United States v. City of Detroit*, 355 U.S. 466, 78 S. Ct. 474 (1958); *United States v. Township of Muskegon*, 355 U.S. 484, 78 S. Ct. 483 (1958).

The United States Department of State, in interpreting the scope of the "most-favored-nation clause," has indicated that only a motor fuel tax which is imposed directly upon a consumer or ultimate user could be subject to a claim for exemption under the reciprocal provisions of the "most-favored-nation clause":

"It is believed that foreign consular officers in the United States generally pay the tax on gasoline. In some instances where the tax is assessed upon the consumer, it has been held that, where treaty provides for the exemption

of consular officers from taxes, they are not obliged to pay the gasoline tax." (Emphasis supplied.) The Assistant Secretary of State (Carr) to the Consul General at Paris (Keena) Oct. 15, 1934, MS. Department of State, file 702.0651/71, (as quoted in IV Hackworth, *op. cit.* p. 792.)

In this same vein, the United States Department of State in 1934 determined as that Mexican consular officers were not exempt from a federal tax upon gasoline. The Federal Act in question was similar to N.J.S.A. 54:39-27. It provided:

"There is hereby imposed on gasoline sold by the importer thereof or by a producer of gasoline, a tax of one cent a gallon, except that under regulations prescribed by the Commissioner with the approval of the Secretary the tax shall not apply in a case of sales to a producer of gasoline." Revenue Act of 1932, § 617(a), 26 U.S.C.A. Internal Revenue Acts 1924 to Date.

The United States Department of State advised the Mexican Embassy as follows:

"Article 20 of the convention concluded at Habana [in 1928, 4 treaties, etc. (Trenwith, 1938) 474] relative to consular agents provides that consular agents \* \* \* shall be exempt from all national, state, provincial, or municipal taxes levied upon their person or property. It will be noted that the taxes from which consular agents and employees are exempted under the provisions of the consular convention are the 'taxes levied upon their person or property.' The exemption is thus limited in its application to personal taxes and property taxes \* \* \*.

\* \* \*

"Section 617(a) of the Revenue Act of 1932, as amended, provides for a tax on gasoline 'sold by the importer thereof or by a producer of gasoline.' Thus the Federal tax on gasoline is not a tax on the person or property of consular agents and employees but is an excise on the sale of gasoline. It is the opinion of this Department, therefore, that the tax exemption accorded consular agents and employees under the consular convention with Mexico of February 20, 1928, is without application to the Federal excise tax on gasoline." The Chief of the Division of Mexican Affairs (Reed) to the Second Secretary of the Mexican Embassy (Vazquez-Treserra) May 8, 1934 MS. Department of State, file 702.0611/599, (as quoted in IV Hackworth, *op. cit.*, p. 790.)

The fact that ambassadors of foreign countries may be entitled to an exemption or refund, does not require that similar benefits be accorded to consular personnel.

The distinction between ambassadors or ministers and consular personnel has long been established and recognized. An ambassador or minister is the highest rank of diplomatic agent and is deemed to be the personal representative of his sovereign or of the head of his state. (The Chief of the Division of Foreign Service Administration (Hengstler) to Miss Laura W. Steele, May 11, 1932, U.S. Dept. of State file 701/198, as quoted in IV Hackworth, *op. cit.*, p. 394.)

A consul, on the other hand, enjoys only the status of a mercantile agent, *Hamilton v. Erie R. Co.*, 219 N.Y. 343, 114 N.E. 399, Ann. Cas. 1918 A. 928 (1918), *error dismissed*, 248 U.S. 369, 395, S. Ct. 95, 63 L. Ed. 307 (1918). An ambassador or minister is absolutely immune from suit even though the suit is based upon a personal transaction. *Magdalena Steam Navigation Co. v. Martin*, 2 El. & El. 94

(Q.B. 1859). But a consul is not immune from suit except where the action is based upon acts which he has committed within the scope of his duties. *The Anne*, 16 U.S. 435, 4 L. Ed. 428 (1818); *The Sao Vincente*, 260 U.S. 151, 43 S. Ct. 13, 67 L. Ed. 179; *In re Lasigi*, 79 Fed. 751 (D.C.S.D.N.Y. 1897). A consul may not interpose a claim for the violated rights of his sovereign, *The Sao Vincente*, *supra*, but an ambassador may interpose such claim, *Compania Espanola v. Havemar*, 303 U.S. 68, 58 S. Ct. 432, 82 L. Ed. 667 (1938).

The appointment of an American citizen as an ambassador accredited to the United States will not be acceptable to the United States, [The Chief of the Division of Protocol (Summerlin) to J. E. Korshak, May 20, 1938, MS. Dept. of State, file 701.0011/278, (as quoted in IV Hackworth, *op. cit.* p. 453)], but an American citizen appointed as a consular representative of a foreign government may receive official recognition from the government of the United States. [Chief Clerk and Administrative Assistant (MacEachran) to Dr. J. L. Arallanal, Dec. 1, 1934, MS. Dept. of State, file 702.0011/138, (as quoted in IV Hackworth, *ibid.* p. 665)].

Our own court in *Seidel v. Peschkaw*, 27 N.J.L. 427, 429 (Sup. Ct. 1859) has described the distinction between diplomats and consular personnel as follows:

"A consul is a mercantile agent of the sovereignty by which he is appointed to protect the commercial interests of its citizens or subjects in a foreign state. By virtue of his office, he is clothed only with authority for commercial purposes. He is not to be considered as a minister or diplomatic agent of his government, intrusted with authority to represent it in negotiations with foreign states, or to vindicate its prerogatives. 1 *Kent's Com.* 43; 3 *Wheaton* 445, *In re The Annie*.

"He has not the immunities of an ambassador, but in civil and in criminal cases is subject to the local laws, in the same manner as other foreign residents owing temporary allegiance to the state to which he is accredited."

Certainly there can be no basis for asserting that an indirect tax paid by consular personnel, which is merely reflected in the price of motor fuel purchased by them, constitutes a direct tax upon the sovereign states which they represent. Cf. *James v. Dravo Contracting Co.*, *supra*; *Alabama v. King & Boozer*, *supra*; *United States v. City of Detroit*, *supra*; *United States v. Township of Muskegon*, *supra*.

We advise you, therefore, that consular personnel attached to the Consulate General of Switzerland are not entitled to an exemption from or refund of any taxes imposed upon the sale of motor fuels under N.J.S.A. 54:39-1 *et seq.*

Very truly yours,

ARTHUR J. SULLS  
Attorney General

By: ALAN B. HANDLER  
Deputy Attorney General

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-

riparian 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,

ARTHUR J. SILLS  
*Attorney General*

By: ROBERT B. KRONER  
*Deputy Attorney General*

SEPTEMBER 27, 1963

HONORABLE RAYMOND F. MALE  
 Commissioner of Labor and Industry  
 Trenton, New Jersey

## FORMAL OPINION 1963—No. 5

DEAR COMMISSIONER MALE:

You have requested advice as to the legality of a rule or regulation permitting joinder of the Commissioner of Labor and Industry, as custodian of the 1% Fund,<sup>1</sup> as a party in appropriate workmen's compensation proceedings. Such a rule has been adopted by the Workmen's Compensation Board, subject to the Attorney General's opinion as to its legality.

As we have previously advised you informally, in our opinion the adoption of a rule for permissive joinder of the 1% Fund through its representative, the Commissioner, is authorized by law. The rule is consonant with the spirit of the 1% Fund law and the Workmen's Compensation laws and has been encouraged by decisions of our courts noted below.

Payments are made from the 1% Fund to persons who become totally disabled "as a result of experiencing a subsequent permanent injury under conditions entitling such persons to compensation therefor, when such persons had previously been permanently and partially disabled from some other cause \* \* \*." N.J.S.A. 34:15-95. The Fund is sometimes referred to as the second-injury fund. *Ratsch v. Holderman*, 31 N.J. 458, 468 (1960) (dissenting opinion). There, Justice Burling, in his dissenting opinion, sets forth the history of the 1% Fund law and the problems it was designed to cure. He cites the classical example as follows (31 N.J. at 468):

"A has lost the sight of one eye in an accident. He is therefore rendered 25% totally disabled. He subsequently secured a job with B firm. Due to an industrial accident he loses his other eye, rendering him totally blind, and 100% disabled."

The problem is whether the second employer should pay compensation for the second disability at the rate of 25% for the loss of one eye or for the resulting total disability. The solution was found in establishing a fund to share the burden of the totally disabling subsequent injury.

Our highest court has expressed the purpose of the 1% Fund law in the following terms in *Balash v. Harper*, 3 N.J. 437, 442 (1950):

"The intent of the statute is to insure the employee full compensation where a compensable disability succeeds but has no causative connection with the results of a prior disability, the combination of the two leaving the employee permanently and totally disabled. The intention is to relieve the employer of the undue burden of a prior disability, with which or its results, the disability arising in his employ has no causative connection."

<sup>1</sup> The "1% Fund" derives its name from a fund accumulated through payments by self-insured employers and insurance companies writing compensation or employer's liability insurance in New Jersey, based upon 1% of the compensation paid out by such companies in the preceding year. N.J.S.A. 34:15-94.

Relieving the second employer from the burden of paying for part of the disability that he did not cause is said to provide an incentive to employers for hiring handicapped people. *Ratsch v. Holderman*, *supra*, 31 N.J. at 469.

The proposed joinder rule is as follows:

"In any workmen's compensation case where it appears that the One Per Cent Fund may be answerable for a portion of the compensation payable to the petitioner by virtue of his alleged or indicated permanent total disability, either party may make application for an order to join the Commissioner of Labor and Industry as a party to the proceeding as custodian of the One Per Cent Fund. Such application shall be by ten days' written notice served upon the adverse party and the Attorney General. Said notice shall recite the facts and be accompanied by copies of the medical reports upon which the application is based. In an appropriate case, the judge of compensation or referee may, on his own motion, join the Commissioner as a party to the proceeding.

"If the motion is granted, an application for One Per Cent Fund benefits shall be filed in accordance with the provisions of R.S. 34:15-95.1, and the hearing official shall proceed to hear the compensation and the One Per Cent Fund cases as a consolidated matter. The hearing official shall make a determination as to the compensation petition and render an advisory report as to the eligibility for One Per Cent Fund benefits. Prior to the commencement of payments from the One Per Cent Fund and thereafter, the petitioner shall submit himself to such further examinations and interviews as may be required to establish his continued total disability."

A.

N.J.S.A. 34:15-64 authorizes the Commissioner, Director and Deputy Directors of Workmen's Compensation, now known as Judges of Compensation (N.J.S.A. 34:1A-12) to make "such rules and regulations for the conduct of the (compensation) hearing not inconsistent with the provisions of this chapter as may, in his judgment, be necessary." The Commissioner, Director and Judges of Compensation meet as a group called the Workmen's Compensation Board and promulgate rules and regulations as such. The first question posed is whether the rule of said Board will control proceedings involving the 1% Fund.

The 1% Fund law, originally enacted by Laws of 1923, c. 81, has been said to be "not part of the Workmen's Compensation Act." *Walker v. Albright*, 119 N.J.L. 285, 288 (Sup. Ct. 1938). And in *El v. Toohy*, 125 N.J.L. 150, 151 (Sup. Ct. 1940), *aff'd o.b.*, 125 N.J.L. 510 (E. & A. 1921), although the court said "in the Revision of 1937 the one per centum statute was incorporated with the Workmen's Compensation act," the counsel fee portions of the Workmen's Compensation laws were held not applicable to claims on the 1% Fund.

But in *Walker v. Albright*, *supra*, decided in January of 1938, the court held that although the two laws were separate laws, the Commissioner, as custodian of the 1% Fund, need not be joined formally as a party to the workmen's compensation proceeding, because he is a "'party' *ex officio* in every such proceeding." The court held that the "award is *res adjudicata* of the fact of total disability when it was made \* \* \*" and was binding upon the Commissioner because of his status as a so-called *ex officio* party to the proceeding. 119 N.J.L. at 286-288. Because of subse-

quent developments we need not consider now the validity of these determinations. In May 1938, following the decision in *Walker v. Albright*, the Legislature amended the 1% Fund law expressly to require that: "In all proceedings affecting the fund under this act, the Commissioner of Labor<sup>2</sup> shall be a necessary party." L. 1938, c. 198; N.J.S.A. 34:15-95.1. See also *In re Glennon*, 18 N.J. Misc. 196, 198 (C. P. 1940); *Wexler v. Lambrecht Foods, infra*, and *Ratsch v. Holderman*, 31 N.J. 458, 461 (1960), where the court left open the question whether a finding made against petitioner in his workmen's compensation proceeding forecloses a contrary assertion against the Fund on principles of *res judicata* or collateral estoppel.

The court in *Walker* recognized the close relationship between workmen's compensation proceedings and proceedings for benefits from the 1% Fund. The same view was taken in *Voessler v. Palm Fichteler & Co.*, 120 N.J.L. 553, 556 (Sup. Ct. 1938), *aff'd o.b.*, 122 N.J.L. 434 (E. & A. 1939), where the court held that the procedure in Workmen's Compensation cases is applicable to proceedings against the Fund.

At the outset, therefore, we conclude that the Workmen's Compensation Board may validly exercise its rule-making power so as to bind the Commissioner, as custodian of the 1% Fund, whether or not the 1% Fund law is a part of the Workmen's Compensation laws. The Board has the rule-making power to bind the workmen's compensation proceeding, and the Commissioner acting alone also has the power to make "rules and regulations, not inconsistent with law as he shall deem necessary to enforce the provisions of this title." R.S. 34:1-20. That power was confirmed in 1948 in the reorganization laws following the adoption of the 1947 Constitution of New Jersey. N.J.S.A. 34:1A-3 (e).<sup>3</sup>

It is noted that the Commissioner has concurred in the promulgation of the rule in question. Since the Board's rule is binding on parties to the workmen's compensation hearing and the Commissioner, by his concurrence in the rule, has agreed to be bound thereby as custodian of the 1% Fund, it is not strictly necessary to determine whether a regulation adopted by the Workmen's Compensation Board, as a departmental unit, may bind the Commissioner without his consent. We conclude, therefore, that the rule will validly control proceedings in the Workmen's Compensation Division to which employees and employers are parties and in which the 1% Fund may be required to participate.

#### B.

The questions remaining are whether an application may be made for benefits from the Fund before the adjudication of a claim by petitioner against his employer and whether the Fund may be compelled by order of a Workmen's Compensation Judge to join in the original workmen's compensation proceeding. Administrative Directive No. 9, promulgated on July 29, 1958 and rescinded on October 20, 1962, provided as follows:

<sup>2</sup> Now known as the Commissioner of Labor and Industry following the reorganization of the Executive Branch of State Government under L. 1948, c. 446, N.J.S.A. 34:1A-2.  
<sup>3</sup> The Commissioner has broad authority to administer the work of the department, to organize the work in such divisions, bureaus and "other organizational units" as he may find necessary for the efficient operation of the department, may adopt rules "for the efficient conduct of the work and the general administration of the department," may co-ordinate the activities of the department and other agencies therein so as "to eliminate overlapping and duplicating (uncertain) divisions and other agencies therein" and may "delegate to subordinate officers and of the several divisions and other agencies therein" and may deem desirable . . . N.J.S.A. 34:1A-3 (a), (d), (f), (i), (j), and N.J.S.A. 34:1A-4. See also: *Esso Standard Oil Co. v. Holderman*, 75 N.J. Super. 455 (App. Div. 1962), *aff'd* 39 N.J. 355 (1963), appeal filed, 32 U.S.L. Week 3070 (U.S. Aug. 2, 1963) (No. 326).

"Applications for benefits for the Second Injury Fund shall not be filed earlier than 6 months prior to the date when the final payment of compensation is payable by the employer for the subsequent permanent injury which, in combination with the previous partial permanent disabilities, is asserted as having resulted in total disability."

This rule led the court to say in *Wexler v. Lambrecht Foods*, 64 N.J. Super. 489, 496 (App. Div. 1960): "A proceeding against the Fund is thus contemplated to follow the compensation proceeding against the employer (citing *Voessler v. Palm Fichteler & Co., supra.*") Speaking for the Appellate Division Judge Kilkenny there said, however:

"It would seem essential that in a case such as this, where the argument addressed to the deputy director by the respondent was for a ruling calculated to induce a proceeding against the Fund by the workman, the Attorney General should be brought into the case at the outset. It is clear that, in substance, whether or not in form, the employer was attempting to lay a foundation for liability of the Fund for part of petitioner's total disability."

Difficulties arising because of the separation of the original compensation proceedings from the proceedings for benefits from the Fund have been noted in numerous cases. At times the experience has been frustrating to claimants, attorneys and the courts, particularly when a variety of legal action may be involved in one case. See *Ratsch v. Holderman, supra*, involving a petitioner who was partially disabled from one accident and unrelated conditions, from a second accident on which he received an award of 12½% of total permanent disability, and, on a later petition, an additional 5% of the total. The court commented that "the record as first presented to us suggested the possibility that the second award was in fact the product of a settlement disguised as a trial." The court further noted that if it was in reality a settlement, it was "made with the understanding that the One Per Cent Fund would be visited with the burden and this despite the palpable fraud upon the Fund that such an understanding between employee and employer would plainly accomplish."

An employee who is totally disabled is posed with the problem of first proceeding against his employer without knowing how he may fare in the later proceeding against the Fund if his employer is absolved from part of the obligation. Often total disability is found and an award is fixed, or settlement made, under the mistaken belief that the claimant is eligible for benefits under the Fund. *In re Glennon, supra*, involved a compensation proceeding against an employer to which the 1% Fund was not a party. That proceeding resulted in a settlement after a hearing and the taking of testimony, in which the petitioner "was found to be disabled 100 per cent, 66⅔ per cent of permanent total being chargeable to the employer due to the compensable accident." 18 N.J. Misc. at 198. It appears that petitioner's total disability was due to the aggravation of a previous, latent condition. Petitioner had conceded the lack of connection between this latent condition and the subsequent accident, believing this put him within the scope of the Fund for the balance of the total disability. Later, the contrary fact was found to be true in the Fund was held not liable. The court said petitioner's remedy, if any, lay in further proceedings against his employer.

Problems arise because the Fund law (N.J.S.A. 34:15-95 (a), (b), (c)) expressly provides that benefits are not available:

"(a) If the disability resulting from the injury caused by his last compensable accident in itself and irrespective of any previous condition or disability constitutes total and permanent disability within the meaning of this Title.

"(b) If permanent total disability results from the aggravation, activation or acceleration, by the last compensable injury, of a pre-existing non-compensable disease or condition.

"(c) If the disease or condition existing prior to the last compensable accident is not aggravated or accelerated but is in itself progressive and by reason of such progression subsequent to the last compensable accident renders him totally disabled within the meaning of this Title."

These provisions have led to considerable litigation and misinterpretation. See: *Mayti v. Male*, 59 N.J. Super. 478 (Cty. Ct. 1960), aff'd 79 N.J. Super. 554 (App. Div. 1963), and *Mayti v. Singer Mfg. Co.*, 76 N.J. Super. 379 (Cty. Ct. 1962), aff'd 79 N.J. Super. 556 (App. Div. 1963).

Procedurally the provision to be considered is N.J.S.A. 34:15-95.1. This section provides: "Applications for benefits under this act shall be made by a verified petition filed in duplicate within two years after the date of the last payment of compensation by the employer or the insurance carrier \* \* \*." This section further provides that the application should be made to the Commissioner, who shall refer it to a Judge of Compensation, "to hear testimony and for an advisory report as to findings; \* \* \*. The decision, however, as to whether the petitioner shall or shall not be admitted to the benefits shall be rendered by the said Commissioner of Labor. \* \* \* In all proceedings affecting the fund under this act the Commissioner of Labor shall be a necessary party."

Under N.J.S.A. 34:15-95.1 application for Fund benefits must be made within two years from the date of last payment by the employer or carrier. The court in *Wexler, supra*, in reference to N.J.S.A. 34:15-95.1, said (64 N.J. Super. at 495):

"We observe a procedural difficulty in making any binding determination as to the applicability of the instant situation to the provisions of the One Per Cent Fund law. This case is not a proceeding against the Fund and the Fund is not represented herein by counsel charged with presenting evidence or argument against this responsibility. \* \* \* Thus, the employee's right to apply for the benefits of the One Per Cent Fund law within that extended period makes it unnecessary to determine his right thereto when his compensation case is heard."

The statute does not prohibit filing an application before the entry of judgment in the workmen's compensation hearing between the employee and employer. As noted above, the Administrative Directive No. 9 had provided that applications for benefits from the 1% Fund could not be filed earlier than six months before the date of final payment of compensation by the employer or the employee's share of compensation for the subsequent permanent injury. See *Wexler case supra*, 64 N.J. Super. at 496. The proposed rule merely advances the date of the application if, on motion, a Judge of Compensation orders joinder of the 1% Fund in the compensation proceeding.

We conclude that the statutory provision requiring the application to be made within two years from the date of last payment of compensation precludes an appli-

cation from being made after that period but does not preclude the making of an application at any time before the expiration of the two-year period. We do not find any legislative intent to insist upon complete separation of the two proceedings, notwithstanding that separation of the proceedings had been the practice. See *Wexler case supra*, 64 N.J. Super. at 495, 496. When the Appellate Division in *Wexler* said that the "proceeding against the Fund is thus contemplated to follow the compensation proceeding against the employer," the court was referring to the practice and to the requirement of Administrative Directive No. 9. The court did not hold that the statute required the proceedings to be maintained separately. Cf. *Voessler, supra*, where the Commissioner came in on the appeal with consent of the parties. The Appellate Division in *Wexler, supra*, did not pass upon the question as to whether joinder of the proceedings was permitted or prohibited by statute. The court did recognize that it was "essential that in a case such as this, where the argument addressed to the deputy director by the respondent was for a ruling calculated to induce a proceeding against the Fund by the workman, the Attorney General should be brought into the case at the outset."

In *Esso Standard Oil Co. v. Holderman, supra*, the court held that the express statutory provision requiring self-insured employers to file certain accident reports after the expiration of the seven days "waiting period" did not preclude a regulation by the Commissioner of Labor and Industry requiring the filing of similar reports before the expiration of the seven day period. The court held that the specific statutory provision did not pre-empt the field to the exclusion of the Commissioner's exercise of jurisdiction through rules and regulations, especially when the regulations deal with procedural matters. 75 N.J. Super. 470-71. Our view here is that in providing that the application for benefits from the Fund be made "within two years after the date of the last payment of compensation by the employer or the insurance carrier," the Legislature's intent was primarily to provide a statute of limitations, that is, a date beyond which the application could not be made. We find no expression of legislative intent to preclude an application or adjudication concurrently with the compensation hearing prior to the expiration of the two year period. Other cases upholding administrative agency regulations notwithstanding the alleged inconsistency between the regulations and legislative enactments specifically dealing with the same subject matter are: *Grenewica v. Ligham*, 34 N.J. Super. 1 (App. Div. 1955) and *Daughters of Miriam Home for Aged and Infirm, Congregation Adas Israel v. Legalized Games, etc.*, 42 N. J. Super. 405 (App. Div. 1956). See also *Kennedy v. City of Newark*, 29 N.J. 178 (1959), where the court held that a statutory provision requiring residence in a city at the time of initial appointment as a condition for appointment to a civil service position did not preclude the adoption of an ordinance by the city requiring continued residence thereafter as a condition for continued employment.

It is the duty of the Commissioner to conserve the Fund. *El v. Toahay, Jr., supra*, 125 N.J.L. at 152. It is also the Commissioner's duty to see to it that workers receive full and prompt compensation benefits to which they are entitled. "Under the social philosophy underlying Workmen's Compensation legislation in this state the Division is not a mere quasi-judicial tribunal confined to the duty of deciding formally litigated claims. It is properly expected to take the initiative where necessary to assure the prompt and full provision for injured workers of all statutory benefits to which they are entitled in a given case." *Esso Standard Oil Co. v. Holderman, supra*, 75 N.J. Super. at 467.

The proposed regulation enables the Commissioner to fulfill all of his obligations, to the Fund, to the employer and to the applicant. An early application for benefits from the 1% Fund through joinder of the Commissioner as a party to the workmen's compensation proceeding, where it appears that the Fund may be answerable for a portion of the compensation payable because of the indicated total disability, meets the needs of all parties. All interests that may be affected by the judgment will be represented. The problem of causal relationship will be clarified. The Fund will have the opportunity to present its own evidence as well as an opportunity to cross-examine other witnesses. The opportunity for mistaken judgments, as represented by the *Glennon* and *Ratsch* cases, may be avoided. The applicant otherwise eligible for 1% Fund benefits will not risk losing his rights through ignorance, error or forgetfulness in failing to file for the benefits within the two year statutory period following the last payment by the employer or carrier.

It is noted that the proposed rule requires the later establishment of continued total disability as a condition for commencement of Fund benefit payments. Except for this condition we feel that the determination of the Judge of Compensation in the hearing to which the Fund has been joined as a party will be binding on the Fund, notwithstanding the provision in N.J.S.A. 34:15-95.1 that only an advisory opinion is rendered by the Judge of Compensation and that the final decision rests with the Commissioner. In *Voessler, supra*, decided shortly after this section of the statute was enacted, the court held that the Commissioner's duty to issue payments from the Fund follows as a matter of course from the ruling of the Workmen's Compensation Division. See: 120 N.J.L. at 557, where the court said:

"When it is judicially determined that the rights of a claimant are under the provisions of the statute it will be, of course, for the commissioner to issue the proper warrant and for the treasurer to pay. But the determination is primarily by the Workmen's Compensation Bureau subject to appeal and other subsequent procedure as under the Workmen's Compensation act."

See also: *El v. Toohey, supra*, 125 N.J.L. at 151.

If circumstances change so that the Fund should no longer be liable for the payment of benefits, the Workmen's Compensation law affords ample opportunity for revision of benefits downward. N.J.S.A. 34:15-27; *Rodriguez v. Michael A. Scaturchio, Inc.*, 42 N.J. Super. 341, 355 (App. Div. 1956); N.J.S.A. 34:15-95; N.J.S.A. 34:15-12b.

Accordingly, you are advised that the proposed rule of permissive joinder of the Fund in a workmen's compensation proceeding may lawfully be promulgated.

Very truly yours,

ARTHUR J. SILLS  
*Attorney General*

By: THEODORE I. BOTTER  
*Acting Attorney General*

DECEMBER 20, 1963

LEO A. CULLOO, *Executive Secretary*  
*Police Training Commission*  
24 Commerce Street  
Newark, New Jersey

FORMAL OPINION 1963—No. 6

DEAR MR. CULLOO:

You have asked for our opinion defining the relationship between the period of probationary or temporary appointment of police officers under N.J.S.A. 52:17B-66 *et seq.* (referred to herein as the Police Training Act, L. 1961, c. 56) and the probationary period of appointment under Civil Service law, R.S. 11:22-6.

In our opinion the probationary appointment of police officers pursuant to the Police Training Act is separate from and supplementary to the probationary period provided for in R.S. 11:22-6 of the Civil Service law.

Section 3 of the Police Training Act (N.J.S.A. 52:17B-68) is as follows:

"Any municipality may authorize attendance at an approved school by persons holding a probationary or temporary appointment as a police officer, and any municipality may require that no person shall hereafter be given or accept a permanent appointment as a police officer unless such person has successfully completed a police training course at an approved school."

Section 4 of the Police Training Act (N.J.S.A. 52:17B-69) is as follows:

"Notwithstanding the provisions of Revised Statutes 11:22-6, a probationary or temporary appointment as a police officer may be made for a total period not exceeding 1 year, for the purpose of enabling a person seeking permanent appointment to take a police training course as prescribed in this act. No person shall be permitted to take a police training course unless he holds such probationary or temporary appointment, and such appointee shall be entitled to a leave of absence with pay during the period of the police training course."

The above provisions indicate that the probationary period intended by the Act is for the purpose of taking courses of training. Other sections of the Act reinforce this view. Section 1 (N.J.S.A. 52:17B-66) sets forth the legislative declaration that:

"\* \* \* the present need for improvement [in local and county law enforcement] can be substantially met by the creation of an educational and training program for persons who seek to become permanent law enforcement officers wherein such persons will be able, while serving in a temporary or probationary capacity prior to permanent appointment, to receive efficient training in this profession provided at facilities selected, approved and inspected by a commission created for such purpose; and that by qualifying and becoming proficient in the field of law enforcement such persons shall individually and collectively better insure the health, safety and welfare of the citizens of this State in their respective communities."

The probationary period for training is not to exceed one year; it may be less. N.J.S.A. 52:17B-69.

Section 7 of the Police Training Act (N.J.S.A. 52:17B-72) is as follows:

"Except as expressly provided in this act, nothing herein contained shall be deemed to limit the powers, rights, duties or responsibilities of municipal or county governments, nor to affect provisions of Title 11 of the Revised Statutes."

R.S. 11:22-6 provides that:

"Appointments and promotions to positions in the competitive, non-competitive and labor classes of the classified service shall be for a probationary period of three months. If, at the expiration of such period, the conduct or capacity of the probationer has not been satisfactory, to the appointing authority, the probationer shall be notified in writing that he will not receive absolute appointment, otherwise his retention in the service shall be equivalent to his final and absolute appointment."

It is clear that the probationary appointment under the Police Training Act is for the purpose of training and educating local police officers; it was not intended to preclude or take the place of the probationary period used to evaluate the conduct of a police officer on the job before his permanent, Civil Service appointment becomes final.

Section 4 (N.J.S.A. 52:17B-69) states that "notwithstanding the provisions of Revised Statutes 11:22-6" a probationary or temporary appointment to take police training may be made. Section 7 (N.J.S.A. 52:17B-72) provides that the Police Training Act is not deemed to affect the provisions of Title 11 of the Revised Statutes, the Civil Service law. In other words, the period for such police training does not affect the provision in the Civil Service law affording a three month period to evaluate work of an employee on the job. R.S. 11:22-6. The purpose of the latter type of probationary period is explained in *Cammarata v. Essex County Park Comm'n.*, 26 N.J. 404, 412 (1958):

"It is difficult to evaluate the character, industry, personality, and responsibility of an applicant from his performance on a written examination or through cursory personal interviews. Knowledge and intelligence do not alone make a good policeman. The crucial test of his fitness is how he fares on the job from day to day when suddenly confronted by situations demanding a breadth of resources and diplomacy. Many intangible qualities must be taken into account, and, since the lack of them may not constitute good cause for dismissal under a tenure statute, the [appointing authority] is entitled to a period of preliminary scrutiny, during which the protection of tenure does not apply, in order that it may make pragmatically informed and unrestricted decisions as to an applicant's suitability."

To like effect is *Devine v. Plainfield*, 31 N.J. Super. 300 (App. Div. 1954). *Briggs v. N.J. Dept. of Civil Service*, 64 N.J. Super. 351, 355 (App. Div. 1960) says:

"It appears that appellant has mistaken the function of the probationary period. Her argument assumes that it is a period during which she should be given further training to qualify her for the position. The probationary period, however, does not have this function. Rather, it is part of the testing process, given in addition to the examination conducted by the Civil Service

Department. During that period the employee must demonstrate that he is competent to discharge the duties of the position."

And see Civil Service Rule 45, paragraph 2:

"2. \* \* \* At the end of the working test or probationary period the appointing authority may discontinue the service of any such appointee if in the opinion of such appointing authority the working test indicates that the appointee is unable or unwilling to perform the duties of his position satisfactorily or is of such reputation, habits and dependability as not to merit continuance in the service. \* \* \*"

In setting up the probationary period for training, the Police Training Act did not attempt to preempt the area of probationary periods to the exclusion of the probationary work period provided under Civil Service law. The probationary appointment period under the Police Training Act is permissive. N.J.S.A. 52:17B-69 provides that a probationary or temporary appointment may be made "for the purpose of enabling a person seeking permanent appointment to take a police training course as prescribed in this act." But R.S. 11:22-6 provides that permanent appointment to Civil Service positions "shall be for a probationary period of three months." (Emphasis added.)

For the foregoing reasons we are of the opinion that the probationary period outlined in section 4 of the Police Training Act is separate from and supplementary to the probationary period provided for in R.S. 11:22-6 of the Civil Service law.

Very truly yours,

ARTHUR J. SILLS  
*Attorney General*

By: LARRY F. LEFKOWITZ  
*Law Assistant*

DECEMBER 20, 1963

HON. JOHN A. KERVICK  
*State Treasurer*  
State House  
Trenton, New Jersey

FORMAL OPINION 1963—No. 7

DEAR MR. KERVICK:

You have requested our opinion as to whether corporations operating pursuant to and within the framework of the Capehart Act (Housing Amendments of 1955, act of August 11, 1955, c. 783, secs. 403 *et seq.* 69 Stat. 651, 42 U.S.C. 1594 *et seq.*) are taxable by the State of New Jersey under the Corporation Business Tax Act (1945), N.J.S.A. 54:10A-1 *et seq.* The corporations to which you have referred were incorporated under the laws of another state for the purpose of constructing military housing facilities under the Capehart Act. The entire capital stock of said corporations has been assigned to and is presently owned by the Federal government.

In our opinion said corporations are not subject to the New Jersey Corporation Business Tax Act, for the reasons stated below.

Your question requires an analysis of the Capehart Act. The Capehart Act is the popular name for the Housing Amendments of 1955 which provide for the construction of housing for military personnel and the military housing mortgage insurance program. This law supersedes the [Wherry] Military Housing Act of 1949 (Act of August 8, 1949, c. 403, 63 Stat. 570). Title IV of the Housing Amendments of 1955 adds Title VIII (Armed Services Housing Mortgage Insurance) to the National Housing Act. Sections 401 and 402 of Title IV are codified in Title 12 of the U.S. Code (12 U.S.C. 1748 to 1748g and 1720). Sections 403 to 410 of Title IV of the Housing Amendments of 1955 deal with the functions of the Defense Department in obtaining and operating housing for military personnel and are codified in Title 42 of the U.S. Code (42 U.S.C. 1594 to 1594f).

The purpose of the Capehart Act is to:

"\* \* \* provide for the construction of urgently needed housing on lands owned or leased by the United States and situated on or near a military reservation or installation for the purpose of providing suitable living accommodations for military personnel of the armed services assigned to duty at the military installation at or in the area where the housing is situated. \* \* \*" Housing Amendments of 1955, § 403(a), as amended, 69 Stat. 651, 70 Stat. 1110, 42 U.S.C. 1594(a).

The actual operation of the Capehart Act is extremely complex. Stated as simply as possible, the Capehart Act provides for the construction of housing facilities on government-owned land by private contractors. Housing Amendments of 1955, § 403(a), as amended, 69 Stat. 651, 70 Stat. 1110, 42 U.S.C. 1594(a). The contracts are awarded on the basis of competitive bidding which includes cost of construction and the builder's profit. Housing Amendments of 1955, § 403(b), as amended, 69 Stat. 651, 70 Stat. 1110, 42 U.S.C. 1594(b). The government then leases the land under a long-term lease at a nominal rental to the successful bidder. National Housing Act, § 805, as amended Aug. 11, 1955, c. 783, Title IV, § 401, 69 Stat. 651, 12 U.S.C. 1748d. The builder thereupon obtains a loan to cover the bid and to finance the construction by placing a mortgage on the entire property. National Housing Act, § 803, as amended Aug. 11, 1955, c. 783, Title IV, § 401, 69 Stat. 647, 70 Stat. 1109, 12 U.S.C. 1748b(b), 24 C.F.R. § 803.7, 8, 9; § 803.13; § 803.251. After the completion of the housing facilities, the entire project, subject to the mortgage encumbrance, is turned over to the Secretary of Defense or his designee who pays directly the principal and interest of the long-term mortgage. Housing Amendments of 1955, §§ 403, 405, as amended, 69 Stat. 651, 652, 70 Stat. 1110, 42 U.S.C. 1594(a), 1594b. If the builder-mortgagor is a corporation, its capital stock also is surrendered to the Secretary who thereafter is entitled to exercise the rights of a stockholder during the life of the corporation and to dissolve the corporation when the mortgage has been paid and satisfied. Additionally, all corporate directors and officers must submit their resignations to the Secretary. Housing Amendments of 1955, § 403(a), (c), as amended, 69 Stat. 651, 70 Stat. 1110, 42 U.S.C. 1594(a), (c), 24 C.F.R. § 803.25. The original principals of the corporation thereafter have no direct interest in the project. The Federal Housing Commissioner is authorized to insure the mortgages, including the advances on such mortgages during construction. National Housing Act, § 803(a) as amended, Aug. 11, 1955, c. 783, Title IV, 69 Stat. 647, 70 Stat. 1109, 71 Stat. 297, 303, 72 Stat. 73, 73 Stat. 322, 682, 74 Stat. 185, 186, 75 Stat. 111, 177, 12 U.S.C. 1748b(a). Additionally, the Secretary of Defense is authorized to guarantee the payment of the notes

and mortgage instruments required by the Commissioner. Housing Amendments of 1955, § 403(c), as amended, 69 Stat. 651, 70 Stat. 1110, 42 U.S.C. 1594(c).

The Corporation Business Tax Act (1945) imposes a tax upon every domestic or foreign corporation "for the privilege of having or exercising its corporate franchise in this State or for the privilege of doing business, employing or owning capital or property, or maintaining an office in this State." N.J.S.A. 54:10A-2. It is a franchise tax, not a tax on property. *Werner Machine Co. v. Director of Division of Taxation*, 17 N.J. 121 (1954), *affirmed* 350 U.S. 492, 76 S. Ct. 534 (1956); cf. *Household Finance Corp. v. Director of Div. of Taxation*, 36 N.J. 353 (1962), *appeal dismissed* 371 U.S. 13, 83 S. Ct. 41 (1962).

In the absence of Congressional consent, a federal instrumentality cannot be subjected to the plenary taxing power of the states. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819). Congress has the power to determine, however, within the limits of the Constitution, the extent to which an instrumentality of the federal government may be subjected to state taxation. *Federal Land Bank of Wichita v. Board of County Commissioners*, 368 U.S. 146, 82 Sup. Ct. 282 (1961). The salient issue, therefore, is whether a corporation organized by private, non-governmental interests for the purpose of constructing military housing facilities pursuant to the Capehart Act is a federal instrumentality or agency, after the military housing project has been completed and the capital stock of the corporation has been assigned to the federal government. Assuming that such a Capehart corporation is an instrumentality of the federal government, it must then be determined whether Congress has sanctioned the imposition upon the corporation of a state or local franchise tax.

In *S. S. Silverblatt, Inc. v. Tax Com'n of State of New York*, 5 N.Y. 2d 635, 159 N.E. 2d 195 (Ct. of App. 1959), *cert. denied*, 361 U.S. 912, 80 S. Ct. 253 (1959), the New York court determined that such a Capehart corporation is created for a commercial purpose for private profit and, therefore, was not an instrumentality of the federal government. Accordingly it was held that such a corporation was not immune from a state tax upon the privilege of recording the underlying mortgage. It is to be noted, however, that *Silverblatt* did not consider the status of such a Capehart corporation *after* the military housing project had been completed and *after* its entire capital stock had been assigned to the federal government. Under the Capehart Act, the demised premises and military housing facility improvements upon completion are owned, operated and maintained entirely by the federal government. The federal government operates the housing as public quarters in the same manner that it operates housing built with federally appropriated funds. Service personnel are assigned by the federal government to the housing quarters, for which no rent is paid, and the project is maintained out of federally appropriated maintenance and operations funds. Once the capital stock of a mortgage-builder corporation has been transferred to the federal government, the corporation continues in existence merely as the nominal lessee and mortgagor. Pursuant to the guarantee of payment by the Secretary, the mortgage debt is amortized with federally-appropriated funds, and the federal government itself pays directly the principal and interest under the mortgage. The corporation has no income and makes no disbursements and engages in no activities. When the federal government has repaid the loan, it terminates the lease and dissolves the corporate-mortgagor.

In *Clallam County, Wash. v. United States*, 263 U.S. 341, 44 S. Ct. 121 (1923), the United States Supreme Court held that a corporation organized under the laws

of the State of Washington by the Director of Aircraft Production for the purchase, production, manufacture and sale of aircraft or equipment for the United States and its allies for the prosecution of the war was an instrumentality of the federal government and its property was immune from a state property tax. The Court stated:

"The State claims the right to tax on the ground that taxation of the agency may be taxation of the means employed by the government and invalid upon admitted grounds, but that taxation of the property of the agent is not taxation of the means. We agree that it 'is not always, or generally, taxation of the means,' as said by Chief Justice Chase in *Thomson v. Union Pacific R.R. Co.*, 9 Wall. 579, 591, 19 L. Ed. 792. But it may be, and in our opinion clearly is when as here not only the agent was created but all the agent's property was acquired and used, for the sole purpose of producing a weapon for the war. *This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account.* The incorporation and formal erection of a new personality was only for the convenience of the United States to carry out its ends." (Emphasis supplied.) (263 U.S. at pp. 344, 345; 44 Sup. Ct. at p. 122.)

In *Clifton v. State Board of Tax Appeals*, 126 N.J.L. 205, 208 (Sup. Ct. 1941), it was stated:

"\* \* \* And when the national government lawfully acts through a corporation which it owns and controls, those activities are government functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments."

After its capital stock has been assigned to the federal government upon the completion of the military housing project, a Capehart corporation serves no private or non-governmental end. It functions solely on behalf of the United States. Since, by the proceeds of the mortgage it has already been paid for the cost of construction, including its builder's profit, and, since it earns no income after its stock has been assigned to the federal government, the corporation cannot be said to be "interested in profit for its own account." To the extent that such a corporation, existing merely as a nominal lessee and mortgagor, functions or acts as all, it does so only for the purposes of the United States under the Capehart Act. It must, therefore, be considered an instrumentality or agency only of the federal government.

There remains to be determined the question of whether Congress has consented to or authorized the imposition of a state franchise tax upon a Capehart corporation whose stock has been assigned to the federal government. In many areas and in many instances Congress has consented to or expressly authorized the imposition of state or local taxes upon federal instrumentalities or their property. E.g., *Reconstruction Finance Corp. v. Beaver County, Pa.*, 328 U.S. 204, 66 S. Ct. 992 (1946); *First Nat. Bank v. Adams*, 258 U.S. 362, 42 S. Ct. 323 (1922). As a corollary, Congress may provide specifically for the tax exemption of federal instrumentalities or property of the federal government and its instrumentalities. E.g., *Federal Land Bank of Wichita v. Board of County Commissioners, supra*; *Reconstruction Finance Corp. v. Beaver County, Pa., supra*. A Congressional consent to state taxation of federal instrumentalities, however, will not be extended beyond its clear terms and provisions and, unless the object of state taxation falls clearly within the area of permissible taxation

specified by Congress, it will be immune therefrom. *Rohr Aircraft Corp. v. County of San Diego*, 362 U.S. 628, 80 S. Ct. 1050 (1960).

There are limited areas wherein Congress has consented to the taxation of the interests of private persons constructing military housing. In *Fort Dix Apartment Corp. v. Borough of Wrightstown*, 225 F. 2d 473, 475-476 (3d Cir. 1955), *cert. denied* 351 U.S. 962, 76 S. Ct. 1024 (1956), it was held that the leasehold interest of a corporation organized pursuant to the Wherry Military Housing Act was subject to a property tax of New Jersey, N.J.S.A. 54:4-2.3 *et seq.* In *Offutt Housing Company v. County of Sarpy*, 351 U.S. 253, 76 S. Ct. 814 (1956), the United States Supreme Court, citing *Fort Dix Apartment Corp. v. Borough of Wrightstown, supra*, likewise held that the leasehold interest of a Wherry housing corporation was subject to a state property tax. Both decisions recognized that the tax upon the private lessee's leasehold interest was not a tax upon the underlying fee owned by the federal government. Thus, they illustrate the principle that a state may impose a tax upon the property interests of private persons dealing in federal property, or with the federal government, provided the tax is not directly upon the federal government or its property. *City of New Brunswick v. United States*, 276 U.S. 547, 48 S. Ct. 371 (1928); *United States v. City of Detroit*, 355 U.S. 466, 78 S. Ct. 474 (1958).

The Capehart Act provides that:

"\* \* \* Nothing contained in the provisions of title VIII of the National Housing Act in effect prior to August 11, 1955 [sections 1748-1748h of Title 12], or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal Government in or with respect to any property covered by a mortgage insured under such provisions of title VIII \* \* \*." (Housing Amendments of 1955, § 408, as amended, 42 U.S.C. 1594 note.)

It is reasonably clear that by this provision Congress has not precluded state taxation of a lessee's interest under the Capehart Act. The New York court in *S. S. Silverblatt, Inc. v. Tax Com'n of State of New York, supra*, pointed out, however, that the foregoing "Savings Provision" pertains solely to the taxation of a private interest in property. The New York state tax was not a tax on property but upon the privilege of recording a mortgage; it was not therefore based upon the "Savings Provision." *A fortiori*, the "Savings Provision" cannot by implication be construed to provide a Congressional consent to a state corporate franchise or privilege tax upon a Capehart corporation when it is owned and controlled completely by the federal government. Nor are there any other provisions in the Capehart Act or any related statute which would authorize the imposition of such a state corporation franchise tax.

In summary, we conclude (1) a Capehart corporation, upon the completion of the military housing project and the assignment of its capital stock to the federal government, is owned and controlled entirely by the federal government and functions only for a federal purpose; as such, it is an instrumentality of the federal government; (2) Congress has not in the Capehart Act, or in any related statute, or by implication, authorized or consented to the imposition of a state tax upon the franchise of such a corporation. We advise you, therefore, that a Capehart corporation, the capital stock of which has been assigned to the federal government, pursuant to the

Capehart Act, is not subject to the Corporation Business Tax Act (1945), N.J.S.A. 54:10A-1 *et seq.*

Very truly yours,

ARTHUR J. SILLS  
*Attorney General*

By: ALAN B. HANDLER  
*Deputy Attorney General*

JANUARY 9, 1963

HONORABLE H. MAT ADAMS  
*Commissioner, Conservation and  
Economic Development*  
Trenton, New Jersey

MEMORANDUM OPINION—P-1

DEAR COMMISSIONER ADAMS:

You have asked whether a county housing authority can be created under the provisions of the Local Housing Authority Law, N.J.S.A. 55:14A-1 *et seq.*, in a county where several local housing authorities have already been created under this same act. In our opinion the county may establish a county housing authority, but the area of its operation is limited to those municipalities who have not already created a local authority and who by ordinance consent to join such a county authority.

N.J.S.A. 55:14A-4 provides for the creation of housing authorities. With respect to county housing authorities the applicable portions of N.J.S.A. 55:14A-4 are as follows:

"Any governing body may, by resolution in the case of counties, \* \* \*, create a body corporate and politic to be known as the 'Housing Authority of \_\_\_\_\_' inserting the name of the \* \* \* county creating such authority. Such authority shall constitute an agency and instrumentality of the \* \* \* county creating it. \* \* \* Where there is no housing authority in existence in any municipality of a county, the governing body of said county may create a housing authority; *provided*, the Director shall certify that there is a need for housing within said county; thereafter, no municipality within said county shall create an authority or join in the creation of a regional authority without the consent of the governing body of said county and without the consent of the county's housing authority."

The "area of operation" of a county authority is defined by N.J.S.A. 55:14A-3(e) as follows:

"\* \* \* (3) in the case of a housing authority of a county, shall include all of the county except that portion which lies within the territorial limits of a municipality or group of municipalities for which a housing authority has been created; with respect to any municipality which has not created or joined in the creation of an authority, a housing authority of a county shall not include such municipality within its area of operation, unless it has first

secured the approval of such action by said municipality (such approval to be evidenced by an ordinance adopted by the governing body of the municipality)."

It is obvious from N.J.S.A. 55:14A-4 that where no municipality has created a housing authority or has joined with another municipality in creating a regional housing authority, the governing body of a county may establish a county housing authority, provided the state director [the executive officer of the Public Housing and Development Authority in the State Department of Conservation and Economic Development, N.J.S.A. 55:14A-3(n)] certifies that there is a need for housing within said county. This opinion, however, deals with a different set of facts, namely, the situation in a county where, before the creation of county housing authority, there is first established one or more municipal housing authorities or one or more regional authorities composed of two or more municipalities.

In a county where one or more municipal housing authorities have been created or one or more regional housing authorities have been created by two or more municipalities [N.J.S.A. 55:14A-3(e)(2)] a county housing authority thereafter can be established. N.J.S.A. 55:14A-3(e)(3). However, a county housing authority established in a county in which there exists a municipal or regional housing authority cannot operate within the territorial limits of the municipality or group of municipalities for which a housing authority has been created and cannot operate within any other municipality unless that municipality first approves by ordinance its inclusion within the area of operation of the county housing authority. If a municipality has been included with its consent within the area of operation of a county housing authority, it cannot thereafter create its own authority or join in the creation of a regional authority. N.J.S.A. 55:14A-4.

It is to be noted that the state director must certify the need for housing within the county only in the case where there is no housing authority in existence in any municipality within the county. There is no requirement for approval by the director for the establishment of a county housing authority in a county where municipal or regional housing authorities exist in some but not in all municipalities within that county.

Very truly yours,

ARTHUR J. SILLS  
*Attorney General*

By: WILLIAM BLOHM, JR.  
*Deputy Attorney General*

MAY 3, 1963

ROSS BECK, *Secretary*  
Monmouth County Board of Taxation  
Freehold, New Jersey

MEMORANDUM OPINION—P-2

DEAR MR. BECK:

You have asked our opinion as to the method of apportioning the tax burden between constituent municipalities of a consolidated school district which have elected

to operate as a regional school district beginning July 1, 1963. Our conclusion is that in the case at hand the apportionment of taxes for the school year beginning July 1, 1963 should be made on the basis of the average daily enrollment of pupils in the municipalities constituting the school district.

The Township of Upper Freehold and the Borough of Allentown, in Monmouth County, now comprise a consolidated school district. N.J.S.A. 18:5-17.1 *et seq.* In December of 1962, by referendum, the voters of this consolidated school district determined to adopt the form of a regional school district. N.J.S.A. 18:8-1 *et seq.* As a result, the constituent municipalities will become a regional school district effective July 1, 1963. N.J.S.A. 18:8-26.

N.J.S.A. 18:5-17.14 provides that in a consolidated school district taxes are apportioned among the constituent municipalities comprising the school district on the basis of apportionment valuations as defined in N.J.S.A. 54:4-49. But the apportionment of taxes for a regional school district may be made either upon the basis of (a) apportionment valuations or (b) average daily enrollment of pupils from the constituent municipalities in the regional school district during the preceding year. N.J.S.A. 18:8-26; see also N.J.S.A. 18:8-17. The newly formed Upper Freehold Township regional school district chose the latter basis of apportionment. In so doing, the tax burden of the Borough of Allentown was increased while that of the Township of Upper Freehold was correspondingly decreased.

On April 3, 1963 the Commissioner of Education certified to the Monmouth County Board of Taxation the average daily enrollment of the constituent municipalities of Upper Freehold regional school district and stated that such statistics were to be used as the basis for making the apportionment of local school taxes in the tax year of 1963 for the fiscal school year beginning July 1, 1963. The Borough of Allentown has questioned this certification on the ground that the now existing consolidated school district does not become a regional school district until July 1, 1963, and contends, therefore, that the county tax board should use apportionment valuations as the basis for apportioning school taxes. Although the apportionment of taxes is made in April of the tax year (N.J.S.A. 54:4-52) and the taxes are raised in the current calendar tax year, in the case at hand the taxes will be raised to meet a budget for the fiscal year of the regional school district beginning July 1 of the tax year. Therefore, in our opinion, the apportionment of taxes should be made in accordance with the law applicable to the type of school district for which the funds are to be raised and expended.

School taxes are raised to meet expenditures during a "school year." A school year is that period beginning on July 1 of one year and ending on June 30 of the following year. R.S. 18:14-76. In the case at hand, the moneys to be expended for the consolidated school district during its fiscal year beginning July 1, 1962 and ending June 30, 1963 were, in fact, raised on a valuation basis during the tax year 1962. The consolidated school district, therefore, has available to it sufficient moneys to complete the present school year, at the end of which the consolidated school district will cease to exist. We understand that this conforms to the usual practice, namely, that taxes for most school districts in the state are raised in a given *calendar tax year* for the *fiscal school year* beginning on July 1 of that year and ending on June 30 of the following year. This practice appears to be supported by the provisions of R.S. 54:4-45 and N.J.S.A. 54:4-75.

R.S. 54:4-45 provides that the clerk or other proper officer of a school district on or before March 1 in each year must transmit to the county board of taxation a

certified statement of the amount of moneys appropriated for school purposes "for the *school year* for which such appropriations are made \* \* \*." (Emphasis added.) The moneys appropriated for local school purposes are paid by the municipality to the custodian of school moneys on this basis: 20% of the annual appropriation must be paid within 40 days after the beginning of the school year, and the remainder is paid from time to time as requested by the board of education, but prior to the last day of the school year. N.J.S.A. 54:4-74.

It is noted that R.S. 18:7-79 provides for a different method of raising taxes for school purposes applicable to some of school districts which operate under the provisions of Chapter 7 of Title 18 of the Revised Statutes, commonly known as Chapter 7 school districts. This section permits the raising of taxes in a calendar year to cover school budget needs during the same calendar year, that is to say, for the last half of the preceding fiscal school year and for the first half of the ensuing fiscal school year. However, assuming but not deciding, that the provisions of R.S. 18:7-79 may be made applicable to a regional school district by virtue of the reference to Chapter 7 in R.S. 18:8-14, the consolidated school district in question has been appropriating moneys on a fiscal school year basis and the appropriation for the regional school district has been made for the fiscal year beginning July 1, 1963.

It is evident that although the municipalities still comprise a consolidated school district at the time the commissioner of education certifies the average daily enrollment for purposes of the apportionment, the resultant taxes will be utilized for the ensuing school year, commencing July 1. The taxes raised will be supporting a regional school district. Logic dictates that if the taxes are to be expended to support a regional school district they should be apportioned according to the regional school district law.

In our opinion, therefore, in this case the taxes to be raised in the 1963 tax year for the fiscal school year of the regional school district beginning July 1, 1963 should be apportioned on the basis selected by the voters of that district. As noted above, the apportionment basis selected was that of average daily enrollment of pupils from the constituent municipalities in the regional school district.

Very truly yours,

ARTHUR J. SILLS  
*Attorney General*

By: JOSEPH A. HOFFMAN  
*Deputy Attorney General*

July 19, 1963

HONORABLE ROBERT J. BURKHARDT  
*Secretary of State*  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-3

DEAR SECRETARY BURKHARDT:

We have been asked whether voting machines equipped with the printed return mechanism manufactured by the Automatic Voting Machine Division of the Rockwell

Manufacturing Company may lawfully be used in this state. As indicated below, we conclude that an examination of the machine by three examiners pursuant to R.S. 19:48-2 is required before approval or disapproval of the new machine can be given.

R.S. 19:48-1 states the substantive standards which must be met by voting machines to be used in this state. R.S. 19:48-2 provides a procedure for determining whether the substantive standards are met in a given case. The Secretary of State must have the voting machines which are proposed for use in New Jersey examined by three examiners whom he appoints. One must be an expert in patent law and the other two must be mechanical experts. These three experts must file a written report. The Secretary of State considers this report, makes his own examination of the machine, and files a report, attached to which must be the report of the three expert examiners, stating whether the machine proposed for use lawfully may be used.

On October 21, 1935, the basic voting machine manufactured at that time by the Automatic Voting Machine Corporation was found lawful for use pursuant to L. 1935, c. 302, the predecessor of R.S. 19:48-2, by then Secretary of State Thomas A. Mathis. The statute provides:

"When the machine has been so approved, any improvement or change that does not impair its accuracy, efficiency or capacity, shall not render necessary a reexamination or re-approval thereof."

The printed return mechanism of the new machine permits the recording of the readings of the counters on the back of the machine both at the opening of the polls and at the close. The manufacturer contends that the addition of the printed return mechanism in no way impairs its accuracy, capacity or efficiency. However, it must be admitted that physically it is an extensive addition to or modification of the original machine. An examination should be made to determine whether or not the machine as modified permits the custodians of the machines and the district boards of elections to perform the duties imposed by R.S. 19:48-6 and R.S. 19:52-1 with respect to checking the proper setting of machine counters.

Since a question is raised as to whether the printed return mechanism has so altered the machine as to render it incapable of meeting the substantive requirements of our election laws, the procedure for examination prescribed by R.S. 19:48-2 should be followed. We understand that the manufacturer has stated in a communication to you that if you feel reexamination of the machine is required, that the letter from its vice president to you dated March 4, 1963 should be considered an application to have the machine formally examined.

We therefore advise you to follow the procedures for examination referred to briefly in this opinion and more fully described in R.S. 19:48-2. Any legal questions that may arise in connection with the examination, particularly whether the Automatic voting machines equipped with printed return mechanisms meet the substantive standards imposed by R.S. 19:48-1 or other sections of the election law, should be referred to us for advice.

Very truly yours,

ARTHUR J. SILLS  
*Attorney General*

By: WILLIAM L. BOYAN  
*Deputy Attorney General*

JULY 19, 1963

HONORABLE ROSCOE P. KANDLE, M.D.  
*Commissioner, Department of Health*  
State House  
Trenton, New Jersey

MEMORANDUM OPINION—P-4

DEAR COMMISSIONER KANDLE:

You have asked whether the State Department of Health has authority to promulgate regulations in order to enforce the provisions of Chapter 52, Laws of 1961 (N.J.S.A. 24:6B-1 *et seq.*), the law dealing with the registration and regulation of drug manufacturing and wholesale drug businesses. This is to confirm informal advice previously given to you that you have the power to promulgate necessary regulations.

Chapter 52 of the Laws of 1961 (N.J.S.A. 24:6B-1 *et seq.*) is an act entitled: "An Act concerning the drug manufacturing and wholesale drug businesses, amending Section 24:3-1 of the Revised Statutes, supplementing subtitle 1 of Title 24 of the Revised Statutes and making an appropriation therefor." The title clearly states that Chapter 52 supplements subtitle 1 of Title 24. R.S. 24:2-1, which is in subtitle 1 of Title 24, states:

"The State Department (of Health) shall execute and enforce the provisions of this subtitle and make and publish all necessary rules and regulations providing for the enforcement and carrying into effect of any provision of this subtitle and for the government of its officers and employees.\* \* \*

Generally, amendments and supplements to existing statutes "are to be construed together with the original act to which they relate as constituting one law \* \* \*." *City of Newark v. Rockford Furniture Co.*, 4 N.J. Super. 205, 208, 209 (App. Div. 1949). As the court there said:

"Thus, the amendment or supplement becomes a part of the original statute as if it had always been contained therein. In the enactment of amendments or supplements, the earlier act on the same subject is generally presumed to have been within the knowledge and view of the Legislature, which is regarded as having adopted the new statute in the light thereof and in reference thereto." *Id.* at 209.

It is noted that subtitle 1 of Title 24 deals generally with food and drugs, the inspection, condemnation and regulation of various foods and drugs and the enforcement of the laws and regulations relating thereto. The enforcement provisions are contained in Chapter 2 of the subtitle, and these provisions relate to the commodities and businesses set forth in the various chapters of the subtitle. Chapter 52 of the Laws of 1961 merely adds to the subtitle another class, namely, drug manufacturing and wholesale drug businesses, and imposes certain requirements in connection with the conduct of such businesses.

Therefore, it is our opinion that the regulatory powers given to you by R.S. 24:2-1 apply to all of the provisions of subtitle 1 of Title 24, including Chapter 52 of the Laws of 1961 which has been made a part of that subtitle.

Very truly yours,

ARTHUR J. SILLS  
*Attorney General*

By: WILLIAM BLOHM, JR.  
*Deputy Attorney General*

JULY 19, 1963

Ross R. Beck, *Secretary*  
*Monmouth County Board of Taxation*  
Hall of Records  
Freehold, New Jersey

MEMORANDUM OPINION—P-5

DEAR MR. BECK:

The Monmouth County Board of Taxation has asked our opinion as to the taxability of land acquired by the Small Business Administration, a governmental entity created by federal statute.

In your request for this opinion you have indicated that the Small Business Administration acquired title to a particular portion of property on February 29, 1960 by a "Sheriff's Deed." It is assumed that title was thus acquired by virtue of mortgage foreclosure proceedings in which the Small Business Administration was the foreclosing mortgagee under a mortgage to secure a loan given by it to the particular property owner-mortgagor under the Small Business Administration Act, 15 U.S.C.A. § 631, et seq.

Under the Act creating the Small Business Administration, it is expressly provided that any interest held by the Administration in property, as security for a loan, shall be subordinate to any lien on such property for taxes due thereon to the state or any political subdivision thereof, 15 U.S.C.A. § 646. Consequently, there can be no question that the subject property was taxable to the owner thereof at the time the Small Business Administration held a mortgage security interest on the property.

We are of the opinion, however, that the property became tax exempt when the fee title was acquired by the Small Business Administration upon the foreclosure of its mortgage lien. It is settled law that in the absence of Congressional consent, a Federal instrumentality cannot be subjected to the plenary taxing power of the states or any of its political subdivisions. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Nor can the property of any Federal instrumentality be subject to local taxation. *Clallam County, Wash. v. United States*, 263 U.S. 341, 44 S. Ct. 121 (1923).

These principles are applicable to the Small Business Administration and any property owned by it. The Small Business Administration was created expressly to serve Federal purposes as declared in the operative enabling legislation, 15 U.S.C.A. §§ 631, 633. This was recognized by the United States Supreme Court in *Small Business Administration v. McClellan*, 364 U.S. 447, 450, 81 S. Ct. 191, 195 (1960) wherein it was stated:

"\* \* \* [T]he Small Business Administration is 'an integral part of the governmental mechanism' created to accomplish what Congress deemed to be of national importance."

The Small Business Administration Act neither explicitly nor by implication provides a Congressional waiver of immunity from taxation. While Congress has in many areas and in many instances consented to the imposition of state or local taxes upon Federal instrumentalities or their property (e.g., *Reconstruction Finance Corp. v. Beaver County, Pa.*, 328 U.S. 204, 66 S. Ct. 992 (1946); *First National Bank v. Adams*, 258 U.S. 362, 42 S. Ct. 323 (1922)], it has not permitted the imposition of such taxes with respect to the Small Business Administration on property owned by it.

Therefore, we advise you that property owned by the Small Business Administration is exempt from local property taxation.

Very truly yours,

ARTHUR J. SILLS  
*Attorney General*

By: ALAN B. HANDLER  
*Deputy Attorney General*

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- "Any" as used in 40:5-2. P-4, 1960.
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- "Authority of the State" as used in 47:3-16 as including the New Jersey Turnpike Authority. P-6, 1960.
- "Citizen" as used in constitutional amendment and implementing legislation concerning Senior Citizens. F.O. 34, 1961.
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- "Highways" as used in various statutes includes turnpikes. F.O. 11, 1960.
- "Hotel" as used in 29:3-3 includes motel. P-17, 1960.
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- "Not conducted for pecuniary profit of any private shareholder or individual" as used in 54:10A-3. P-3, 1960.
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- "Pension" as used in N.J.S.A. 18:13-112.51 is equivalent to "The annuity portion of the retirement allowance" found in N.J.S.A. 18:13-112.70. P-25, 1961.
- "Present value" as used in 43:15A-50. F.O. 24, 1961.
- "Public purpose" as used in 1947 Const. of N. J., Art. VIII, § 111, par. 3, as including beach protection. F.O. 2, 1961.
- "Rated capacity of the equipment" as used in N.J.S.A. 58:4A-4. F.O. 23, 1960.
- "Roadside vending machine" considered "dairy products store," "roadside stand," and "mercantile establishment" as used in milk control law. F.O. 4, 1960.
- "Source" as used in N.J.S.A. 58:4A-4. F.O. 23, 1960.
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- "The assessed value of real property" as used in Bank Stock Tax Act, R.S. 54:9-1 et seq. P-1, 1961.
- "Waters of this State" as used in the Power Vessel Act. F.O. 1, 1960.
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