FORMAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

NEW JERSEY

1978-1984

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FORMAL OPINIONS

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February 10, 1978

JAMES J. SHEERAN, *Commissioner*
Department of Insurance
201 East State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 1—1978

Dear Commissioner Sheeran:

You have asked for advice concerning the requirements of the insurance rating laws when a company proposes to adopt a rating system approved for a rating organization of which it was not previously a member, whose loss and expense experience would have been included in the organization's rate filing. For the following reasons, it is our opinion that the Commissioner of Insurance has the authority to make a separate determination as to whether the use or adoption of a rating organization's rating system will result in appropriate rates for an insurer in light of its own particular loss and expense experience and data.

You have advised us that Allstate Insurance Company and several other companies that traditionally have made independent rate filings for private passenger automobile insurance have sought to adopt the rate increase you recently approved for the Insurance Services Office ("ISO"). ISO is a rating organization authorized to make uniform rate filings on behalf of approximately 230 companies that write automobile coverage in New Jersey. Allstate and other independents had individual filings pending contemporaneously with that made by ISO. A separate hearing was held on each rate application and an individual report and recommendations was submitted to you following each hearing. The Hearing Officer has recommended an average overall rate increase for Allstate of approximately seven percent. Although you ultimately approved an increase for ISO averaging about fourteen percent, the Hearing Officer's recommendation on that application was even higher than the amount actually approved for ISO. Following the ISO approval, you were advised by Allstate[1] that it was withdrawing its independent application and would adopt the new ISO rates. We understand that in the past the Department has permitted independent companies to adopt ISO rates after an increase without the formality of full membership in instances where their experience had been filed with ISO but they had not previously authorized ISO to file for rates on their behalf. Similar so-called "Me Too" filings have been allowed to other companies that had not filed their experience with ISO but which had insufficient volume, in any event, to support an independent rate filing. No large independent filer like Allstate, however, has ever previously sought or obtained Department approval to adopt an ISO rate increase upon withdrawal of a separate, pending application.

New Jersey has opted for the prior approval system of establishing

1. For convenience, we will limit the factual discussion to the Allstate situation, but the legal principles would apply to any company that uses or proposes to adopt the system approved for a rating organization where such use would permit rates that were clearly excessive or inadequate for the individual company.

insurance rates, as set forth in N.J.S.A. 17:29A-1 *et seq.* For all kinds of insurance not expressly exempted from the application of the Act, an insurance company may not charge premiums in New Jersey except in accordance with a rating system on file with and approved by the Commissioner. N.J.S.A. 17:29A-15 and 25. An insurance company may develop and file its rating system independently or as a member of a licensed rating organization, which may do so on behalf of all of its member companies. N.J.S.A. 17:29A-2, 4, 6 and 14. Moreover, rating organizations generally must be open to membership by any insurance company. *See* N.J.S.A. 17:29A-3. Rating organizations like ISO provide an economical method for insurance companies with relatively small shares of the market to pool their resources in gathering the complex data needed to support a rate filing. Membership in a rating organization is beneficial to such companies because the cost to each of them of developing independent rate filing data would be excessive. Moreover, ISO and other rating organizations provide the Department of Insurance with a workable method for determining proper rate levels for many small companies in the aggregate; most of these companies are too small to have sufficient loss experience data for the level of actuarial "credibility" necessary for proper rate determinations. For correlative reasons, the larger companies have traditionally made independent rate filings in New Jersey. Each of them writes a percentage of the total market representing a large enough sample for the development of credible loss data, and is able to bear the expense of developing independent statistics in support of an individual rate. Although it would be unusual, it is clear that nothing in the rating laws would prevent Allstate from becoming a member of ISO, which could then file a rating system on behalf of Allstate along with all other member companies.

The question of whether Allstate may simply abandon a pending, independent rate filing and adopt a recent ISO rate increase, however, requires a more comprehensive analysis of the rating laws. The statutory guideline and mandate with respect to the determination of proper rates are that rates shall be approved only if they are neither unreasonably high or excessive nor inadequate for the safeness and soundness of the insurer and they must not be unfairly discriminatory as between similar risks. N.J.S.A. 17:29A-4, 7, 10, 11 and 14. In applying those criteria, the Commissioner is specifically required to consider the following:

> the factors applied by insurers and rating organizations generally in determining the bases for rates; the financial condition of the insurer; the method of operation of such insurer; the loss experience of the insurer, past and prospective, including where pertinent, the conflagration and catastrophe hazards, if any, both within and without this State; to all factors reasonably related to the kind of insurance involved; to a reasonable profit for the insurer, and, in the case of participating insurers, to policyholders' dividends. . . . [N.J.S.A. 17:29A-11.]

In order to assure proper rate determinations, statistical information concerning the loss and expense experience of all insurers must be reported and filed with the Commissioner. N.J.S.A. 17:29A-5. Insurers are

prohibited from giving false or misleading information to a rating organization or to the Commissioner that would affect the proper determination of rates. N.J.S.A.17:29A-16. The public importance of determining proper rates and charging permiums only in accordance with an approved rating system is underscored by the fact that any violation of the act is a ground for the assessment of penalties of up to $500 for each violation. N.J.S.A. 17:29A-22 and 23. The statutory provisions requiring the filing of accurate loss and expense data by insurers and rate approval by the Commissioner based upon factors that vary among companies, such as financial condition, method of operation and loss experience, make the underlying purpose of the legislation clear. The factors to be considered in a rate determination for an independent filer or for a rating organization ordinarily should be based upon the particular loss and expense data of the company or companies that will use the rate ultimately approved. Thus, for example, a company cannot be a member of more than one rating organization, hoping to use whichever rating system would provide the higher rate, as approved. See N.J.S.A. 17:29A-2. And, upon the application of a member, the Commissioner must make a separate determination of whether to allow it to deviate from the rating system approved for its organization. N.J.S.A. 17:29A-10.

The Act does not provide any express guidance as to whether the Commissioner has the authority to make a separate determination bearing on the reasonableness of the rates of a particular member or subscriber to a rating organization. N.J.S.A. 17:29A-10 by its terms refers only to the deviation of a member company from the approved system of a rating organization made on its own application. N.J.S.A. 17:29A-7, however, permits the Commissioner to order an alteration of a previously approved rating system on his own initiative whenever he finds that it results in inadequate or excessive rates. In this case, it is our opinion that in view of the underlying statutory purpose, N.J.S.A. 17:29A-7 would apply even though the Allstate and ISO applications were for alterations of previously filed rating systems (i.e. rate increases) rather than for initial rating systems.

In *Insurance Company of North America v. Howell,* 80 N.J. Super. 236 (App. Div. 1963), the court held that a provision which stated that if the Commissioner failed to approve or disapprove a rating system within 90 days after it was filed, the system would be deemed approved by him, applies only to an original rate filing and not to filings for alterations of existing rating systems. The INA decision does not require, however, that once a rate system has been amended by an approved alteration filed pursuant to N.J.S.A. 17:29A-14, the Commissioner no longer has any power to consider whether the modified rating system produces appropriate rates for an insurer or a rating organization.[2] The insurance

2. Although the question was not decided, the court suggested in the INA case that the Commissioner, in the exercise of the broad powers conferred upon him, might inferentially at any time, direct a change in a previously approved alteration of a rating system in light of insurance experience, even though no express language to that effect appears in Section 14. *See Insurance Company of North America v. Howell, supra* at 251-52.

rating laws should not be interpreted to undermine the intended legislative purpose of insuring that rates are reasonable and adequate. Consequently, it is clear that an application for an increase or other alteration in a rating system does not extinguish the Commissioner's on-going power to determine that rates provided on behalf of an insurer are adequate for the safeness and soundness of the insurer and not unreasonable or excessive with respect to insureds. To construe the insurance rating laws in any other manner would be to reach an inconsistent result and undermine the salutary legislative purpose underlying the enactment of the insurance rating laws. *See State v. Bander,* 56 N.J. 196 (1970); *Marranca v. Harbo,* 41 N.J. 569 (1964).

In light of these underlying principles, it is our judgment that under N.J.S.A. 17:29A-7 the Commissioner has the authority to make a separate determination as to whether the ISO rating system as applied to the expense and loss experience of a particular insurer will produce rates that are not unreasonably high or excessive and are adequate for the safeness and soundness of the insurer. As to ISO members and subscribers, this authority should be exercised only in unusual circumstances where it is reasonably clear that a rating organization's rating system would not provde appropriate rates for an individual insurer consistent with the legislative scheme. On the other hand, it would not ordinarily be appropriate for non-rating organzation members or subscribers to use rating organization rates. This would be particularly true in the Allstate situation where the report and recommendations of a hearing officer who considered the evidence adduced to support the application concluded that, in light of its experience, Allstate was entitled to a percentage increase substantially lower than that which was separately approved for ISO. But even as to non-rating organization members or subscribers there may be individual circumstances in which an insurer's experience is so limited in nature that the rating organization system may be deemed to be appropriate. All of these determinations in individual cases are committed to the sound discretion of the Commissioner of Insurance in carrying out his regulatory responsibilities under the insurance laws.

You are therefore advised that whenever a company uses or proposes to adopt a rating system approved for a rating organization, the Commissioner of Insurance has the authority to make a determination as to whether the rating system applied to the insurer will provide rates that are not unreasonably high or excessive and are adequate for the safeness and soundness of the insurer consistent with the provisions of the insurance rating laws.[3]

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

3. It is suggested that the Department of Insurance should give consideration to the adoption of regulations or guidelines dealing with the circumstances under which an independent evaluation may be made to determine the appropriateness of a rating system approved for a rating organization to the insurer which uses or proposes to adopt such a rating system.

February 14, 1978

ANN KLEIN, *Commissioner*
New Jersey Department of Human Services
135 West Hanover Street
Trenton, New Jersey 08625

FORMAL OPINION NO.2—1978

Dear Commissioner Klein:

You have requested advice as to the scope of State and county welfare agency responsibility respecting the investigation and prosecution of fraud committed by either employees or recipients of the Food Stamp Program. You are hereby advised that the State and counties are obligated to investigate apparent instances of recipient or employee fraud, make demand for the repayment of food stamp coupons issued as a result of fraud or misrepresentation, make an administrative determination as to whether the facts warrant referral of the matter to State or federal authorities for prosecution, and refer the matter to such authorities if appropriate.

The Food Stamp Program [7 U.S.C. §2011 *et seq.,* as amended by P.L. 95-113, 91 Stat. 958 (1977)]* was enacted by Congress in order to alleviate the condition of widespread hunger and malnutrition common among members of low-income households. Food stamps or coupons permit eligible recipients to purchase food at a considerable discount. The coupons themselves are financed by the federal government, while the costs of administering the program are shared by the State and federal governments. 7 U.S.C. §2025(a). The Secretary of Agriculture is charged by Congress with operation of the program on the national level, and in exercise of this function he possesses the delegated authority to promulgate regulations which guide the operation of State programs. 7 U.S.C. §2013(c).

The knowing use, transfer, acquisition, alteration or possession of food stamps, or the vouchers used by recipients to obtain them, in violation of the Food Stamp Act or regulations is a crime under federal law, 7 U.S.C. §2024(b), as is the redemption of food stamps with knowledge that they have been received, used, or transferred in violation of the Act or regulations, 7 U.S.C. §2024(c), provided that the food stamps or vouchers in question are of the value of $100 or more. See also 7 C.F.R. §270.4. Although prosecution under State law for offenses involving the Food Stamp Program was neither encouraged nor proscribed by former federal legislation, recent amendments to the Food Stamp Act clearly provide for a State enforcement role by authorizing the Secretary to fund 75% of the costs of State food stamp investigation and prosecutions. 7 U.S.C. §2025(a), as amended by Food Stamp Act of 1977, §16(a), 91 Stat. 976 (1977).

The Department of Agriculture's regulations specify that once a State food stamp agency determines that food stamps have been fraudulently obtained by recipients, the State shall make demands for the return of food

*All citations to 7 U.S.C. §2011 *et seq.* refer to the current version of this legislation as recently amended by the Food Stamp Act of 1977, P.L. 95-113, §1301 *et seq.,* 91 Stat. 958 (1977).

stamps issued due to such fraud. 7 C.F.R. §271.8(e). However, State responsibility does not terminate upon recovering fraudulently issued stamps, for:

> Demand and payment of any such amounts shall not relieve or discharge such household of any liability, either civil or criminal, for such additional amounts as may be due under any other applicable provisions of law. *Id.*

State as well as federal prosecutions are contemplated by 7 C.F.R. §270.4(d), which specifies that fraud, misrepresentation, or willful failure to report information in connection with food stamp applications is subject to criminal prosecution or civil liability under federal statutes "as well as to any legal sanctions as may be maintained under State law." *Id.*

This policy is further clarified in program instructions periodically issued by the Food and Nutrition Service of the U.S. Department of Agriculture. Thus, FNS(FS) Instruction 736-1 at page 8 (1972) states that:

> It is likely, in any case in which a household has fraudulently obtained coupons, that there have been violations of either State or Federal criminal laws.

In such cases, continues the instruction, it should be determined administratively whether the facts warrant referral of the matter to the appropriate prosecutorial authorities. In the event of such referral, administrative collection action should be withheld until criminal prosecution is either declined or completed, or until such action is approved by the prosecutors. Where, however, the evidence does not warrant referral for criminal prosecution, or where prosecutorial authorities decline to take action, the State agency is responsible to initiate collection action. *Id.*

In New Jersey, the county welfare agencies are responsible for direct administration of the Food Stamp Program and act as agents of the State in this capacity. N.J. Food Stamp Manual (FSM) §111, N.J.A.C. 10:87-1.1(b); *cf. Essex County Welfare Bd. v. Dept. of Inst. & Agencies,* 75 N.J. 232 (1978); *Essex County Welfare Bd. v. Dept. of Inst. & Agencies,* 139 N.J. Super. 47 (App. Div. 1976). Thus, all references to State agencies in the federal statutes and regulations apply to the county welfare agencies with equal force. The provisions of New Jersey's food stamp regulations track their federal counterparts, requiring that possible criminal violations involved in the over-issuance of food stamps be referred to State or federal law enforcement officials (FSM §691.1, N.J.A.C. 10:87-6.41), and that collection activities are to be pursued after completion of the prosecutorial process [FSM §691.2(c), N.J.A.C. 10:87-6.41(a)(2)(iii)].

It is thus apparent that recipients who illegally receive benefits under the Food Stamp Program are subject to both federal and State criminal sanctions. *E.g.* 7 U.S.C. §2024; N.J.S.A. 2A:111-2, -3. *See State v. Jeske,* 13 Wash. App. 118, 533 P.2d 859, 861 (Wash. Ct. App. 1975). An essential duty of State and county welfare agencies is to investigate the facts of all alleged abuses of the program in order to initiate prosecution or collection, or both.

The fact that State or county employees, or employees of vendors which contract with the State to issue food stamps to recipients, are engaged in federal food stamp activities does not in any way insulate them from possible prosecution for violations of State law. Such employees are subject to State prosecution for embezzlement (N.J.S.A 2A:102-1) and other offenses notwithstanding their participation in a federal program. Additionally, they are subject to federal criminal sanctions which punish the unauthorized issuance, use, transfer, acquisition, alteration, possession or presentation of such coupons. 7 U.S.C. §2024; 7 C.F.R. §270.4(b). The State and counties are implicity responsible to investigate the possibility of such offenses and report their findings to State, county or federal authorities, as appropriate, just as they would with offenses by non-food stamp employees.

In sum, prosecutions for abuse of the Food Stamp Program by recipients or employees may be pursued according to State and/or federal law. The State and county welfare agencies have the responsibility to investigate allegations of violations of law, refer such matters to the appropriate prosecutors, and take action to recoup improperly acquired food stamps.

Very truly yours,
JOHN J. DEGNAN
Attorney General
By: RICHARD M. HLUCHAN
Deputy Attorney General

April 18, 1978

ANN KLEIN, *Commissioner*
Department of Human Services
135 West Hanover Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 3—1978

Dear Commissioner Klein:

You have asked for an opinion as to whether the Division of Medical Assistance and Health Services may validly promulgate regulations under the Pharmaceutical Assistance for the Aged (hereafter "P.A.A.") Program, excluding the coverage of prescribed drugs, insulin, insulin syringes or insulin needles for persons who are inpatients in nursing homes or hospitals. For the following reasons, you are advised that payments to pharmacies may not be denied for prescription drugs, insulin, insulin syringes or insulin needles of eligible persons solely on the basis of their being inpatients in nursing homes or hospitals.

The P.A.A. Program was enacted by Laws of 1975, c. 194, as a supplement to the New Jersey Medical Assistance and Health Services

(Medicaid) Act, N.J.S.A. 30:4D-1 *et seq.* As originally implemented, the P.A.A. Program provided for direct reimbursement to certain eligible persons for pharmaceutical costs. As amended by L. 1975, c. 312, effective February 19, 1976, single residents of the State age 65 and over whose annual income is less than $9,000 and any married residents age 65 and over whose combined income is less than $12,000 are eligible for P.A.A. except if the prescription drug costs of an otherwise eligible person are wholly covered by any other plan of assistance or insurance, N.J.S.A. 30:4D-21, 23. Although basic eligibility for P.A.A. was thus broadly defined, P.A.A. availability was narrowly limited by income-related deductible provisions located elsewhere in the statute.

The 1977 amendments, L. 1977, c. 268, effective January 1, 1978, address P.A.A. availability by removing all deductible provisions in the Act and substituting a $1.00 copayment requirement. "Thus all eligible senior citizens' drug costs, less a copayment of $1.00, would be paid by the State." Assembly Institutions, Health and Welfare Committee Statement on S. 1790, dated July 11, 1977. Pursuant to these amendments, regulations implementing the P.A.A. Program were substantially changed. N.J.A.C. 10:69A-4.3(c) was amended to provide:

> P.A.A. does not pay for prescribed drugs, insulin, insulin syringes or insulin needles for persons who are inpatients in nursing homes or hospitals.

Hospital or nursing home inpatients had not been excluded from participation in the Program under previous versions of the Act and its regulations.

In our review of this amended regulation, it is apparent that there is no authority under the Act, as amended, which would allow for the blanket exclusion of inpatients at nursing homes and hospitals as a class from participation in the program. The annual income restrictions and the requirement that other insurance be used to pay for prescription drugs prior to reimbursement by the program are the only legislatively authorized restrictions on eligibility. The eligibility requirements were not affected in any manner by the 1977 amendments. There is no apparent indication of a legislative intent to exclude any category of otherwise eligible senior citizens. The Committee Statement on S. 1790 indicates only that "this legislation would expand coverage to provide assistance to a larger number of elderly citizens . . . ." Therefore, it may be reasonably assumed that the legislature intended to continue as heretofore the coverage of all eligible persons including inpatients at hospitals, nursing homes and related facilities.

In addition, there is no apparent legislative purpose to delegate its prerogative to establish the conditions of eligibility for participation in the program. In this regard, the rule-making authority of the Commissioner of Human Services is found in N.J.S.A. 30:4D-24 which provides:

> The commissioner shall by regulation establish a system of payments or reimbursements and a system for determining eligibility, including provisions for submission of proof of actual and anticipated annual income, and evidence of complete or partial coverage of prescription drug costs by any other assistance or insurance plans.

This statute on its face merely authorizes the Commissioner to establish a system by which the eligibility of individual applicants may be determined under the legislatively prescribed general standards of eligibility. There is no implicit authority in our judgment to allow the Commissioner to set broad conditions of eligibility applicable to classes of senior citizens other than those set forth in the Act. It is therefore clear that a regulation which would exclude from the benefits provided by the Act senior citizens who are inpatients in nursing homes or hospitals would be in excess of the authority granted to the Commissioner in her administration of the P.A.A. Program.

It has been suggested that since the cost of inpatient care at nursing homes and hospitals is so great, income larger than prescribed in the statute may be presumed for any private patient. This is an impermissible assumption. It excludes not only persons who receive income but also persons who liquidate property or other resources to pay for nursing home or hospital care. In using "income" as the principal basis for participation in the program, the legislature apparently recognized the distinction between "income" and "resources" previously established by regulations implementing the Medicaid Program. Compare N.J.A.C. 10:94-4.28 with N.J.A.C. 10:94-4.2. Therefore, unless an otherwise eligible senior citizen's "income" from all sources, including current income produced by resources, exceeds the annual eligibility standards, he or she is eligible for participation in the program without regard to the value of his or her "resources." A determination of inpatient eligibility in the program should be made on a case by case basis and should not assume income in excess of eligibility requirements.*

For these reasons, you are advised that N.J.A.C. 10:69A-4.3(c) which excludes senior citizens who are inpatients in nursing homes or hospitals from the benefits provided by the P.A.A. Program is inconsistent with the governing statutory provisions concerning eligibility and is therefore invalid.

Very truly yours,
JOHN J. DEGNAN
Attorney General

* The Commissioner does have the power to define the term "income" by regulation. This has been done at N.J.A.C. 10:69A-2.1, which provides in part that "[i]ncome received or anticipated shall include all income received from whatever source derived . . . ." Under this regulation, treatment of gifts or contributions from family members as "income" is permissible, since such gifts or contributions are not "resources" held by the P.A.A. eligible person but are currently made available in a given year. Gifts of over $200 have consistently been considered "income" for the purpose of determining Medicaid eligibility, N.J.A.C. 10:4D-4.28, N.J.A.C. 10:94-4.32(a)(8), and a similar interpretation of "gifts" for P.A.A. purposes comports with the supplementary nature of the P.A.A. Program.

April 25, 1978

RUSSELL H. MULLEN, *Acting Commissioner*
New Jersey Department of Transportation
1035 Parkway Avenue
Trenton, New Jersey 08625

FORMAL OPINION NO. 4—1978

Dear Commissioner Mullen:

You have asked whether the New Jersey Department of Transportation must receive site plan approval from municipalities for the location of auto transformer substations being constructed as part of the reelectrification of lines of the former Erie Lackawanna Railway Company under a project authorized by the New Jersey Transportation Bond Act of 1968, L. 1968, c. 126, as supplemented (hereinafter "Bond Act"). The project calls for the reelectrification of railroad lines through 37 municipalities and requires, as an integral part, the construction of 16 electrical substations of various types. With few exceptions, the 16 substations are each to be located in different municipalities. Location generally is mandated by considerations such as the source and availability of utility power, the length of track a station must serve, the electrical load to be handled, the proper distribution of power, the proximity to other substations and budget limitations. All substations are to be constructed on property acquired by the State for that purpose.

The New Jersey Supreme Court has addressed the issue of State immunity from local land use regulation on several occasions, concluding that ". . . state agencies are generally immune from the zoning ordinance provisions of a municipality." *Berger v. State,* 71 N.J. 206, 218 (1976); *Rutgers v. Piluso,* 60 N.J. 142, 153 (1972). *See also Town of Bloomfield v. N.J. Highway Authority,* 18 N.J. 237 (1955). The decisions hold that the existence of immunity in a particular case is to be determined from legislative intent. They set forth the key criteria to be examined in making that determination: 1.) The nature and scope of the instrumentality seeking immunity; 2.) the kind of function or land use involved; 3.) the extent of the public interest to be served thereby; 4.) the effect local land use regulation would have upon the enterprise concerned; and 5.) the impact upon legitimate local interests. 71 N.J. at 218. When viewed in light of the above criteria, the legislative history and factual circumstances surrounding this project make it clear that the Department of Transportation is immune from local land use regulation.

The Department of Transportation was established by the Legislature as a principal department in the executive branch of state government with broad powers to develop and promote programs for efficient and economical transportation services on a statewide basis with special emphasis to be given to the preservation and improvement of commuter railroads. N.J.S.A. 27:1A-1 *et seq.* In furtherance of these objectives, the Legislature enacted, and the people approved at a general election, the Bond Act "for the purpose of capital expenditure for the cost of providing an improved public transportation system for the State." The Bond Act specifically reserved $200,000,000 of the proceeds from the sale of bonds for the

improvement of mass transportation facilities and appropriated all proceeds from the sale of bonds to the Department of Transportation for the purposes set forth in the Act. "Improvement of mass transportation facilities" was defined to include "the development, acquisition by purchase, lease or otherwise, the construction, reconstruction, improvement, rebuilding, relocation, renewal, establishment or rehabilitation of mass transportation facilities . . ." as well as "the acquisition of all property rights-of-way, easements and interests therein as shall be necessary for the improvement of mass transportation facilities." The Bond Act further declared that it "is in the public interest that these essential transportation facilities and equipment be provided in the shortest possible time, thereby saving on the anticipated increased construction costs as well as providing a safer, more adequate transportation system." By L. 1968, c. 424, the Legislature appropriated a portion of the bond sale proceeds for various mass transportation projects, including the reelectrification of the Erie Lackawanna and authorized and directed the Commissioner of Transportation "to take such steps as shall be necessary to implement and carry out the program authorized by the New Jersey Transportation Bond Act of 1968. . . ."

The foregoing leaves little doubt that the Department of Transportation, in implementing the reelectrification project is, in the words of the Supreme Court in *Rutgers,* "an instrumentality of the State performing an essential governmental function for the benefit of all the people of the State. . . ." 60 N.J. at 153. As such, the Legislature would not intend that it be subject to restriction or control by local land use regulation. "Indeed" the Court continued, "such will generally be true in the case of all state functions and agencies." 60 N.J. at 153. Moreover, where, as in this case, municipal land use regulation would temporarily delay, and could permanently thwart, a state-wide project of general public benefit which the Legislature has directed be completed in the shortest possible time, the legislative intent to immunize the State agency responsible for the project is apparent. As stated by the Court in *N.J. Turnpike Authority v. Sisselman, et al.,* 106 N.J. Super. 358, 366 (App. Div. 1969) *cert. den.* 54 N.J. 565 (1969),* "To hold otherwise would delay, disrupt, fragmentize and possibly defeat completion of this necessary public project, an extensive project passing through several municipalities." After citing several cases in support of the proposition that the Turnpike Authority and similar agencies are immune from local zoning and planning regulations, the Court explained, "The rationale of these cases is that legislatively created agencies, authorized by the superior governmental authority of the State, may not be subjected to rules and regulations of local governing boards and agencies, in the absence of clear language subjecting the state-created agencies

*The case held that where the Legislature expressly authorized the building of a highway spur by the Turnpike Authority, that agency was not required to refer the project to the local planning board for review and recommendation under N.J.S.A. 40:55-1.3, the source of N.J.S.A. 40:55D-31 in the present Municipal Land Use Law. It is important to note that neither N.J.S.A. 40:55D-31 nor any other provision of the Municipal Land Use Law, N.J.S.A. 40:55D-1 *et seq.*, specifically subjects the Department of Transportation to local jurisdiction.

to the jurisdiction of local boards."

Finally, there appears to be no local interest which, when compared to the overwhelming evidence in support of immunity, would lead to the conclusion that the Legislature intended the Department of Transportation to be subject to local land use regulation in connection with this project. It must be emphasized, however, that legitimate local interests may not be arbitrarily disregarded. "And at the very least, even if the proposed action of the immune governmental instrumentality does not reach the unreasonable stage for any sufficient reason, the instrumentality ought to consult with the local authorities and sympathetically listen and give every consideration to local objections, problems and suggestions in order to minimize the conflict as much as possible." *Rutgers v. Piluso, supra,* 60 N.J. at 154. This, in fact, is being done by the Department of Transportation. A series of public meetings have been held to explain the project and its impact to affected communities. Technical meetings with municipal engineers and administrators have been held to discuss the planned location of substations and possible alternatives. Furthermore, an environmental impact assessment is being prepared which will address itself to potential noise, aesthetic and land use impacts of the project and will include a discussion of suggested alternative locations for substations. The assessment will be distributed to all affected municipalities for comment and a public hearing will follow. Only after the above procedure is complete will a final decision be made.

In view of the above, you are advised that the Department of Transportation, in proceeding with the Erie Lackawanna reelectrification project is immune from local land use regulations.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: KENNETH S. LEVY
Deputy Attorney General

May 16, 1978

JOHN CLEARY, *Director*
Office of Cable Television
Board of Public Utilities
101 Commerce Street
Newark, New Jersey 07102

FORMAL OPINION NO. 5—1978

Dear Director Cleary:

You have requested an opinion as to whether ownership of a cable television system by a municipality is permissible under the Cable Television Act. For the following reasons, you are advised that a municipality may own and operate a cable television system.

The Cable Television Act was enacted in 1972 to provide regulation of cable television companies in the public interest under the supervision of an Office of Cable Television [now in the Board of Public Utilities (Board) in the Department of Energy]. The Act defines a cable television company as any "person" owning, controlling, operating or managing a cable television system. A "person" in turn is defined to include specifically "any agency or instrumentality of the state or any of its political subdivisions." N.J.S.A. 48:5A-3(g). The legislative intent to authorize municipal ownership of a cable TV system is further evidenced by N.J.S.A. 48:5A-40 which provides:

> [N]othing herein shall prevent the sale, lease or other disposition by any CATV company of any of its property in the ordinary course of business, nor require the approval of the Board to any grant, conveyance or release of any property or interest therein heretofore made or hereafter to be made by any CATV company to the United States, the State or any county or *municipality* or any agency, authority or subdivision thereof *for public use.* [Emphasis supplied.]

In addition, Board approval is not necessary to validate the title of a municipality to any lands or interest to be condemned under this statute for public use. It is thus clear from these provisions that the legislature has determined that a municipality is a "person" who can own and operate a cable television system for public use.

This legislative intent is additionally reinforced by regulations adopted by the Office of Cable Television. These regulations expressly state that municipalities and other local political sub-divisions are subject to the jurisdiction and regulatory authority of the Office of Cable Television and by definition they are "persons" who can own and operate a cable television system for public use.[1] It is well established that the interpretation of an administrative agency is entitled to great weight in the construction of a statute. *In re Application of Saddle River,* 71 N.J. 14, 24 (1976). These regulations adopted with apparent tacit legislative acquiescence are, therefore, an additional persuasive indication of the presumed legislative purpose to include a municipality within those entities authorized to own and operate a cable TV system.

The general regulatory scheme established by the Act does not present any impediment to a municipality franchising and operating its own cable television system. Although the initial consent is issued by the municipal

1. N.J.A.C. 14:18-1.1(c) provides as follows:

These regulations apply to:
1. Cable television companies which own, control, operate or manage a cable television system;
2. Municipalities, cities and counties where applicable.

N.J.A.C. 14:18-1.2 defines a "Cable Television Company" as "any person owning, controlling, operating or managing a cable television system." A "person" is defined to include: "any agency or instrumentality of the State of New Jersey or any of its political subdivisions."

governing body in which the facilities are to be placed, N.J.S.A. 48:5A-22, the pervasive regulation of rates, charges, services and facilities rests exclusively at the state level with the Office of Cable Television. N.J.S.A. 48:5A-16 to 21. Ample control and checks on the issuance of consents by a municipality to itself are apparent throughout the legislative scheme. A municipal consent must conform "in form and substance to all requirements of this act and all rules, regulations and orders duly promulgated by the director." N.J.S.A. 48:5A-25. The information required concerning an applicant's financial responsibility, technical competence and general fitness are regulated by statute. N.J.S.A. 48:5A-27, 28.

The statute provides procedures for the review of municipal consents and for the resolution by the Office of Cable Television of disputes between CATV companies, municipalities or citizens. N.J.S.A. 48:5A-39; 48:5A-10(b)(d)(e)(f) and (g). A municipality may designate the Office of Cable Television as the "complaint office" to hear complaints of local subscribers. N.J.S.A. 48:5A-26(b). Moreover, and most important, the Board reviews the application and issues the certificate for the construction, extension or operation of the system. N.J.S.A. 48:5A-15 through 21. Any person claiming to be aggrieved on the issuance of a certificate applied for, can demand a hearing, and such complaint, will be heard, if the Board deems that there is reasonable ground for the complaint. N.J.S.A. 48:5A-16(b). There is consequently no implicit statutory prohibition against, municipal ownership and operation of a cable television system.[2]

You are thus advised that municipal ownership of a cable television system is authorized by the Cable Television Act. A municipality may by ordinance franchise such operation, subject to the regulatory approval and continuing jurisdiction of the Office of Cable Television.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: BLOSSOM A. PERETZ
Deputy Attorney General

2. If it deems it appropriate, the Board may, through the adoption of rules and regulations, set up separate procedures for municipal CATV approval. N.J.S.A. 48:5A-2, 6, 9, 10; *In re Cable Television,* 132 N.J. Super. 45 (App. Div. 1974).

May 17, 1978

TO SECRETARIES OF ALL PROFESSIONAL BOARDS

FORMAL OPINION NO. 6—1978

A question has arisen as to the number of affirmative votes needed to authorize action to be taken by the several professional boards. It is our opinion that a majority of the existing members of the board is necessary to take action and conduct the business of the professional board.*

This inquiry requires an analysis of N.J.S.A. 45:1-2.2(d) which provides as follows:

> d. A majority of the voting members of such boards or commissions shall constitute a quorum thereof *and no action of any such board or commission shall be taken except upon the affirmative vote of a majority of the members of the entire board or commission.*

The italicized language was added by recent amendment. Laws of 1977, c. 285.

There is no available legislative history to assist in the interpretation of this statutory section. It is therefore necessary to discern the probable legislative intent from the language of the statute together with the import of its recent amendment. Clearly, prior to its amendment, the statute reflected the common law rule of "quorum." A majority of all the members of a governing body constituted a quorum and in the event of vacancy, a quorum consisted of a majority of the remaining members. *Ross v. Miller,* 115 N.J.L. 61, 63 (S.Ct. 1935). It was likewise the rule at common law that a majority of those assembled in a quorum could take affirmative action and conduct the business of the governmental body. *Ross. v. Miller, supra.*

In the interpretation of a statute, its language should not be regarded to be merely repetitive nor superfluous. *Foy v. Dayko,* 82 N.J. Super. 8,

* Professional board means The New Jersey State Board of Certified Public Accountants, the New Jersey State Board of Architects, the State Board of Barber Examiners, the Board of Beauty Culture Control, the Board of Examiners of Electrical Contractors, the New Jersey State Board of Dentistry, the State Board of Mortuary Science of New Jersey, the State Board of Professional Engineers and Land Surveyors, the State Board of Marriage Counselor Examiners, the State Board of Medical Examiners, the New Jersey Board of Nursing, the New Jersey State Board of Optometrists, the State Board of Examiners of Opthalmic Dispensers and Opthalmic Technicians, the Board of Pharmacy, the State Board of Professional Planners, the State Board of Psychological Examiners, the State Board of Examiners of Master Plumbers, the State Board of Shorthand Reporting, the State Board of Veterinary Medical Examiners, and the X-ray Technician Board of Examiners in the Division of Consumer Affairs; and the New Jersey Real Estate Commission in the Department of Insurance.

13 (App. Div. 1964). It cannot be assumed that the legislature by its amendment simply restated the common law rule, since the amendment specifies a need for an affirmative vote of a majority of the members of the entire board or commission. There are no cases in New Jersey which interpret the meaning of the phrase "the entire board or commission." Analogous cases construing comparable language such as "a majority of all the members" or "a majority of the whole number of councilmen" have held that language to mean a majority of the authorized membership provided by law. *Prezlak v. Padrone,* 67 N.J. Super. 95, 103 (Law Div. 1961). *Dombal v. Garfield,* 129 N.J.L. 555 (S.Ct. 1943); *Ross v. Miller, supra* at 65.

The holdings of these cases which require a majority of "authorized membership" are inapposite to the present situation. A review of the amendatory language clearly demonstrates a legislative purpose to modify the common law rule solely with respect to the number of persons needed to take affirmative action by a professional board. There is no indication of a legislative intent to alter or modify in any manner the number of persons needed to constitute a duly convened quorum; as heretofore a majority of the "existing" membership of the board. A statute should be construed in a manner to give sense and meaning to all of its parts. *Gabin v. Skyline Cabana Club,* 54 N.J. 550, 555 (1969). Also, where a statute derogates from the common law, the statute must be strictly construed. *Boileau v. DeCecco,* 125 N.J. Super. 263, 268 (App. Div. 1973). It may therefore be reasonably assumed to be the legislative intent to continue to require a majority of the existing membership of a professional board to constitute a quorum, but that no action be taken except upon the affirmative vote of a majority of the existing members of the board. A majority of a quorum would not be sufficient unless the same is equivalent to or more than a majority of the existing appointed membership of the professional board.

For these reasons, you are advised that pursuant to N.J.S.A. 45:1-2.2(d) a majority of the membership of a professional board shall constitute a quorum, but that no affirmative action be taken in the conduct of the business of a board unless upon the affirmative vote of the majority of the present appointed members of the board or commission.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

May 18, 1978

JOANNE E. FINLEY, M.D., *Commissioner*
Department of Health
John Fitch Plaza
Trenton, New Jersey

FORMAL OPINION NO. 7—1978

Dear Dr. Finley:

You have asked whether the Public Health Council's adoption of c. 15 of the State Sanitary Code (10 N.J.R. 189) on April 10, 1978 is procedurally defective because its text differs from the text of the proposed rule published on October 6, 1977 (9 N.J.R. 466) and, if so, what corrective action the Council may take. In addition, you have asked by what procedure the Council can postpone the effective date of these regulations should it desire to do so.

On September 12, 1977 the Public Health Council adopted certain proposed rules regulating smoking in public places. The full text of these proposed rules was published in the New Jersey Register on October 6, 1977 and after appropriate notice, a public hearing was held on October 20, 1977. On April 10, 1978 the Public Health Council adopted its rules concerning smoking in public places, but with certain substantive changes with respect to (1) those persons and entities subject to the regulations, (2) the appropriate designation of smoking permitted areas, (3) the responsibility of persons in charge of a public establishment, and (4) a new provision for a waiver of the regulation in individual cases. N.J.A.C. 8:15-1.1 *et seq.* The question therefore posed is whether it was incumbent on the Council to provide new notice to the public of the regulation's intended changes prior to its final adoption. For the following reasons, it is our opinion that it was, and the Council should now readvertise and schedule a public hearing to give interested persons a new opportunity to comment and/or submit data and views with respect to the adopted regulations.

The rule-making authority of the Public Health Council is governed by the provisions of its enabling legislation and by the Administrative Procedure Act. N.J.S.A. 26:1A-1 *et seq.;* N.J.S.A. 52:14B-1 *et seq.* The Council is empowered to adopt the State Sanitary Code as a body of regulations having the force and effect of law "to preserve and improve the public health." N.J.S.A. 26:1A-7. Although neither statute expressly addresses the question of whether the Council may validly adopt a regulation which differs to some degree from the one initially proposed, it is the implicit legislative purpose that the public have an opportunity to be heard on significant changes made in the version adopted by the administrative agency.

N.J.S.A. 26:1A-7 specifically requires the Council to hold a public hearing prior to the final adoption of any sanitary regulation or amendment thereto or repealer thereof. The Council is also directed to publish at least 15 days prior to such hearing a notice of such hearing together with a brief summary of the proposed regulation and a statement as to where the public may obtain copies of the proposed text. N.J.S.A.

52:14B-4(a) in the Administrative Procedure Act provides in pertinent part:

> Prior to the adoption, amendment, or repeal of any rule, except as may be otherwise provided the agency shall:
>
> 1. Give at least 20 days' notice of its intended action. The notice shall include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, and the time when, the place where, and the manner in which interested persons may present their views thereon. The notice shall be mailed to all persons who have made timely request of the agency for advance notice of its rule-making proceedings and in addition to other public notice required by law shall be published in the New Jersey Register;
>
> 2. Afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing. The agency shall consider fully all written and oral submissions respecting the proposed rule.

With particular reference to the present inquiry, there is an express legislative direction that "all interested persons" shall be given notice and an opporunity to comment on either the terms or substance of intended regulatory action. An agency's responsibility in this regard implements the underlying salutary legislative intent to encourage public input in the rule-making activities of state agencies. This is, furthermore, consistent with the general theory of administrative rule-making that the public interest is served by the promulgation of regulations in advance governing the conduct of affected persons to insure predictable governmental decision making. *Boller Beverages, Inc. v. Davis,* 38 N.J. 138, 151, 152 (1962). The legislative purposes are not fully served when a rule adopted by an administrative agency differs in significant respects from a version proposed and submitted to the public for its consideration.

As a result, the Division of Administrative Procedure in the Department of State, the agency charged with the responsibility of administering the Administrative Procedure Act, has promulgated N.J.A.C. 15:15-4.7 which provides:

> (c.) If . . . the agency shall determine to revise the text of a rule previously published, *which revision has the effect of enlarging its original purpose or of increasing the burden upon any person, the adopting agency shall* request publication of any Notice of Intention to adopt or change a rule and shall accord to the public further opportunity to be heard.
>
> (d.) *If, however, the substantive change effected by such revisions shall not have the effect as described in this Section, it shall not be republished* pursuant to this Subchapter, but the agency may proceed to adopt the rule as modified. [Emphasis supplied.]

As adopted, c. 15 of the State Sanitary Code differs in several substantial respects from the text of the original proposal. Specifically, the adopted

regulation contains a number of definitions and exemptions and a number of conditions and/or requirements to separate smokers from nonsmokers, as well as an enforcement provision, that were not present in the proposed version. Although the prohibition of "smoking in certain public places" remains the general objective of the Council, the revisions would increase the "burden" on a number of potential persons or public places. More specifically, the significant revisions in order of their appearance in the adopted text are as follows:

> (1) N.J.A.C. 8:15-1.2(a) precludes the lawful designation of a smoking permitted area unless one of four alternative conditions exists "to minimize the movement of smoke into adjacent 'no smoking' areas:
>
> 1. There is a continuous physical barrier, such as a wall, partition or furnishing of at least 4½ feet in height to separate the 'smoking permitted' or 'no smoking' areas. The barrier may contain doors for exit and entry.
>
> 2. There is a space of at least four feet in width to separate the said areas. This space may be either an unoccupied area or a section of seating area acting as a buffer zone and in which smoking is not permitted.
>
> 3. The ventilation system in the room containing both 'smoking permitted' and 'no smoking' areas has total air circulation (recirculated air plus outside air) of not less than six air changes per hour.
>
> 4. The concentration of carbon monoxide in the 'no smoking' area shall at no time exceed the concentration of carbon monoxide in outside air within 12 feet of the building by more than nine parts per million.

The original proposal did not restrict the nature of the area which the person in charge could designate for smoking. It merely required the designation of a special isolated area where smoking would be permitted. The adopted version of the regulation now specifies that prior to the designation of a smoking area, at least one of four alternative conditions must exist to minimize the movement of smoke into the adjacent nonsmoking area. This section, therefore, increases the potential burden imposed on both the individual who desires to smoke in public and the "person actually in charge" of a public place in which smoking is regulated.

(2) N.J.A.C. 8:15-1.3(a) makes the person in charge of the public place involved "responsible for implementation of and compliance with this regulation." The original proposal did not. In view of the penalty provision which attaches to any violation of the Sanitary Code (N.J.S.A. 26:1A-10), the inclusion of such an enforcement provision is a significant increase in the original burden.

(3) N.J.A.C. 8:15-1.3(c) prohibits the designation of a smoking permitted area larger than 75% of "the total area

used by the public" in any public place and requires that the "no smoking" area be "no less attractive or convenient" than the "smoking permitted" area. The original proposal only established a maximum dimension for smoking areas in restaurants or "eating places." The inclusion of all other public places is a significant increase in scope.

It is our opinion that these revisions have the effect of substantially increasing the burden of compliance upon regulated persons. Consistent with the underlying legislative purpose to provide full and informed public participation in the rule-making activities of state agencies and to allow "all interested persons" with an opportunity to be heard, it is our judgment that another public hearing should have been held on c. 15 prior to its final adoption. Inasmuch as the regulation has not yet become effective, the Council may extend its effective date of July 1, 1978 by filing an order with the Division of Administrative Procedure amending its order of adoption filed on April 18, 1978.[1] This will provide the Council with an additional period of time to again provide the public with adequate notice of its intended action and to hold another public hearing with respect thereto. In that regard and in view of the public interest generated by the adoption of c. 15, it is suggested that the public hearing and the opportunity of the public to comment in writing not be limited to the above discussed revisions but be open to comment on all the smoking regulations in their entirety.

Very truly yours,
JOHN J. DEGNAN
Attorney General

1. An order adopting these rules was filed by the Public Health Council with the Division of Administrative Procedure on April 18, 1978 to become effective on July 1, 1978. In view of our conclusion that the smoking rules of the Public Health Council are procedurally defective, they may not be implemented as of their present effective date of July 1, 1978. Accordingly, without passing on the question of whether or not a change in the effective date of a valid rule is by itself a substantive amendment under the provisions of the Administrative Procedure Act, the Public Health Council, under these unique circumstances, can amend its filed order of adoption to postpone the effective date and thereby allow additional time for it to submit a new proposal in a procedurally correct manner.

May 26, 1978

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

FORMAL OPINION NO. 8—1978

Dear Director Graham:

You have asked whether Laws of 1975, c. 354, N.J.S.A. 12:3-37.1,[1] changes the requirement that the conveyance of an interest in State tidelands must be supported by adequate consideration in the amount of the fair market value of the interest being conveyed. In particular, you wish to know whether the New Jersey Department of Environmental Protection[2] may grant a perpetual lease of such lands to a municipality for no or nominal consideration under the above statute. For the reasons set forth herein you are advised that both questions must be answered in the negative.

Article VIII, §4, par. 2 of the Constitution of 1947[3] establishes a permanent school fund for the equal benefit of all the people of this State. In so doing, the Constitution provides a mechanism whereby the legislature "may" appropriate "money, stock and other property" to that fund. However, the Constitution also establishes that, once appropriated, such "money, stock and other property" is irrevocably dedicated to the school fund. The language of Article VIII is unequivocal; the fund for the support of free public schools is to be "perpetual" and may not be violated "for any other purpose, under any pretense whatever."

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

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

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

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

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

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

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

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

5. Dictum in *Henderson v. Atlantic City* suggests that a "privilege could be granted to a municipality to use (State owned tidelands) as a park until such times as the state thought it to the benefit of the school fund to transmute the land into money by sale or lease." 64 N.J. Eq. at 587. N.J.S.A. 12:3-36 permits the use of such lands by a municipality for park and other public purposes "for a nominal consideration" until the State decides to grant a fee in this property to such municipality "or to other grantees for . . . adequate compensation . . . ." *Formal Opinion-1960,* No. 18, which addresses questions raised by N.J.S.A. 12:3-36, interprets "adequate" to mean "constitutionally sufficient" but cautions that this statute may not be used to "indirectly" impair the school fund. *Id.* at 40. Should an "irrevocable conveyance for full consideration at a later date" be in any manner prevented or substantially impeded, then "a lease or permit revocable in law would be(come) perpetual in fact" and, therefore, unconstitutional. *Id.* at 40.

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

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

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

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

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: DEBORAH T. PORITZ
Deputy Attorney General

June 23, 1978

JOHN P. CLEARY, *Director*
Office of Cable Television
80 Mulberry Street
Newark, New Jersey 07102

FORMAL OPINION NO. 9—1978

Dear Director Cleary:

You have requested our opinion whether a cable television company may transmit a game which it characterizes as "bingo" without violating state constitutional and statutory provisions regulating gambling. In our judgment the game in question, although called "bingo," is not bingo as constitutionally and statutorily defined. Further, it constitutes "gambling" only within the narrow aspect of sponsorship by service stations. Therefore, in all other respects the game may be lawfully presented.[1]

The Constitution of 1947 declares the strong public policy against gambling. Except for particular forms of gambling specifically mentioned, the Legislature is prohibited from authorizing any kind of gambling:

> 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. . . . [*N.J. Const.* (1947), Art. IV, §7, ¶2.]

Submission to and authorization by the people are not required with respect to the forms of gambling expressly mentioned in this constitutional section, including "bingo" in subsection A:

> It shall be lawful for bona fide veterans, charitable, educational, religious or fraternal organizations, civic and service clubs, volunteer fire companies and first-aid or rescue squads to conduct, under such restrictions and control as shall from time to time be prescribed by the Legislature by law, games of chance of, and restricted to, the selling of rights to participate, and the awarding of prizes, in the specific kind of game of chance sometimes known as bingo or lotto, played with cards bearing numbers or other designations, 5 or more in one line, the holder covering numbers as objects, similarly numbered, are drawn from a receptacle and the game being won by the person who first covers a previously designated arrangement of numbers of such a card, when the entire net proceeds of such games of chance are to be devoted to educational, charitable, patriotic, religious or public-spirited uses, in any municipality, in which a majority of the qualified voters, voting thereon, at a general or special election as the submission thereof shall be prescribed by the Legislature by law, shall authorize the conduct of such games of chance therein.

1. The format is that of "bingo" in all respects except that of consideration paid by the participants. Each game is to last one hour and will feature three prize categories. The viewer achieving diagonal, diamond, up, across or down bingo and who is the first to contact the studio by telephone will be awarded free home box office service for one month. The game will then resume under the same rules, with prizes worth up to $100 being awarded to those viewers achieving X or T bingo and blackout bingo (the entire card being filled). The numbers and letters are pulled at random and by chance from a machine in the studio, with the numbers and letters displayed on a tote board shown to the home audience. Presentation of the game is bottomed upon a contract signed by the cable television company and various merchants whose products are given as prizes and whose names are prominently mentioned. Each of the approximately 35 merchants pays $260 for a 13-week sponsorship period; in return, the cable television company provides, in addition to mention of the sponsor's name, posters and streamers for store windows and bingo cards to be distributed to viewers. The cards are given without charge and without condition of purchase, but a viewer may obtain a card only by visiting one of the participating stores.

The question presented is whether the sort of activity conducted by the cable television company is encompassed by these constitutional provisions. The Supreme Court of New Jersey in *Martell v. Lane,* 22 N.J. 110, 118 (1956), adopted the dictionary definitions by defining "to gamble" as "[t]o stake money or any other thing of value upon an uncertain event; to hazard; wager" and "gambling" as "the act of playing or gaming for stakes." In the following paragraph of *Martell* the court mentioned the constitution prohibition upon legislative sanction of gambling unless authorized by the electorate, thereby indicating that these were the constitutional definitions. In an earlier case, moreover, the court emphasized the element played by risk in gambling activity by defining gambling as "the act of risking or staking anything on an uncertain event." *State v. Western Union Telegraph Co.,* 12 N.J. 468, 490 (1953). The lower courts have held equivalently by stating that "the three components of a gaming episode are price, chance and prize." *State v. Ricciardi,* 32 N.J. Super. 204, 207 (Law Div. 1954), *aff'd* 18 N.J. 441 (1955); *O'Brien v. Scott,* 20 N.J. Super. 132, 137 (Ch.Div. 1952). *See also Formal Opinion No. 17-1961,* dated August 1, 1961.

To be sure, some New Jersey cases have indicated a broader definition of "consideration," but these decisions either dealt with statutory police power enactments more rigorous than the constitutional requirement or offered as legal principle statements apparently at variance with the more modern decisions. In *Hunter v. Teaneck Township,* 128 N.J.L. 164, 168-69 (Sup. Ct. 1942), construing a municipal ordinance prohibiting "game[s] of chance," the former Supreme Court mentioned a line of precendent from other jurisdictions stating that "if the game is designed to and does appeal to, and induces, lures, and encourages, the gambling instinct, it constitutes a game of chance," but Judge (later Justice) Haneman in *O'Brien v. Scott, supra,* lucidly observed that that test "begs the question [since] we are again relegated to an ascertainment of the meaning of the basic word 'gambling.' " 20 N.J. Super. at 137.

The decisions in *State v. Berger,* 126 N.J.L. 39 (Sup. Ct. 1941), and

Furst v. A & G Amusement Co., 128 N.J.L. 311 (E. & A. 1942), are explained by the opinion of the new Supreme Court in *Lucky Calendar Co. v. Cohen*, 19 N.J. 399 (1955). Relying upon those earlier decisions, the *Lucky Calendar* court construed the statute forbidding lotteries as it then existed and held not only that the statute did not require consideration of any kind, *Id.* at 410-14, but that, even if consideration were required, it was present in the form of a participant's inconvenience in simply filling out a coupon. *Id.* at 414-18. With *Berger* having held that payment for admission to a theater was consideration and with *Furst* having held that mere attendance without payment satisfied that requirement, the court in *Lucky Calendar* concluded that the statute demanded only consideration sufficient to sustain a simple contract. *Id.* at 415. Nevertheless, as the Supreme Court itself said, *Id.* at 417, and as the Attorney General later pointed out, *Formal Opinion No. 17-1961, Lucky Calendar* was dealing with a legislative definition. Through N.J.S.A. 2A:121-1 *et seq,* the Legislature had in effect created a statutory type of "gambling" which required no consideration whatever or only the most minimal consideration. The constitutional definition was untouched.[2]

In fact, *Lucky Calendar* when combined with subsequent legislative response supports our conclusion that the game proposed here is neither "gambling" nor "bingo" within their constitutional and statutory meanings. In 1961 the Legislature amended the lottery statute to provide a definition of "lottery" which, while accepting actual inconvenience as a form of consideration, exempted games in which the only consideration was the doing of an act to enter the class of eligible persons. N.J.S.A. 2A:121-6. The Attorney General later held, however, that box-top contests and contests open to patrons of a theater or a store remained unlawful, *Formal Opinion No. 17-1961,* and, presumably in response to this conclusion, the Legislature in 1964 again revised the lottery statute to authorize such games and to circumscribe the meaning of "consideration" so as not to include actual inconvenience:

> As used in this chapter, the term 'lottery' shall mean a distribution of prizes by chance in return for a consideration in the form of money or other valuable thing. Consideration shall not be deemed to exist with respect to a distribution of prizes by chance in a contest where admission to the class of distributees is based upon the submission of a box top, package, label, coupon or other similar article connected with merchandise produced or sold by the sponsor of the contest in the regular course of business, provided that the sales price of said merchandise does not include any direct or indirect charge to the purchaser for the right to participate in such contest. [N.J.S.A. 2A:121-6.]

2. The Court of Errors & Appeals in *Furst v. A. & G Amusement Co.* had intimated that the definition of "consideration" adopted there, which comprehended mere attendance at a theater drawing, was the constitutional definition. 128 N.J.L. at 312. That statement, nonetheless, seems too broad in light of later judicial and legislative action. As has been discussed the Supreme Court and the lower courts have emphasized the requirement of risking something of value, and the Legislature itself has determined, presumably without infringing constitutional boundaries, to revise the statutory definition of "lottery" so as to exclude games in which consideration does not take the form of money or some other item of actual value. That statutory modification would have to be invalidated as unconstitutional if the *Furst* statement concerning attendance without payment of value being consideration were considered constitutional doctrine. But since a statute must be construed so as to render it constitutional if possible, *State v. Profaci,* 56 N.J. 346, 350 (1970); *State v. Hudson County News Co.*, 35 N.J. 284, 294 (1961); *Woodhouse v. Woodhouse,* 17 N.J. 409, 416 (1955), the statement should instead be considered only *dictum.*

Consequently, the lottery statute as it stands now does not condemn games in which consideration does not take the form of money or some other item of actual value. As mentioned, note 2, *infra,* the statute by so providing would violate the state constitution if "consideration" in a constitutional sense included slight inconvenience or even no inconvenience whatever. The New Jersey constitution is, however, "not a grant but a limitation of powers," with the Legislature free to exercise the power of sovereignty if not so restricted. *Gangemi v. Berry,* 25 N.J. 1, 7 (1957); *Behnke v. N.J. Highway Authority,* 13 N.J. 14, 24 (1953); *State v. Baldinotti,* 127 N.J.L. 46, 48 (Sup. Ct. 1941). A statute must, therefore, be interpreted so as to render it constitutional if possible. Cases cited, note 2, *infra.* To conclude that "consideration" is so broad a term would require constitutional voiding of the present version of the lottery statute; the Attorney General declined to so hold in 1961, *Formal Opinion No. 17-1961,* and we reaffirm that determination.

Not only does the constitutional definition of "gambling" encompass only the staking of an item of value upon chance, but this requirement is an element of both the constitutional and statutory definitions of "bingo" and the statutory definition of "lottery." The constitutional provision includes " the selling of rights to participate," and the equivalent statutory definition within the Bingo Licensing Law, N.J.S.A. 5:8-24 *et seq,* requires the "selling [of] shares or tickets or rights to participate. . . ." N.J.S.A. 5:8-25. Without doubt the Legislature, as it once did with regard to lotteries, could regulate as an exercise of the police power an activity which, as that proposed here, does not include the selling of rights to participate, but it has not done so. The only restriction is that of the constitutional provision and the substantially identical statutory definition, and that definition does not comprehend this kind of game, for here rights to participate are not sold, but are given away at no cost to all who ask. Moreover, as has been discussed, the game is not a lottery, since under its present statutory definition the necessary consideration must be "in the form of money or other valuable thing," N.J.S.A. 2A:121-6, and that sort of consideration will not be present.

Our conclusion is buttressed by two federal decisions. In *Federal Communications Comm'n v. American Broadcasting Co.,* 347 U.S. 284, 294, 74 S. Ct. 593, 98 L. Ed. 699 (1954), the Supreme Court of the United States held that the mere listening to a program was not of itself consideration so as to make the game show a lottery within the meaning of a federal statute whose elements were consideration, chance and prize. Similarly, *Caples Co. v. United States,* 243 F. 2d 232, 234 (D.C. Cir. 1957), held that viewers did not provide consideration by journeying to a sponsor's store

to obtain the necessary game card.[3] While these decisions do not directly bear upon New Jersey law, they do reinforce our opinion both that the state constitutional prohibition is relatively narrow and that the game proposed will not violate either that provision or the statutory sections cited.

Although we have concluded, consequently, that the game is generally lawful, we wish to note that the game would be unlawful in one particular. As discussed, the game is not a lottery under the definition of N.J.S.A. 2A:121-6, but the game would constitute a lottery under the statute controlling the retail sale of motor fuels. N.J.S.A. 56:6-1 *et seq.* The statute provides that:

> It shall be unlawful for any retail dealer to use lotteries, prizes, wheels of fortune, punch-boards or other games of chance, in connection with the sale of motor fuels. [N.J.S.A. 56:6-2(f).]

Although "lotteries" is not defined by this statute, the judiciary has declined to adopt the definition of N.J.S.A. 2A:121-6. In *United Stations of New Jersey v. Kingsley,* 99 N.J. Super. 574, 585-86 (Ch. Div. 1968) and *United Stations of New Jersey v. Getty Oil Co.,* 102 N.J. Super. 459, 467-68 (Ch. Div. 1968), the Chancery Division held the definition contained within the lottery statute did not control the Title 56 provision and that, adhering to *Lucky Calendar v. Cohen, supra,* consideration is not required, 99 N.J. Super. at 486, and, alternatively, consideration is present with the mere visiting of the service station by a customer. 102 N.J. Super. at 468. The court so held because the legislative purposes underlying the two statutes differed, the lottery statute having been designed to prevent the public from being defrauded of their money in return for a chance to receive something possibly of less value than the sum invested and the motor fuels trade statute having been designed to regulate the adverse aspects of competition. These decisions, therefore, support still further our conclusion that the Legislature is constitutionally free to impose upon various activities restrictions more or less rigorous in order to protect the public welfare and that it has not done so with respect to the game in question here. Nonetheless, since a gasoline station dealer may not operate a lottery as thus defined at his place of business, he would also violate the statute dealing with the sale of motor fuels if he did so through a communications medium such as cable television. Consequently, a cable television company presenting the proposed game should not contract with service stations to sponsor the game.

3. The position of the Federal Communications Commission adheres to these decisions, for in its letter of June 28, 1976 addressed to the Telamerica Corporation that agency ruled that with no purchase from participating merchants being necessary to participate, "it is our view that the element of consideration is not present and that, accordingly, the proposed cable bingo game would be compliant with our rules."

In summary, we have concluded that the game proposed to be conducted on cable television is lawful except to the extent noted.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: BERTRAM P. GOLTZ, JR.
Deputy Attorney General

JOSEPH H. LERNER, *Director*
Division of Alcoholic Beverage Control
Newark International Plaza
U.S. Route 1-9 (Southbound)
P.O. Box 2039
Newark, New Jersey 07114

July 19, 1978

FORMAL OPINION NO. 10—1978

Dear Director Lerner:

You have requested an opinion as to whether holders of State Beverage Distributor's licenses (hereafter S.B.D.'s) may sell malt alcoholic beverages in original containers for off-premises consumption on Sundays and weekdays during the same hours as the sale of alcoholic beverages for on-premises consumption is permissible. It is our opinion that S.B.D. licensees may sell malt alcoholic beverages under these circumstances.

For many years the permissible hours for retail sale of alcoholic beverages for off-premises consumption were governed by a rule of the Division of Alcoholic Beverage Control. N.J.A.C. 13:2-36.1 prohibited sales on Sunday and limited sales on other days to the hours of 9:00 a.m. to 10:00 p.m. In 1971 the Legislature enacted N.J.S.A. 33:1-40.3 which provides as follows:

> Whenever the sale of alcoholic beverages for consumption on the premises and off the premises or either thereof is authorized in any municipality by ordinance or rule or regulation of the Division of Alcoholic Beverage Control, by the holder of a retail consumption or retail distribution license, such ordinance or rule shall authorize the sale of malt alcoholic beverage[s] in original bottle or can containers for consumption off the premises on the same days and during the same hours as the sale of alcoholic beverages for consumption on the premises is permitted and authorized in said municipality.
>
> All parts of ordinances and regulations of the Director of the Division of Alcoholic Beverage Control inconsistent with the provisions of this act are superseded to the extent of such inconsistency.

Therefore, the sale of malt alcoholic beverages for off-premises consumption is permitted during the same days and hours during which municipalities permit the sale of alcoholic beverages for on-premises consumption.

In the resolution of the question of whether the statute includes an S.B.D. licensee,[1] it is significant to note that its literal terms do not restrict its application to any particular class of licensee. The operative language states, without qualification, that under the circumstances described in the statute, a municipal ordinance or Division rule "shall authorize the sale of malt alcoholic beverages in original . . . containers for consumption off the premises on the same days and during the same hours as the sale of alcoholic beverages for consumption on the premises . . ." While the prefatory language refers to "retail consumption or retail distribution license," it merely describes the contingency which must exist before a right to make such sales arises. It does not place a limitation on the particular class of licensee permitted to make the sale. In the event the Legislature intended such a limitation, it could have stated a qualification in express terms. An additional qualification which the Legislature has failed to include in its own enactment should not be inferred by indirection. *Crastel v. Board of Commissioners, Newark,* 9 N.J. 225, 230 (1952). *See also State v. Congden,* 76 N.J. Super. 493, 501-502 (App. Div. 1962). It is therefore clear that whenever a rule or ordinance permits the sale of alcoholic beverages for on or off-premises consumption by a retail consumption or distribution licensee, then any duly licensed person may sell malt alcoholic beverages for off-premises consumption.

This construction of the plain terms of the statute is reinforced by the underlying legislative purpose. The statement accompanying the bill (S2108) and the Governor's statement indicate it was designed to provide additional convenience to the general public in the purchase of malt beverages. Significantly, both statements make reference to "package stores," a term as readily applicable to S.B.D. licensees as to other distribution licensees. It is therefore apparent that the principal legislative purpose was simply to increase public convenience in the purchase of malt alcoholic beverages. A construction of the statute which would exclude S.B.D. licensees from its terms would be inconsistent with this expressed legislative history.

Furthermore, it would be anomalous to interpret the statute to limit S.B.D. licensees in the sale of malt alcoholic beverages to different hours than any other retailer who is privileged to make package sales. S.B.D.'s historically have been subject to the same hour restrictions as other licensees engaged in comparable sales. A.B.C. Bulletin 380, Item 10. It cannot be assumed that the Legislature intended to substantially depart from this administrative practice and place more onerous hourly restrictions on this small class of licensees. A statute should be interpreted to avoid unreasonable or absurd consequences. *Davis v. Heil,* 132 N.J. Super.

1. S.B.D. licensees are entitled to sell "unchilled, brewed, malt alcoholic beverages in original containers only, in quantities of not less than 144 fluid ounces," both to retail licensees, at wholesale, and to the general public at retail, for off-premises consumption. *See* N.J.S.A. 33:1-11(2c).

283, 293 (App. Div. 1975); *In re The Summit and Elizabeth Trust Co.,* 111 N.J. Super. 154, 168 (App. Div. 1970). Therefore, we conclude that it was the legislative intent that malt alcoholic beverages in original containers be more readily available to the general public by extending the hours and days of sale for all licensees, including S.B.D. licensees.

Parenthetically, assuming the prefatory language of the Act, which refers to the "holder of a retail consumption or retail distribution license," is deemed to be a condition of the authority to make the sale under the statute, an S.B.D. licensee would in any event be encompassed by its terms. The Division of Alcoholic Beverage Control has concluded that an S.B.D. is "in part, a retail licensee." *Re Berkeley Beverage Co.,* A.B.C. Bulletin 331, Item 4. That it is a distribution license is manifested by its name and the nature of the privileges granted by it. N.J.S.A. 33:1-11(2)(c). Also, the Division of Alcoholic Beverage Control has consistently held that retail sales by such licensees are subject to the same regulations which govern retail sales of package goods by other retail distribution licensees. *See Re Riverside Distributors,* A.B.C. Bulletin 611, Item 11; A.B.C. Bulletin 580, Item 10; *Re K & O Liquor Store,* A.B.C. Bulletin 201, Item 7. If the Legislature intended to depart from this administrative practice of maintaining comparability between these classes of licensees, it could have used the specific statutory designation of the kind of license for which it intended the privilege of selling during extended hours to be applicable.[2] The use of the more general terms "retail consumption" and "retail distribution licensee" is a compelling indication that the presumed legislative intent was to encompass all licensees privileged to make retail sales. Therefore, an S.B.D. licensee should be considered a retail distribution licensee as that term is employed in the statute.

In conclusion, you are advised that under the provisions of N.J.S.A. 33:1-40.3 State Beverage Distributor's licensees may sell malt alcoholic beverages in original containers for off-premises consumption on Sundays and weekdays during the same hours as the sale of alcoholic beverages for on-premises consumption is permitted.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: MART VAARSI
Deputy Attorney General

2. For example, it could have limited the privileged to "Class C" licenses or to "plenary retail consumption," "seasonal retail consumption," "plenary retail distribution" or "limited retail distribution" licensees. *See* N.J.S.A. 33:1-12. It is evident from other portions of the Alcoholic Beverage law that whenever the Legislature intends for a provision to apply only to a specific type or class of license, it invariably specifies the type or class by its exact statutory designation. *See, e.g.,* N.J.S.A. 33:1-12.14, 15, 17, 23, 25, 26, 27, 28, 29 and 39; N.J.S.A. 33:1-17; N.J.S.A. 33:1-19.1; N.J.S.A. 33:1-23 (c. 246, L. 1977).

September 27, 1978

COLONEL CLINTON L. PAGANO
Superintendent
Division of State Police
Box 68
West Trenton, New Jersey 08625

FORMAL OPINION NO. 11—1978

Dear Colonel Pagano:

In *Formal Opinion No. 23—1977* we concluded that the statutory exemption from the Private Detective Act of 1939 for ". . . any officer or employee solely, exclusively and regularly employed" by an enumerated government agency was applicable only while municipal police officers perform police related activities for and on behalf of the municipality. The performance of police related activities by off duty policemen which are not under the supervision of a municipality, it was further concluded, would subject them to the requirements of the Private Detective Act to the same extent as would police related activities performed by any other person. As a result, we advised that off duty police officers who engage in activity regulated by this Act would be subject to the licensing requirements of the Act except to the extent commercial enterprises and similar private entities made arrangements directly with the employing municipality to use policemen during their off duty hours. Questions have subsequently arisen as to the meaning of that opinion and the interpretation of this Act as it bears on these activities of off duty municipal policemen. As a result, you have asked for clarification.

Initially, it is necessary to review the pertinent statutory provisions in order to determine the nature of the activities comtemplated by the Legislature. N.J.S.A. 45:19-10 makes it unlawful for an unlicensed person to "engage in the private detective business or as a private detective or investigator or advertise his . . . business to be a private detective business" without having first obtained a license to conduct such business from the Superintendent of State Police. The statutes further provide in N.J.S.A. 45:19-11 that any person desiring to conduct a private detective business or the business of a private detective shall file an application with the Superintendent of State Police. The term "private detective business" is defined in N.J.S.A. 45:19-9(a) which states in pertinent part:

> 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, ... Also, it shall mean *the furnishing for hire* or reward of watchmen or guards or private patrolmen or other persons to protect persons or property, either real or personal, or for any other purpose whatsoever. [Emphasis supplied.]

The words of a statute are to be given their ordinary and well understood meaning. *Service Armament Co. v. Hyland,* 70 N.J. 550, 556 (1976).

Therefore, in interpreting the above cited statutory language, it is apparent that those police related activities subject to licensure are those which may be fairly characterized as the conduct of a "business" or the "furnishing for hire or reward" of watchmen or guards or private patrolmen to protect persons or property. A business or the conduct of furnishing persons for hire is commonly understood in this context to refer to a "commercial enterprise for profit." *Webster's Seventh New Collegiate Dictionary,* p. 113. This interpretation has been reflected in analogous instances of government regulation. In *Sands v. Board of Examiners of Electrical Contractors,* 54 N.J. 484 (1969), the court was concerned with a regulatory statute dealing with those who engage in the "business as an electrical contractor for hire." The court held that it would be in disregard of the ordinary meaning of those terms to equate electrical work performed as incident to the sale of a private house with engaging in the business of electrical contracting for hire. The court concluded that the statutory language used was intended to reach the typical category of electricians who hire out either to general contractors or individual homeowners. This interpretation was also given to a statute which authorized municipalities to regulate the "business" of trailer camps in *Morris v. Elk Twp.,* 40 N.J. Super. 34 (Law Div. 1956). The placing of one trailer upon a parcel of vacant land would not subject the owner to municipal regulations, since the court characterized a "business" to be a "commercial enterprise for profit." These definitions of the pertinent statutory language reinforce that the present statute was designed by the Legislature to govern a regular business for profit as an independent contractor and not to deal with or affect the use of off duty policemen or any other person by a private commercial establishment to perform police related functions on an employment basis.

The general framework of the statute regulates only those who are conducting a business and holding themselves out generally for hire or to a class of the public to perform those functions. Indeed, the term "private detective business" expressly excludes any employees, investigator or investigators, solely, exclusively and regularly employed by any person, association or corporation insofar as their acts relate solely to the business of their respective employers. N.J.S.A. 45:19-9(a). There is consequently a clear legislative indication to leave free of regulation those persons who act as employees of private commercial establishments to perform police related responsibilities for them at their request and under their direction.

The legislative history of the enactment of the Private Detective Act also supports this view. The statement on Assembly Bill No. A 185, later enacted as Laws of 1939, c. 369, stated that:

> The purpose of this act is to regulate the business of private detective and private detective agencies and to provide such regulations as will establish the business of private detectives on that high plane which will deserve the confidence and respect of the citizens of the State of New Jersey and at the same time protect all persons engaged in the business of private detective against interlopers, racketeers and irresponsible persons who would use their business as private detective to cover up criminal activities and malicious impositions on the public.

The legislative focus was thus with the private detective, private watchman or private patrolman who holds himself out generally to accept public patronage or clientage for profit and to protect the members of the public with whom the detective may deal or otherwise be involved.

It is therefore clear that where arrangements are made with off duty municipal police or any other persons to peform police related activities for private commercial establishments as their employees on either a full or part time basis, those activities would not fall within the intendment of the Act.[1] Rather, the statute would be directed only to those instances where municipal policemen or other persons act as an independent contractor and advertise, hold themselves out, actively pursue and solicit a variety of police related opportunities on a regular basis for hire or profit.[2]

In summary, therefore, it is our opinion that regular members of a municipal police department during their off duty hours or any person may engage in police related activities for private persons or entities without being in violation of the Private Detective Act, so long as those activities do not constitute the business of a private detective or private security guard or watchman.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

1. It should be pointed out that in any instance where a private commercial entity does not employ someone directly to perform police related duties, it has the option, as expressed in our initial opinion (*Formal Opinion No. 23—1977*), to make provision directly with a municipal police department to secure the services of a police officer for these purposes with remuneration paid through the municipality. Of course, this option is available only where a municipality is willing to participate in such an arrangement.

2. It is suggested that the Superintendent of State Police promulgate appropriate rules and guidelines to further define the types or categories of police related activities contemplated by the Act.

November 3, 1978

JOHN A. WADDINGTON, *Director*
Division of Motor Vehicles
Department of Law and Public Safety
25 South Montgomery Street
Trenton, New Jersey

FORMAL OPINION NO. 12—1978

Dear Director Waddington:

The Division of Motor Vehicles has requested an interpretation of the so-called "grandfather" provision of the recently-enacted "Bulk Commodities Transportation Act," N.J.S.A. 39:5E-1 *et seq.* [L. 1977, c. 259]. Specifically, the Division has inquired as to whether or not, or to what extent, applicants who qualify for grandfather status under N.J.S.A. 39:5E-8 are exempt from the requirements set forth in N.J.S.A. 39:5E-7 for issuance of a certificate of public convenience and necessity authorizing operations within this State. Where it has been determined that such a certificate shall issue, the Division has further inquired as to the permissible extent of operations to be authorized thereby. For the following reasons, it is our opinion that once an applicant satisfies the conditions contained in N.J.S.A. 39:5E-8, he is thereby entitled to be issued a certificate of public convenience and necessity, which certificate shall authorize the applicant only to continue those operations in which he was engaged one year prior to the effective date of this act, or on April 10, 1977.

N.J.S.A. 39:5E-7 provides in pertinent part that all intra-state carriers of bulk commodities must obtain a "certificate of public convenience and necessity" from the Division of Motor Vehicles authorizing operations within this State. Said certificate is to be issued by the Division upon written application therefor and a finding that:

> the applicant is fit, willing and able to properly perform the function of a bulk commodities hauler and to conform to the provisions of this act . . . and that the proposed service . . . is in the public interest and consistent with the transportation policy declared in this act,[1] is or will be required by public convenience and necessity;[2] otherwise said application shall be denied. [N.J.S.A. 39:5E-7.]

Application for said certificate pursuant to N.J.S.A. 39:5E-7 is however only one of two statutory methods whereby said certificate can be

1. Factors to be considered in determining whether the proposed service is "in the public interest and consistent with the transportation policy declared in this act" include the applicant's financial responsibility, business reputation, moral character and observance of motor vehicle laws in the operation of his business. N.J.S.A. 39:5E-7(b)(1).

2. The applicant has the burden of proving the need for the proposed service and the inadequacy of existing service. N.J.S.A. 39:5E-7(c).

obtained. The other method is set forth in N.J.S.A. 39:5E-8, the Act's so-called "grandfather clause," which instructs that:

> The director shall issue a certificate . . . to any hauler of bulk commodities . . . who was in operation as such within this State 1 year prior to the effective date of this act provided that:
> a. the operation was continuous since that date . . .
> b. the applicant . . . had a permanent place of business within this State on or before [that date] . . .
> c. the applicant owned or operated under lease at least one motor vehicle registered in this State used in the transportation of bulk commodities on or before [that date] . . . .

The question thus presented is whether bulk haulers who meet the qualifications set forth in N.J.S.A. 39:5E-8 are entitled to a certificate authorizing operations without showing that they are "fit, willing and able" to provide the proposed service and/or that the service is consistent with the transportation policy of the act and/or is required by public convenience and necessity. Clearly, the answer to this question must be in the affirmative.

In this regard, it must be initially recognized that N.J.S.A. 39:5E-8 expresses no intention to require more than what is actually delineated therein. The language is explicit. If the listed qualifications are satisfied, the Director "shall issue" the certificate. Since the Legislature in drafting the act could easily have attached other qualifications onto this provision if it had so desired, it must be concluded that the qualifications actually set forth therein were all that were deemed necessary.

Such reading, moreover, coincides with that attached to a similar provision of the federal transportation code; namely, 49 U.S.C.A. §306,[3] after which various state regulatory schemes (including apparently this one) have been modeled. This provision has consistently been viewed as an exception to the normal requirement of proof of public convenience and necessity, *Gregg Cartage Co. v. United States,* 316 U.S. 74, 83, 62 S. Ct. 932, 86 L. Ed. 1283 (1942); *McDonald v. Thompson,* 305 U.S. 263, 59 S. Ct. 176, 83 L. Ed. 164 (1939), and where its conditions have been met, the applicant's "fitness" has also been seen as not in issue, *Alton R. Co. v. United States,* 315 U.S. 15, 62 S. Ct. 432, 86 L. Ed. 586 (1942); *Winter Garden Company v. United States,* 211 F. Supp. 280, 291 (D.C. Tenn. 1962). *See also Puhl v. Pennsylvania Public Utilities Com'n,* 11 A. 2d 508, 511

3. This provision states that:
> [N]o common carrier by motor vehicle . . . shall engage in any interstate or foreign operations on any public highway . . . unless there is in force . . . a certificate of public convenience and necessity issued by the Commission authorizing such operations: Provided, however, that, . . ., if any such carrier or predecessor in interest was in bona fide operation . . . on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time . . ., the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation. . .

(Pa. 1940), interpreting a similar state statute as dispensing with any need to establish public convenience and necessity or fitness or ability to perform the service to be rendered. Rather, the inquiry has always been limited to whether in fact the grandfather conditions have been satisfied and if so, what authority should be granted. A similarly restricted inquiry would appear to be all that should be conducted here.

The question thus remains as to how much authority can and should be granted to the applicant who qualifies for grandfather status under N.J.S.A. 39:5E-8. On the one hand, the Division has indicated that it views as its duty under the statute to limit the authority so granted to only those operations actually conducted by the grandfather applicant on the critical date—a view believed to be fully consistent with the intent and purposes of this act. On the other hand, there is the language, appearing in N.J.S.A. 39:5E-13 of the act which seems to suggest a less restrictive approach:

> Certificates or permits issued pursuant to section 8 [the grandfather provision] . . . shall authorize operations over irregular routes between all points within the State.

After a careful review of the general framework of the statute and its legislative purposes, it is concluded that the authority granted by the statute to a grandfathered applicant refers only to the actual operations conducted by it at the designated time.

Initially, it should be noted that this interpretation of the statute is in accord with the great weight of judicial authority interpreting similar statutes. *See Alton R. Co. v. United States, supra* at 315 U.S. 22; *Loving v. United States,* 32 F. Supp. 464 (D.C. Okla. 1940), aff'd 310 U.S. 609 (1940); *Santini Bros. v. Maltbie,* 23 N.Y.S. 2d 566, 260 App. Div. 545 (1940); *Puhl v. Pennsylvania Public Utilities Com'n, supra;* and other cases cited at 4 A.L.R. 2nd 700. Such statutes have variously been viewed as having as their purpose to assure "substantial parity" between future and prior operations, *Alton R. Co. v. United States, supra,* to recognize and preserve prior "vested" rights, *Crescent Express Lines v. United States,* 49 F. Supp. 92 (D.C. S.D.N.Y. 1943), *aff'd* 320 U.S. 401 (1943), and to avoid any disruption of settled lawful motor carrier service, *A.E. McDonald Motor Freight Lines v. United States,* 35 F. Supp. 132 (D.C. Tex. 1940). These purposes are clearly not served by an interpretation which would afford grandfather applicants a special privilege to conduct more expansive operations than they had conducted before.

To so interpret the "grandfather" provision, moreover, would infect the act with a serious constitutional infirmity, in that any grant of authority to grandfather applicants beyond the scope of their prior operations without a showing of public convenience and necessity or fitness or ability to provide such service would appear to discriminate against non-grandfather applicants and deny them the equal protection of the law to which they are constitutionally entitled. *See Morey v. Dowd,* 354 U.S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957). The test, as set forth therein, is whether the classification under examination is rationally related to a legitimate state purpose. If so, there is no denial of equal protection. Grandfather authorization limited to the prior operations alone satisfies this criteria,

since it furthers the above-stated purposes of the act and stems from a rational distinction, namely, that the existence of such service itself evidences its future justification in terms of public convenience and necessity, and that the grandfather's prior experience in rendering such service evidences his fitness and ability to continue to do so in the future. Extension of the grandfather preference into operations not heretofore provided, however, serves no such purpose and has no such rational justification. In such a situation, the status quo would not be maintained and the grandfather's prior experience would no longer appear evidential, either as to the public convenience and necessity for the new service or as to his fitness and ability to provide such service.[4] Lacking either a legitimate purpose or a rational justification, it appears doubtful whether such a preference could withstand constitutional challenge.

Additionally, such preference appears at apparent odds with the avowed purposes of the act as a whole. By permitting grandfather haulers to automatically expand their operations to include different commodities or to cover different territories would effectively disable the Division from ascertaining with any degree of certainty whether a particular service is or is not necessary and convenient. *See Grove v. United States,* 40 F. Supp. 503, 505 (D.C. Pa. 1941); *Santini Bros. v. Maltbie, supra* at 568. Once necessary, who could say that it might not later become redundant and vice-versa. Furthermore, the legislative recognition that previously people were "able to engage in this business without having to demonstrate any knowledge of how to safely handle the cargo or the vehicle" (Assembly Transportation and Communications Committee Statement accompanying the bill, L. 1977, c. 259, p. 702) would remain uncorrected in those situations where the grandfather applicant seeks to provide a service for which he has no prior experience. These conflicts thus serve to validate an implicit legislative intent to preclude the extension of the grandfather preference into operations not heretofore provided. To whatever extent the quoted language in N.J.S.A. 39:5E-13 appears contrary to such reading of the statute, the spirit and reason of the legislation must prevail over the literal sense of the terms used. *In re Roche's Estate,* 16 N.J. 579 (1954).[5]

For the reasons expressed above, you are therefore advised that once applicants for a certificate under N.J.S.A. 39:5E-8 satisfy the conditions set forth therein, they are entitled to such a certificate, regardless as to whether or not they might fail to meet one or more of the qualifications contained in N.J.S.A. 39:5E-7. You are further advised that such certificates should only authorize the applicant to continue those operations in which he was engaged one year prior to the effective date of the

4. A hauler of dirt, for example, cannot automatically be considered capable of hauling hazardous materials. Likewise, a rural hauler cannot automatically be presumed to have acquired any familiarity with the problems associated with hauling in a populous, metropolitan area.

5. With this in mind, it is concluded that the quoted language should be construed as no more than a legislative directive to the effect that authorization to grandfather haulers shall not be restricted to specific routes. Rather, it shall be over irregular routes between whatever points or within whatever territory in this State such hauler had operated on the critical date.

act, or on April 10, 1977. If additional authority is requested, either as to use or as to expansion of territory, the same should be viewed and treated as an application for authority under N.J.S.A. 39:5E-7.

Very truly yours,
JOHN J. DEGNAN
Attorney General
By: ROBERT M. JAWORSKI
Deputy Attorney General

January 29, 1979

GEORGE H. BARBOUR, *Commissioner*
EDWARD H. HYNES, *Commissioner*
RICHARD B. McGLYNN, *Commissioner*
Board of Public Utilities
1100 Raymond Boulevard
Newark, New Jersey 07102

FORMAL OPINION NO. 1—1979

Gentlemen:

The State Board of Public Utilities has submitted to the Joint Legislative Committee on Transportation and Communications a report entitled "In the Matter of the Board's Investigation of Lifeline Electric and Gas Rates." You have asked for our opinion as to whether the lifeline rates mentioned in such report will become effective if the Legislature does not take action within 60 days of the submission of the rate and schedule to the legislative committee. You are advised that the rates set forth in the report of the Board of Public Utilities will not become effective if the Legislature fails to take any action with respect to those rates, since the report submitted by the Board of Public Utilities to the Legislature does not contain a "proposed lifeline rate" within the meaning of the Act.

In 1977 the Legislature enacted legislation to authorize the then Public Utilities Commission to adopt schedules of reduced electric and gas utility rates applicable to certain designated consumer income groups. Laws of 1977, c. 440, N.J.S.A. 48:2-29.6 *et seq.* This legislation, commonly referred to as the "Lifeline Law," authorizes the Board to establish a rate for the minimum amount of gas and electricity necessary to supply the minimum energy needs of the average residential user. The Board was also authorized to establish a rate for the minimum amount of gas and electricity to be designated by the Board. On November 28, 1978 the Board of Public Utilities, as a result of its investigation into lifeline rates and a schedule of eligible utility customers, submitted a report to the Joint Senate and Assembly Standing Committee on Transportation and Communications. There has been no official legislative resolution passed or any other action with respect to such report at this time.

The question therefore posed is whether or not the rates and schedule mentioned in the report will become effective and binding on the Board of Public Utilities after the passage of 60 days from the submission of the report to the legislative committees. In order to respond to this issue, the provisions of N.J.S.A. 48:2-29.12(a) are relevant and provide as follows:

> The commission shall submit the proposed lifeline rate and schedule of eligible users to the said joint committee constituted under section 6 for its review. The joint committee shall make such recommendations to the Legislature on the proposed rate and schedule as it may deem advisable.
>
> If within 60 days of the submission of the rate and schedule to the committee, the Senate and General Assembly do not adopt a concurrent resolution approving or disapproving the rate and schedule, the rate and schedule shall be deemed approved.

It is clear from the language on the face of this statute that in order to invoke its terms the Board shall submit *its proposed* lifeline rate and schedule of eligible users to the Joint Committee for its review. In this case, based on our review of the report, it is evident that it does not contain the proposed lifeline rate and schedule of eligible users of the Board of Public Utilities.

It is necessary to briefly refer to certain significant portions of the report. In its introduction, the Board states that "while section 7 requires [it] to provide the legislative committees with certain information, because of the nature of the information obtained, the Board deems it necessary and appropriate to recommend to the Legislature certain amendments to the act." Thus, the Board in its report provides rating information and other pertinent information relating to the lifeline increment, the lifeline program and its administration, to illustrate the nature of its recommendations for legislative change. For example, the Board notes that after calculating a lifeline rate pursuant to the existing statutory standard, discounts to consumers vary significantly among the utilities and, furthermore, in some cases, there would be little or no discount at all. As a result the Board points out that the existing legislative standard of "lowest effective rate" results in divergent and minimal discounts for recipients and that the act should be amended to permit the Board to establish a lifeline rate based upon a fixed cents per therm and per kilowatt hour discount. It is thus apparent that the rating information compiled by the Board was used to illustrate the inadvisability of the use and implementation of such rates pursuant to the existing statutory standard. For this reason and in the context of the recommendation set forth in the Board's Conclusions to the Legislature, it cannot reasonably be said that the Board has proposed "a lifeline rate" intended to be implemented by it after the passage of 60 days. Rather, it has submitted to the Legislature its views with regard to the inadvisability of the existing legislation under the existing factual circumstances. We are therefore unable to characterize the report of the Board as containing the "proposed lifeline rate" envisioned by N.J.S.A. 48:2-29.12(a).

Furthermore, we have no question that the Board has been conferred with discretionary authority to decide whether to propose and implement the legislation. This view is premised on the fact that the act is by its terms directory, rather than mandatory, in tone. Prior to enactment, the bill before the Legislature (A 1830) stated that "the Public Utility Commission shall designate a minimum volume of gas and a minimum quantity of electricity . . . necessary to supply the minimum energy needs of the average residential user. . . . The language of the bill was ultimately amended during its legislative consideration to finally read as follows:

> The Public Utility Commission is hereby *authorized* to designate a minimum volume of gas and a minimum quantity of electricity . . . .

and

> The Public Utility Commission is hereby *authorized* to establish a rate for the minimum amount of gas and electricity established. . . . [N.J.S.A. 48:2-29.7(a), (b).]

The Board therefore has been conferred with the discretion to implement a lifeline program. To set forth certain rating information pertaining to this program in a report generally designed to recommend legislative change is not in our judgment the exercise of that discretion contemplated by the Act.

In conclusion, you are advised that the rates and schedules mentioned in a report of the Board of Public Utilities submitted to the Legislative Committee on Transportation and Communications will not become effective and binding on the Board after the passage of 60 days from the date of its submission, since the report does not contain the "proposed lifeline rate" within the meaning of the Act.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

February 9, 1979

JOHN J. HORN, *Commissioner*
Department of Labor and Industry
John Fitch Plaza
Trenton, New Jersey

WARREN E. SMITH, *Acting Director*
Division on Civil Rights
Department of Law and Public Safety
Newark, New Jersey

FORMAL OPINION NO. 2—1979

Gentlemen:

You have asked for an opinion as to the continued validity of the New Jersey statutes governing the temporary disability benefits program which limit benefit payments to pregnant women to an eight-week period surrounding childbirth while permitting all other claimants to collect benefits for up to 26 weeks. In particular, you ask whether these statutes are consistent with an amendment to Title VII of the federal Civil Rights Act of 1964 signed into law by President Carter on October 31, 1978. The amendment prohibits discrimination on the basis of pregnancy, childbirth and related medical conditions in public or private employment related benefit programs.

The New Jersey statutes in question, N.J.S.A. 43:21-4(f)(1)(B) and 43:21-39(e), which restrict benefit eligibility for disability associated with normal pregnancy to the four weeks before the expected date of birth and the four weeks following termination of the pregnancy, are analyzed in detail in *Formal Opinion No. 1—1975.* We there concluded that these provisions were consistent with the United State Supreme Court's opinion in *Geduldig v. Aiello,* 417 U.S. 484 (1974), which upheld the constitutionality of similar pregnancy provisions in California's temporary disability benefits law.

The new federal amendment, P.L. 95-555, adds the following new subsection to §701 of the Civil Rights Act:

> (k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; *and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work,* and nothing in section 703(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion. [Emphasis added.]

The amendment provides that it shall become effective 180 days after

enactment—or May 1, 1979.

The legislative history of the new amendment makes clear that its purpose was to nullify the Court's holding in *Geduldig* as well as its subsequent decision in *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976), which reached a similar result with respect to private benefit programs under Title VII. *See* H.R. Rep. No. 95-948, 95th Cong., 2d sess. 11, reprinted in 1978 U.S. Code Cong. & Ad. News 6525.[1] It is clearly established in this regard that Title VII applies to states and their political subdivisions, *Fitzpatrick v. Bitzer,* 427 U.S. 445, 448-449 (1976), and operates to invalidate conflicting state laws as well as discriminatory actions of public or private employers authorized by such laws. *E.g., Kober v. Westinghouse,* 480 F.2d 240, 245-246 (3rd Cir. 1973).

Insofar as the New Jersey provisions allow female claimants to collect disability benefits for normal pregnancy[2] under State and private plans for a maximum of only eight weeks while all other claimants are potentially eligible for up to 26 weeks, the statutes plainly conflict with the federal amendment and may no longer be enforced as of the May 1 effective date of the amendment. In the meantime, the Department of Labor and Industry should seek amendatory legislation to bring these statutes into conformity with Title VII as amended.

You are therefore advised that N.J.S.A. 43:21-4(f)(1)(B) and 43:21-39(e) are inconsistent with the recent amendment to the federal Civil Rights Act of 1964 insofar as they treat disability associated with normal pregnancy and delivery differently from other disabilities. These provisions will no longer be enforceable in their present form as of May 1 of this year. At that time, claims for disability benefits based on pregnancy, childbirth or related medical conditions must be treated the same, for purposes of eligibility and benefit payments, as all other claims.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: MICHAEL S. BOKAR
Deputy Attorney General

1. The Report of the House Committee on Education and Labor, through an apparent oversight, fails to make specific reference to the *Geduldig* decision. It does, however, explicitly point to the fact that "five states have temporary disability laws under which employees of private employers are assured partial wage replacement if they become temporarily disabled." It specifically cites in this respect the New Jersey law, which it notes covers complications of pregnancy "on same basis as other disabilities" while covering disability associated with normal pregnancy for "four weeks before and four weeks after childbirth." This explicit reference to the five states with laws of this kind, including the California law considered in *Geduldig,* leaves no doubt as to the intent of Congress to effectively nullify the Court's holding in that case by preempting state laws that treat disability associated with normal pregnancy on a different basis than complications of pregnancy and other disabilities.

2. In *Formal Opinion No. 1—1975,* we concluded that these provisions treat disability associated with *complications* of pregnancy, such as caesarian section delivery and vaginitis, no differently from other disabilities for which up to 26 weeks of benefits may be paid. Hence, our conclusion here as to the invalidity of these provisions directly affects only normal pregnancy.

February 22, 1979

JOSEPH A. LE FANTE, *Commissioner*
Department of Community Affairs
363 West State Street
Trenton, New Jersey

FORMAL OPINION NO. 3—1979

Dear Commissioner LeFante:

The Department of Community Affairs has requested an interpretation of the Relocation Assistance Act of 1971, N.J.S.A. 20:4-1 *et seq.* Specifically, the Department has asked whether it has jurisdiction to hear cases arising under N.J.S.A. 20:4-1 where a municipality is the displacing agency. You are advised that the Department does have jurisdiction to hear such cases.

The New Jersey Relocation Assistance Act of 1971, N.J.S.A 20:4-1 *et seq.* (hereinafter "Act"), is designed to establish a uniform policy for the fair and equitable treatment of persons displaced by State and local acquisition of real property. N.J.S.A. 20:4-2. The Act provides that persons and businesses displaced by a taking agency shall be compensated by relocation payments made to them by the taking agency in the amount specified by the Act. N.J.S.A. 20:4-4. The Act establishes the Commissioner of Community Affairs as the Act's administrator and grants to the Commissioner the power to adopt rules and regulations necessary to assure:

> that any person aggrieved by a determination as to eligibility for a payment authorized by this act, or by the amount of a payment, may have his application reviewed by the head of the taking agency or other appropriate officer. [N.J.S.A. 20:4-10(a)(3).]

This provision permits the head of the taking agency to review cases where a person is aggrieved by the decision of that taking agency.* Thus, a municipal official is the appropriate person to review a decision of a taking agency where the taking agency is a municipality. However, the Act also grants review power to an "other appropriate officer." This additional grant of review power demonstrates an obvious intent to permit review of relocation matters by a party other than the head of the taking agency. The answer to the present inquiry, then, turns on whether the Commissioner of Community Affairs is an "appropriate officer" as this term is used in the Act.

The Relocation Act, as orginally introduced as Assembly Bill No. 2320 on April 1, 1971, provided that the Attorney General and not the Commissioner of Community Affairs was to be the state officer responsible for the Act's administration. The Attorney General was to be granted authority to adopt rules and regulations providing for administrative review of decisions of taking agencies. The Commissioner of Community Affairs was substituted as the administrator of the Act prior to its final adoption by the Legislature. This change indicates the legislative intent to involve the Department of Community Affairs in relocation matters, presumably because of the Department's high degree of expertise in administering the State's existing Relocation program pursuant to the Relocation Assistance Law of 1967, N.J.S.A. 52:31B-1 *et seq.* From this designation of the Commissioner of Community Affairs as administrator of the Act it may also be reasonably assumed to have been the legislative purpose that this official act as arbiter in complaints brought pursuant to the Act. The Commissioner has the greatest familiarity statewide with the operation of the Act and is the "appropriate officer" to rule on its proper enforcement.

*A "taking agency" is defined as "the entity, public or private, including the State of New Jersey, which is condemning private property for a public purpose under the power of eminent domain." N.J.S.A. 20:4-3(a).

Support for this view may be found in §10(b) of the Act and in that section of the regulations pertaining to grievance procedures, N.J.A.C. 5:11-2.16. Section 10(b) provides that:

> The Commissioner may prescribe such other regulations *and procedures,* consistent with the provisions of this act, as he deems necessary or appropriate to carry out this act. [Emphasis supplied.]

The general clause enables the Commissioner to promulgate procedural regulations as he may find necessary to implement the provisions of the Act. Pursuant to this broad regulatory power the Commissioner has promulgated a series of regulations setting forth the grievance procedure to be followed in hearings conducted pursuant to the Act. For example, Subsection (a) provides that

> An application for a hearing must be filed with the Commissioner within 15 business days of the receipt by the applicant therefore of notice of the action, ruling, notice or order complained of.

Subsection (g) indicates in pertinent part that

> [A] hearing shall be conducted by a hearing examiner designated by the Commissioner. . . .

This grievance procedure is clearly consistent with the broad legislative authorization given to the Commissioner to prescribe appropriate procedures to carry out the Act. Indeed, the Commissioner has in fact exercised the authority to review the applications of aggrieved parties for relocation assistance payments since the adoption of the Act in 1971. The interpretation of a statute by an agency entrusted with its administration is entitled to great weight in discerning the probable legislative intent. *Pringle v. N.J. Department of Civil Service,* 45 N.J. 329, 323-3 (1965); *Lill v. Director, Division of Alcohol Beverage Control,* 142 N.J. Super. 242, 250 (App. Div. 1976).

These procedural regulations of the Commissioner of Community

Affairs were recently reviewed by the New Jersey Supreme Court in the context of an appeal dealing with reimbursement for relocation expenses. *Paterson Redevelopment Agency v. Max Schulman, et al.,* 78 N.J. 378 (1979). In its consideration of the questions of the defendant's failure to exhaust administrative remedies, the Supreme Court opined concerning the above cited regulations:

> The regulations, in accordance with the mandates of the Administrative Procedure Act, further provided for grievance procedures including hearings before an examiner designated by the Commissioner. N.J.A.C. 5:11-2.16. These procedures were not followed by defendants.
>
> It is clear from the foregoing that the proper procedure to be followed in relocation cases is for the claimant to present his demands, including any necessary substantiating documents, to the local agency. If the claimant is dissatisfied with the amounts granted, he should then request a hearing as provided in N.J.A.C. 5:11-2.16. Only after the hearing has taken place and a final adverse agency determination has been entered may the claimant request judicial intervention by appeal as of right to the Appellate Division. R. 2:2-3(a)(2).

It is thus clear that the authority of the Commissioner of Community Affairs to hear cases arising under the Relocation Assistance Act of 1971 has been reinforced by the Supreme Court's specific recognition of the propriety of the Commissioner's assertion of jurisdiction in this area.

In conclusion, you are advised that the Commissioner of Community Affairs has the jurisdiction to hear cases brought under the Relocation Assistance Act of 1971 where a municipality is the displacing agency.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: DENNIS J. KRUMHOLZ
Deputy Attorney General

March 1, 1979

HOWARD H. KESTIN, *Director and Chief Administrative Law Judge*
Office of Administrative Law
234 East State Street
Trenton, New Jersey 08608

FORMAL OPINION NO.4—1979

Dear Judge Kestin:

You have asked for an opinion as to the effect of the Act which establishes an independent Office of Administrative Law on the existing positions of Hearing Officers and/or Examiners in the respective agencies of State government. Also, you inquire as to the effect of the State Agency Transfer Act on these positions, as such Act is expressly mentioned in the Act creating the Office of Administrative Law. For the following reasons, it is our opinion that the functions and responsibilities of Hearing Officers-Examiners in the respective state agencies, insofar as they pertain to presiding over contested cases as are required by the Administrative Procedure Act, have now been abolished and placed exclusively by the Legislature in the Office of Administrative Law. As a result, the Chief Examiner and Secretary of the Civil Service Commission should conduct an investigation in accordance with civil service laws and regulations to determine the continuing need for such positions and the tenure, seniority and demotional rights of employees serving in those capacities.

In order to properly evaluate the implications of this Act, Laws of 1978, c. 67, N.J.S.A. 52:14F-1 *et seq.,* it is necessary to briefly review its operative provisions. In its most pertinent aspect, the Act provides:

> All hearings of a state agency required to be conducted as a contested case under this act or any other law shall be conducted by an administrative law judge assigned by the Director of the Office of Administrative Law, except as provided by this amendatory and supplementary act. [Laws of 1978, c. 67, subsection 8(c).

In order to implement this legislative purpose, the Director of the Office of Administrative Law shall, among other things, assign an administrative law judge to any agency empowered to conduct contested cases to preside over such proceedings in contested cases as are required by sections 9 and 10 of P.L. 1968, c. 410 (C. 52:14B-10). Section 5n. In addition, the Director may assign an administrative law judge to any agency to conduct or assist in matters other than the conduct of contested cases or administrative adjudications, including rule-making and investigative hearings, as requested by the head of an agency. Section 5o. The full-time administrative law judges referred to in the Act shall be appointed by the Governor and serve for terms of five years and until the appointment and qualification of their successors. Section 4. The Director of the Office of Administrative Law may, in addition, appoint additional administrative law judges on a temporary or case basis as may be necessary for the proper performance of the duties of the office. Section 5m.

From this statutory framework, it is clear that the responsibility for the hearing of a contested case other than those heard by the head of the agency itself [1] and heretofore presided over by persons employed by the respective state agencies has now been centralized and placed by the Legislature under the supervision of a new single state agency. Typical of the hearings[2] that would be transferred from the departments to the Office of Administrative Law are: (1) hearings conducted by the Department of Environmental Protection required to be held "before the commissioner or a member of the department designated by him," N.J.S.A. 13:1G-13, for persons charged with violations of codes, rules and regulations of the Department, N.J.S.A. 13:1G-11; (2) hearings by the Department of Health to be held before the "commissioner or a member of the department designated by him," N.J.S.A. 26:1A-45; and (3) hearings under N.J.S.A. 18A:6-9 giving the Commissioner of Education "jurisdiction to hear and determine all controversies and disputes arising under school laws, excepting those governing higher education."

It is significant to note, however, that although the responsibility to conduct and preside over hearings of a state agency required to be conducted as a contested case has been placed by the Legislature in administrative law judges in the Office of Administrative Law, there has been no express or implicit legislative indication from the terms of the Act to transfer existing hearing officer-examiner positions or their occupants employed in the respective state agencies to the Office of Administrative Law. In fact, the general tenor of the statute providing for the selection of administrative law judges by the Governor for terms of five years suggests a legislative intent to abolish the responsibility heretofore assumed by hearing officers-examiners and place the same in the newly created Office of Administrative Law. In the event the Legislature intended to transfer the existing positions of hearing officer-examiners and/or their occupants and/or to preserve employment rights arising under Title 11, where applicable, it could have stated its intention in unmistakable terms. Therefore, it can reasonably be concluded that the Act does not provide any authority to transfer existing positions as hearing officers-examiners and their occupants employed in the operating state agencies to the Office of Administrative Law.

1. Under section 10b of the Act, it is provided that unless a specific request is made by the agency, no administrative law judge shall be assigned by the Director to hear contested cases with respect to any matter where the head of the agency, a commissioner, or several commissioners, are required to conduct, or determine to conduct, the hearing directly and individually. Moreover, it should also be noted that nothing in the Act shall be construed to deprive the head of any agency of the authority to determine whether a case is contested, or to adopt, reject or modify the findings of fact and conclusions of law of an administrative law judge. Section 9a.

2. A partial lisitng of other examples of the hearing function vested in the commissioners of the various departments may be found at: N.J.S.A. 17:1-8.8. (Department of Banking); N.J.S.A. 10:5-8 (Division on Civil Rights); N.J.S.A. 11:1-20 (Department of Civil Service); N.J.S.A. 55:13A-6 (Department of Community Affairs); N.J.S.A. 30:11-3, 30:11-16 *et seq.*, 30:11A-8 (Department of Human Services).

The provisions of the State Agency Transfer Act, N.J.S.A. 52:14D-1 *et seq.*, do not alter this conclusion. Section 11 of the Act provides that it shall be subject to the provisions of the State Agency Transfer Act. In order to determine the effect of those provisions, it is important to review the terms and general purpose of the State Agency Transfer Act.

The State Agency Transfer Act was enacted in 1971 and its title indicates that it is

> An act concerning the organization and reorganization of the State Government, relating to the transfer of functions, powers and duties from one agency to another by law. . . .

In its operative provision, the Act provides that "[w]henever by law *an agency* of the State Government *is transferred,* the provisions of this Act shall apply unless otherwise provided by the act effecting such transfer." N.J.S.A. 52:14D-3. The Act then provides a means for the transfer of appropriations and other monies available to the transferor agency and the rights of employees under Title 11, Civil Service, and any pension law or retirement system as a result of such transfer.

From its terms and its purpose, the State Agency Transfer Act has no application to the present situation insofar as it bears on hearing officers-examiners in the several state agencies. That Act was prinicpally enacted to deal with the implications of reorganizations in the agencies of State government where the same is effected by law. In this sense, this law would seem to complement the provisions of the Executive Reorganization Act or in instances when substantive governmental reorganization is accomplished by direct legislation. In this instance, there has been no expression of legislative intent to reorganize or transfer any of the agencies of state government to the Office of Administrative Law but merely to place a new function or responsibility in that agency. Therefore, it can be assumed to have been the probable legislative intent in including a reference to the State Agency Transfer Act to refer solely to the rights of those employees heretofore employed by the predecessor agency, Division of Administrative Procedure, now transferred to the Office of Administrative Law.[3]

For these reasons, it is our opinion that the identified functions, powers and duties heretofore exercised by hearing officers-examiners employed by the several state agencies insofar as they pertain to presiding over contested cases has been placed by the Legislature in administrative law judges employed by the Office of Administrative Law. Further, it is also our opinion that the functions of hearing officers-examiners in the respective state agencies insofar as they pertain to presiding over contested cases have been abolished by reason of the enactment of Laws of 1978, chapter 67. The Chief Examiner and Secretary, in accordance with normal

3. "All the functions, powers and duties heretofore exercised by the Division of Administrative Procedure in the Department of State pursuant to the Administrative Procedure Act, P.L. 1968, c. 410 (C. 52:14B-1 *et seq.*) are transferred to and vested in the Office of Administrative Law created by this amendatory and supplementary act." Section 2.

civil service practices, should conduct an investigation to determine the continuing need for those positions and the appropriate civil service tenure, seniority and demotional rights of occupants of those positions.[4]

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

4. In a statement of the Senate, State Government, Federal and Interstate Relations Committee and the Veterans Affairs Committee, it is stated that the application of the provisions of the State Agency Transfer Act would grandfather in present employees of agencies whose functions are being transferred to the new Office of Administrative Law and that "grandfathering" would be inclusive of those employees presently serving as hearing officers. In our judgment, this statement of these Committees has no support in either the terms or purposes of the enactment. We cannot accept the same as conclusive of the overall legislative intent.

March 2, 1979

SIDNEY GLASER, *Director*
Division of Taxation
Taxation Building
West State & Willow Streets
Trenton, New Jersey 08625

FORMAL OPINION NO. 5—1979

Dear Director Glaser:

You have asked for our opinion as to whether pension income received by a non-resident of New Jersey from a public or private pension plan is subject to the Gross Income Tax Act. For the reasons set forth below, you are advised that such pension income is subject to the Tax Act.*

N.J.S.A. 54A:2-1 provides for imposition of the tax upon every individual's "New Jersey gross income as herein defined . . ." subject to certain deductions, limitations and modifications set forth in the act. The term "gross income" is defined in N.J.S.A.54A:5-1(j) to include

> pensions and annuities except to the extent of exclusions in section 54A:6-10 hereunder, notwithstanding the provisions of [the sections of public pension laws which provide an exemption of such benefits from state taxation]. . . .

* The particular inquiry which prompted this request concerns non-resident retired teachers receiving pensions from the Teachers Pension and Annuity Fund. The Fund is a public State administered pension plan created pursuant to N.J.S.A. 18A:66-1 *et seq.*

It is clear, therefore, that the Legislature has imposed the tax upon all pension and annuity income. The only question is whether a pension income recipient is exempted from the income tax because he or she is no longer a resident of New Jersey.

With respect to non-residents, the Tax Act specifically provides that:

> The income of a nonresident individual shall be that part of his income derived from sources within this State as defined in this act. [N.J.S.A. 54A:5-5.]

"Income derived from sources within New Jersey" is, in turn, defined to include:

> compensation, net profits, gains, dividends, interest or income enumerated and classified under chapter 5 of this act to the extent that it is earned, received or acquired from sources within this State:
>
> * * *
>
> 2. In connection with a trade, profession, occupation carried on in this State or for the rendition of personal services performed in this State; . . . [N.J.S.A. 54A5-8.]

Since pension income is "income enumerated and classified under Chapter 5", and since pension benefits received from a public or private pension plan for work performed in New Jersey are attributable to a profession or occupation carried on within New Jersey, such pension income is "income derived from sources within New Jersey" and is subject to the income tax.

Accordingly, you are advised that pension income received by non-residents from a public or private pension plan in New Jersey is subject to the New Jersey Gross Income Tax Act.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: DOUGLAS G. SANBORN
Deputy Attorney General

March 12, 1979

ANGELO R. BIANCHI, *Commissioner*
Department of Banking
36 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 6—1979

Dear Commissioner Bianchi:

You have inquired whether, pursuant to the statutory provisions which establish the Office of Administrative Law, hearings held on branch banking applications will be required to be conducted by adminstrative law judges rather than by Departmental hearing officers. You are advised that such hearings need not be conducted by an administrative law judge under provisions of that Act.

The hearings at issue are those conducted in connection with applications by banks (commercial banks and savings banks) for full branch offices, N.J.S.A. 17:9A-20A, applications by banks to relocate principal or branch offices, N.J.S.A. 17:9A-22, applications by savings and loan associations for establishment of full and limited facility branch offices, N.J.S.A. 17:12B-26 and applications by savings and loan associations to relocate existing branch offices to a different trade area, N.J.S.A 17:12B-27.1(4). In each instance, the Commissioner is empowered to conduct such investigation *or* hearing *or* both, as he deems advisable, in order to determine whether the application meets the pertinent statutory criteria for approval. Pursuant to N.J.A.C. 3:1-2.3, an objector may request that the Department hold a hearing. If a request for hearing is granted, the hearing may be held before the Commissioner, or before a deputy commissioner, hearing officer or any employee of the Department authorized by the Commissioner, N.J.A.C. 3:1-2.9(a).

Currently, the vast majority of the hearings are conducted by the Departmental hearing officer. At such hearings, the applicant and the objectors are accorded the opportunity to be heard, to introduce exhibits into evidence and to present and cross-examine witnesses, N.J.A.C. 3:1-2.13(a).

Pursuant to a recent amendment to the Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.*

> All hearings of a State agency required to be conducted as a *contested case* under this act or any other law shall be conducted by an administrative law judge assigned by the Director of the Office of Administrative Law, except as provided by this amendatory and supplementary act. [N.J.S.A. 52:14B-10(c).] [Emphasis added.]

Thus, the key inquiry is whether the Department's branch hearings represent "contested cases" as that term is defined in the Administrative Procedure Act. If so, they will be required to be conducted under the auspices of an administrative law judge. N.J.S.A. 52:14B-2(b) defines "contested case" as:

> a proceeding, including any licensing proceeding, in which the legal rights, duties, obligations, privileges, benefits or other legal relations of *specific parties are required by constitutional right or by statute* to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their interests, after *opportunity for an agency hearing.* [Emphasis added.]

As a preliminary matter, it should be noted that the Administrative Procedure Act does not "create a substantive right to an administrative hearing", *In re Application of Modern Industrial Waste Service,* 153 N.J. Super. 232, 237 (App. Div. 1977). Rather, the Act prescribes the procedures to be followed in the event an administrative hearing is otherwise required by statute or constitutional considerations. *Id.* Even if an administrative hearing is required by statute, the nature of that hearing must be examined towards the goal of determining whether the ultimate agency decision or determination disposes of the "legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties. . . ." In such instance, the agency acts in a quasi-judicial fashion and there is a "contested case" as defined by N.J.S.A. 52:14B-2(c). Conversely, if the purpose of the hearing is to provide a forum for the expression of public sentiment on proposed agency action or if the hearing is "informational" in nature, the agency acts in a legislative manner and the hearing is not conducted as a contested case, *Public Interest Research Group v. State,* 152 N.J. Super. 191, 206 (App. Div.) *certif. den.* 75 N.J. 538 (1977); *Wildlife Preserves Inc. v. Borough of Lincoln Pk.,* 151 N.J Super. 533, 542 (App. Div. 1977); *In re Matter of Public Hearings,* (C.O.A.) 142 N.J. Super. 136, 151-52 (App. Div.) *certif. den.* 72 N.J. 457 (1976).

The courts have examined the nature of the Department's branch application procedures and have concluded that hearings are not mandated by constitutional right, *Elizabeth Federal Savings and Loan Assn. v. Howell,* 24 N.J. 488, 505 (1957). In *First National Bank of Whippany v. Trust Co. of Morris Cty.,* 76 N.J. Super. 1, 8 (App. Div. 1962) the court expressly found that a hearing on a branch banking application is not necessary to comply with constitutional due process requirements. The court stated:

> [W]here the Legislature constitutes an administrative official [the Commissioner] as its *alter ego,* it is merely carrying out its exclusive function to establish public policy in fields in which the public interest is the primary object to be served and individual interests are only incidentally affected. *Id.*

The Court noted that in fixing the standards for the processing and approval of branch applications:

> [T]he obvious emphasis is pointed at the benefit to the *public* and not at any advantage to a banking institution by the applicant or established objectors. . . . [Emphasis in original.]

The determination of the Commissioner to approve or disapprove a branch application is conceived as primarily benefiting the public and only in-

cidentally of benefit to the applicant or objector. The discretionary hearing, if held, is designed to elicit views of objector institutions or others that might aid the Commissioner in determining whether the public interest will be served by approval or denial of the application.

It is also apparent both from the language of the branching statutes and judicial interpretation thereof, that a statutory right to a hearing is not available to either the applicant or an objector. The relevant statutory sections provide alternatively for Departmental investigation or hearing or both "as the Commissioner may determine to be advisable", N.J.S.A 17:9A-20A, N.J.S.A. 17:9A-22C, N.J.S.A 17:12B-26, and N.J.S.A. 17:12B-27.1(4); *In re Application of the Summit & Elizabeth Trust Co.,* 111 N.J. Super. 154, 164 (App. Div. 1970); *First National Bank of Whippany, supra.*

It is therefore clear that in accordance with the decision in *First National Bank of Whippany, supra,* and the branch banking statute a hearing on a branch banking application is neither required by constitutional right nor by statute. As a result, branch banking proceedings are not contested cases within the meaning of the Administrative Procedure Act and need not be conducted by administrative law judges.*

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: MARK S. RATTNER
Deputy Attorney General

* It is noteworthy, however, that in any instance where the Commissioner requests and the Director of the Office of Administrative Law approves, an administrative law judge may be assigned to conduct such hearings. N.J.S.A 52:14F-5(o) provides the Director of the Office of Administrative Law shall "[a]ssign an administrative law judge or other personnel to any agency to conduct or assist in administrative duties and proceedings other than those related to contested cases or administrative adjudications, including but not limited to rule-making and investigative hearings, if so requested by the head of an agency and if the director deems appropriate".

March 16, 1979

ANGELO R. BIANCHI, *Commissioner*
Department of Banking
36 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 7—1979

Dear Commissioner Bianchi:

You have asked for an opinion as to whether the Commissioner of Banking has the authority to inquire into and/or investigate certain lending practices of a depository institution under the New Jersey Home Mortgage

Disclosure Act (Antiredlining Act), where such practices tend to have a disproportionate impact on certain neighborhoods in this State. Specifically, certain financial institutions in the Newark banking market limit mortgage loans to properties which are owner-occupied or are single-family dwellings. For example, one institution will accept mortgage applications only on 1 to 2 family owner-occupied residences. Another will accept applications on 1 to 4 family units but requires that these units be owner-occupied. The effect of these restrictive lending criteria is felt particularly hard in Essex County's urbanized areas. In Newark, based upon 1970 data, only 7.4% of the housing would qualify under a 1 family, owner/occupancy requirement. In Orange, only 15.6% of the housing would qualify under this requirement. In contrast, 92.8% of North Caldwell's housing units meet the 1 family, owner/occupancy requirement. The ultimate question is whether the Antiredlining statute applies where the "effect" of an institution's lending policy is to exclude from loan consideration significant portions of the housing in a given area merely because that area's general housing characteristics fail to meet the institution's lending criteria. It is our opinion that the Commissioner has the authority to find a violation of the Act when a depository institution's lending criteria acts to disproportionately exclude home financing in certain neighborhoods and such lending terms are unsupported by a reasonable analysis of the lending risks associated with applicants for given loans or the condition of the properties to secure those loans.

One of the major purposes of the Antiredlining Act is to "prohibit the arbitrary denial of mortgage loans on the basis of the location of the property to be mortgaged," N.J.S.A. 17:16F-1. In furtherance of this purpose is N.J.S.A. 17:16F-3 which provides, in pertinent part:

> No depository institution shall discriminate, on a basis that is arbitrary or unsupported by a reasonable analysis of the lending risks associated with the applicant for a given loan or the condition of the property to secure it, in the granting, withholding, extending, modifying or renewing, or in the fixing of the rates, terms, conditions, or provisions of any mortgage loan on real property located in the municipality in which a depository institution has a home or branch office, or in any municipality contiguous to such municipality, merely because such property is located in a specific neighborhood or geographical area.

If the Commissioner of Banking finds that a depositor institution's lending practices are in violation of the Act, he is vested with authority to order that institution to cease such unlawful practices, N.J.S.A. 17:16F-9. Prior to the issuance of a cease and desist order the depository institution will be afforded a hearing, N.J.A.C 3:1-9.11.

For present purposes, the relevant inquiry is whether the Act applies when the effect of an institution's lending criteria, although not explicitly based on geographical limits, is the disproportionate exclusion of properties in certain neighborhoods. Several principles provide a helpful frame of reference within which to discuss the issue. First, an administrative agency possesses only those powers expressly or impliedly granted

it by the Legislature, *Kingsley v. Hawthorne Fabrics Inc.*, 41 N.J. 521, 528 (1964). The agency may not act in excess of that legislative grant of authority. Thus, it must be asked what the Legislature intended by the use of the term "discriminate" in N.J.S.A. 17:16F-3. If discrimination based upon explicit geographic lending criteria must be shown, a lending practice which merely results in the exclusion of properties in certain neighborhoods will not be a violation of the Act. The second relevant principle derives from the fact that the Antiredlining statute is remedial in nature. It is designed to prohibit practices which the Legislature has viewed as destructive to the fabric of the State's urban centers, N.J.S.A. 17:16F-1. As remedial legislation, the act is entitled to a liberal construction which will further its essential purpose, *State v. Meinken,* 10 N.J. 348, 352 (1952).

A review of the statement accompanying Senate Bill No. 1091, which was enacted as N.J.S.A. 17:16F-1 *et seq.*, supports the view that lending policies discriminatory in effect are prohibited by N.J.S.A. 17:16F-3. A bill statement may be relied upon as evidence of the actual intent of the Legislature, *State v. Sanchez,* 149 N.J. Super. 381, 394 (Law Div. 1977). The statement on Senate Bill No. 1091 indicates that:

> The term redlining is used to refer *both* to outright denial of mortgage money *and varying the terms of the loan in a manner that clearly constitutes discrimination.* [Emphasis added.]

Several examples of varying the terms of the loan are discussed, including refusal to lend on properties older than a prescribed number of years, excessive down payments and charging higher interest rates than on properties located in other areas. None of these loan terms explicitly exclude properties based upon neighborhood, but the discussion of these lending devices indicate a legislative awareness that the lending practices of depository institutions may be neutral on their face and yet have a discriminatory impact. For example, a lending policy which refuses loans on all properties older than a prescribed number of years will, even if applied to all mortgage applications in an institution's lending area, impact disproportionately on urban centers. In the same manner, an owner-occupancy requirement or a single-family requirement, may operate to exclude a large percentage of residences from particular urban neighborhoods. The exclusion results "merely because such proper[ties] [are] located in a specific neighborhood" and the neighborhood's general physical characteristics fail to meet the institution's uniform lending criteria.

It would be inconsistent with the examples given in the bill statement, as well as with the remedial purpose of the statute, to interpret N.J.S.A. 17:16F-3 to apply only to cases where geographical criteria are clearly established. Where an institution's lending policy, even if uniformly applied, has a discriminatory impact on properties in given geographical areas, it reasonably may be assumed to have the implicit legislative purpose to grant the Commissioner of Banking the authority to inquire whether a violation of the Antiredlining Act has occurred. You are therefore advised that the Commissioner has the authority to find a depository institution in violation of the Antiredlining Act when that institution's

lending criteria for home financing have a disproportionate impact on certain neighborhoods and those lending criteria have not been proven by the lending institution at a hearing held by the Commissioner to be supported by a reasonable analysis of the risks associated with the applicants for given loans or the condition of the properties used to secure those loans.

Very truly yours,
JOHN J. DEGNAN
Attorney General
By: MARK S. RATTNER
Deputy Attorney General

April 23, 1979

WILLIAM H. FAUVER, *Commissioner*
Department of Corrections
Whittlesey Road
Trenton, New Jersey 08628

FORMAL OPINION NO. 8—1979

Dear Commissioner Fauver:

You have requested our opinion as to whether it is within the authority of a chief executive officer of a state correctional institution to restore commutation credits to an inmate when those credits have been previously forfeited by the inmate as a result of his flagrant misconduct. For the following reasons you are advised that, in the discretion of the chief executive officer, such commutation credits may be restored to the inmate.

N.J.S.A. 30:4-140 governs the allowance of commutation credits to inmates in state correctional institutions. This statute provides in pertinent part:

> For every year or fractional part of a year of sentence imposed upon any person committed to any State correctional institution for a minimum-maximum term there shall be remitted to him from both the maximum and minimum term of his sentence, for continuous orderly deportment, the progressive time credits indicated in the schedule herein. When a sentence contains a fractional part of a year in either the minimum or maximum thereof, then time credits in reduction of such fractional part of a year shall be calculated at the rate set out in the schedule for each full month of such fractional part of a year of sentence. No time credits shall be calculated as provided for herein on time served by any person in custody between his arrest and the imposition of sentence. In case of any flagrant misconduct the

board of managers may declare a forfeiture of the time previously remitted, either in whole or in part, as to them shall seem just.*

It is clear from this statutory language that, although an inmate has an entitlement to commutation credits, the chief executive officer may declare a forfeiture of all or part of those credits in appropriate cases.

Although the statute does not in express terms authorize the restoration of forfeited commutation credits, the underlying statutory scheme for institutional discipline of inmates in state correctional institutions provides implicit support for that practice. The Department of Corrections is responsible for providing for the custody, care and discipline of those persons committed to state correctional institutions, N.J.S.A. 30:1B-3. In particular, the commissioner and the chief executive officer of such institution possess inherent authority for the maintenance of prison discipline as well as for the establishment of procedures to effectuate that responsibility. *Avant v. Clifford,* 67 N.J. 496, 549 (1975); N.J.S.A. 30:4-4. *See also,* N.J.S.A. 30:1B-6(g). Since the appropriate management of a penal institution requires the discipline of its inmates, the cases have recognized that prison officials possess wide and pervasive discretion in the treatment of inmates in matters of internal prison management and discipline. *See McCloskey v. State of Maryland,* 337 F.2d 72, 74 (4th Cir. 1964); *Gahagan v. Pennsylvania Bd. of Probation and Parole,* 444 F.Supp. 1326 (E.D. Penn. 1978); *Urbano v. McCorkle,* 334 F.Supp. 161, 167 (D. N.J. 1971) supplemented by 346 F.Supp. 51 (D. N.J. 1972) *aff'd* 481 F.2d 1400 (3rd Cir. 1973); *Davis v. United States,* 316 F.Supp. 80, 82 (E.D. Mo. 1970) *aff'd* 439 F.2d 1118 (8th Cir. 1971); *Avant v. Clifford, supra,* at pp. 563-564 (Conford, J. concurring).

In view of the broad statutory framework conferring authority for the discipline of inmates, we cannot assume that it can be the legislative purpose, in the absence of an express indication to the contrary, that a restoration of commutation credits is foreclosed. Implicit in the authority to declare a forfeiture of credits is the discretion to revoke such a forfeiture. Furthermore, an administrative agency has been held to have the inherent authority to reopen and modify its determinations. *Burlington County Evergreen Park Mental Hospital v. Cooper,* 56 N.J. 579, 600 (1970); *Mount v. Trustees of Public Emp. Retirement System of New Jersey,* 133 N.J. Super. 72, 82 (App. Div 1975). Additionally, a statute should be construed with regard to its purpose and consistent with related statutes in the area. *Appeal of N.Y. State Realty & Terminal Co.,* 21 N.J. 90, 98 (1956); *Apartment Management Co. v. Tp. Comm. of Union Tp.,* 140 N.J. Super.

* N.J.S.A. 30:4-4a provides in pertinent part:

> Whenever in any law, rule, regulation, contract, document, judicial or administrative proceeding or otherwise, reference is made to the board of managers of any institution, the same shall mean and refer to the chief executive officer of the institution. . . .

Thus, pursuant to this statute, the authority to declare the forfeiture of commutation time credits resides in the chief executive officer of the correctional institution in which the inmate is incarcerated.

220, 224 (App. Div. 1976); *N.J. Prop.-Liab. Ins. Guar. Co. v. Sheeran,* 137 N.J. Super. 345, 351 (App. Div. 1975) *certif. den.* 70 N.J. 143 (1976). Thus, since the authority conferred on prison officials to declare a forfeiture of commutation credits is an aspect of their ability to maintain prison discipline, we can reasonably assume that the legislature intended to confer concomitant authority on those prison authorities to restore commutation credits in those cases where the interests of prison management and discipline are similarly served.

In conclusion, it is our opinion that the existing administrative practice permitting the restoration of commutation credits previously forfeited under N.J.S.A. 30:4-140 is within the authority of prison officials where the same is implemented in a manner that is neither arbitrary nor capricious and is consistent with the best interests of the inmates and prison management and discipline.

Very truly yours,
JOHN J. DEGNAN
Attorney General
By: EUGENE M. SCHWARTZ
Deputy Attorney General

May 4, 1979

SIDNEY GLASER, *Director*
Division of Taxation
Taxation Building
West State & Willow Streets
Trenton, New Jersey 08625

FORMAL OPINION NO. 9—1979

Dear Director Glaser:

You have asked for our opinion as to whether temporary disability benefits received by an employee from either the "State Plan"[1] or a "private plan"[2] established pursuant to the Temporary Disability Benefit Law, are excludable from gross income under the New Jersey Gross Income Tax Act. For the reasons set forth below, you are advised that such benefits are excludable from gross income.[3]

N.J.S.A. 54A:2-1 provides in pertinent part that:

> There is hereby imposed a tax for each taxable year . . . on the New Jersey gross income as herein defined of every individual . . ., subject to the deduction, limitations and modifications hereinafter provided. . . .

"Gross income" is defined in N.J.S.A. 54A:5-1:

> New Jersey gross income shall consist of the following categories of income:

> a. salaries, wages, tips, fees, commissions, bonuses, and other remuneration received for services rendered whether in cash or in property. . . .

Temporary disability benefits received from a private plan or the State Plan are within the ambit of "gross income" as defined in the Tax Act, since the right to such benefits arises by virtue of the employee's employment, and since such benefits are funded and/or paid (at least in part) by the employers. Unless specifically excluded by N.J.S.A. 54A:6-1 through 6-15, such benefits are subjected to tax under N.J.S.A. 54A:5-1.[4] N.J.S.A. 54A:6-1 provides that:

1. The Temporary Disability Benefits Law, N.J.S.A. 43:21-25 *et seq.*, provides for the establishment of a state disability benefits fund, in which contributions of employers and employees are deposited. N.J.S.A. 43:21-46(a). The state disability benefits fund is in the custody of the State Treasurer, and is held in trust for the payment of temporary disability benefits. Such benefits are payable to "covered individuals" as defined in N.J.S.A. 43:21-27(b) in certain circumstances set out in the Law. *See* N.J.S.A. 43:21-37 through 42. This form of disability coverage is referred to as coverage under the "State Plan."

2. As an alternative to contributing to the State Plan, an employer may, under certain circumstances, establish a private disability plan for its employees, which plan is subject to review by the Division of Employment Security. A private plan must, in effect, provide beneftis to employees which equal or exceed the benefits provided by the State Plan, without requiring that the employees contribute more than they would be required to contribute under the State Plan. N.J.S.A. 43:21-32.

3. It has been suggested that N.J.S.A. 54A:6-13, which provides an exclusion for "all payments and benefits received under any unemployment insurance law," could be construed to provide an exclusion for temporary disability payments received under N.J.S.A. 43:21-25 *et seq.* Although it is true that the Temporary Disability Benefits Law is a supplement to the Unemployment Compensation Law, N.J.S.A. 43:21-1 *et seq.*, and is codified as Article 2 of the "Unemployment Compensation" Chapter (Chapter 21) of Title 43, Subtitle 9, the Benefits Law itself recognizes that there is a difference between an unemployment compensation law and a disability benefit law. N.J.S.A. 43:21-30 provides:

> No benefits shall be required or paid under this act for any period with respect to which benefits are paid or payable under any unemployment compensation or similar law, or under any disability or cash sickness benefit or similar law, of this State or of any other state or of the Federal Government. . . .

And, the Act itself is entitled "Temporary Disability Benefits Law," N.J.S.A. 43:21-25, to be distinguished from the "Unemployment Compensation Law," N.J.S.A. 43:21-1. Furthermore, other states' temporary disability laws may or may not be codified as an "unemployment compensation" law, and there does not appear to be any reason or intent to treat such payments differently for purposes of the Tax Act. Accordingly, although N.J.S.A. 54A:6-13 (like N.J.S.A. 54A:6-6(a)) supports our conclusion that this type of benefit was intended to be excluded, that section cannot reasonably be read to provide the exclusion.

4. That such benefits would be subject to tax under N.J.S.A. 54A:5-1 is fully consistent with, indeed supported by, the specific exclusions from gross income of federal social security benefits (N.J.S.A. 54A:6-2), railroad retirement benefits (N.J.S.A. 54A:6-3), and unemployment insurance benefits (N.J.S.A. 54A:6-13).

> The items in sections 54A:6-2 to 54A:6-9, inclusive, shall be specifically excludable from gross income.

N.J.S.A. 54A:6-6 provides an exclusion for:

> Compensation for injuries or sickness.
> a. Amounts received under workmen's compensation acts as compensation for personal injuries or sickness.
> b. The amount of damages received, whether by suit or agreement, on account of personal injuries or sickness.
> c. *Amounts received through accident or health insurance for personal injuries or sickness.*
> d. Amounts received as a pension, annuity or similar allowance for personal injuries or sickness resulting from active service in the armed forces of the United States or in the Coast and Geodetic Survey or the Public Health Service, or as a disability annuity payable under the Foreign Service Act of 1946. [Emphasis added.]

This exclusion provision is essentially similar to §104 of the Internal Revenue Code ("I.R.C."); that exclusion provision, entitled "Compensation for injuries or sickness," reads as follows:

> (a) In general.—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc. expenses) for any prior taxable year, gross income does not include—
>
> (1) amounts received under workmen's compensation acts as compensation for personal injuries or sickness;
> (2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness;
> (3) *amounts received through accident or health insurance for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee. or (B) are paid by the employer);* and
> (4) amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country or in the Coast and Geodetic Survey or the Public Health Service, or as a disability annuity payable under the provisions of section 831 of the Foreign Service Act of 1946, as amended. [22 U.S.C. 1081; 60 Stat. 1021.[[Emphasis added.]

In view of the substantial similarity of these provisions which provide exclusions from taxable income, as well as several others,[5] it may be reasonably assumed that the Legislature was aware of these exclusions in the Internal Revenue Code and intended to specifically incorporate them

into the tax act. It is appropriate, therefore, to look to §104 of the I.R.C. as an aid in interpreting N.J.S.A. 54:6-6. *See* 2A Sutherland, *Statutory Construction,* §52.02 at 328-329 (4th Ed. 1973).

§104(a)(3) of the I.R.C. provides an exclusion for "amounts received through accident or health insurance." for purposes of §104(a)(3), that term includes "amounts received from a sickness and disability fund for employees maintained under the law of a state. . . ." §105(e) of the I.R.C.[6] Thus, under the Internal Revenue Code the exclusion of "amounts received through accident or health insurance" has been applied to temporary disability benefits payments received, whether from the employer or the employer's plan, from an insurance company, or from [a] State fund. . . ." *See* Rev. Rul. 75-479, 1975-2 CB 44 and Rev. Rul. 75-499, 1975-2 CB 43; amplifying Rev. Rul. 72-191, 1972-1 CB 45. Since N.J.S.A. 54:6-6(c) was patterned after §104(a)(3), the likely legislative intent was the temporary disability benefits received from the State Plan or a private plan are amounts received from "accident or health insurance" and excludable from gross income under the Tax Act. On the other hand, since the Legislature did not incorporate a limitation on the exclusion with regard to amounts attributable to contributions by an employer as set forth in section 104(a)(3),[7] we conclude that it intended to exclude the entire amount of temporary disability benefits from gross income under the Tax Act.

In conclusion, you are advised that temporary disability benefits received from the State Plan or a private plan are excludable from gross income under the Tax Act.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: DOUGLAS G. SANBORN
Deputy Attorney General

5. The following exclusion provisions of the Tax Act and the I.R.C. are also substantially identical: N.J.S.A. 54A:6-4 and I.R.C. §101; N.J.S.A. 54A:6-5 and I.R.C. §102; N.J.S.A. 54A:6-7(b) and I.R.C. §113; N.J.S.A. 54A:6-8 and I.R.C. §117.

6. Even prior to the inclusion of §105(e) in the I.R.C., the Supreme Court of the United States held that temporary disability payments received from an employer's plan were receipts from "health insurance" as that term was used in the exclusion provision which antedated §104(a)(3). *Haynes v. United States,* 353 U.S. 81, 77 S. Ct. 649, 1 L. Ed. 2d 671 (1957).

7. §104(a)(3) limits the exclusion to amounts

> [O]ther than [those] received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (B) are paid by the employer.

May 9, 1979

MR. THOMAS RUSSO, *Director*
Division of Medical Assistance
and Health Services
Department of Human Services
324 East State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 10—1979

Dear Mr. Russo:

The Department of Health, which assists in administering the program for setting the rate of reimbursement payable to nursing homes under the New Jersey Medical Assistance and Health Services Act (N.J.S.A. 30:4D-1 *et seq.*) (Medicaid), has asked whether any nursing home dissatisfied with the rate set for it should have its administrative appeal heard by an administrative law judge. It is our opinion that such a rate reimbursement appeal is a contested case and should be heard by an administrative law judge.

By authority of N.J.S.A. 30:4D-7(b) the Division of Medical Assistance and Health Services in the Department of Human Services is responsible for determining the amount of payment for services rendered to Medicaid recipients by providers of medical services. *See Formal Opinion No. 8-1976.* Reimbursement rates for certified nursing home providers participating in the Medicaid program are set in accordance with Cost Accounting and Rate Evaluation (CARE) regulations adopted by the Department of Human Services (N.J.A.C. 10:63-3 *et seq.*) and administered in substantial part by the Department of Health. Nursing home rates are set prospectively on an annual basis, depending on the fiscal year used by the facility for its accounting purposes. A rate is based on the specific cost data submitted by the particular facility and is set in terms of a *per diem* amount for that particular nursing home.

The CARE regulations make available two stages of administrative appeal to resolve disputes concerning the rate that is initially established. N.J.A.C. 10:63-3.20. The nursing home may request a meeting with a Health Department rate analyst for review and adjustment of the rate (Level I Appeal). Thereafter, the home may request a conference with a panel of representatives of the Departments of Health and Human Services. On occasion the panel may include a representative of the Department of Transportation which furnishes appraisals of the value of nursing home land and property, elements that are factored in the reimbursement rate. This "Level II" appeal is conducted in an informal manner. It concludes by the panel's submitting a memorandum containing its recommendations to the Director of the Division of Medical Assistance and Health Services, who makes the final administrative decision.

Through the recent amendments to the Administrative Procedure Act (L. 1978, c. 67), N.J.S.A. 52:14B-1 *et seq.*, 52:14F-1 *et seq.*, all "contested cases" heard by a State agency must be conducted by an administrative

law judge instead of by Departmental hearing officers. N.J.S.A. 52:14B-10(c). A "contested case" is defined by N.J.S.A. 52:14B-2(b) as:

> a proceeding, including any licensing proceeding, in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their, interests, after opportunity for an agency hearing.

Thus where, by statute or constitutional law, a hearing is required before a State agency may determine the legal rights of specific parties, the matter constitutes a "contested case" which must be heard by an administrative law judge. *See Public Interest Research Group v. State of New Jersey,* 152 N.J. Super. 191, 205, (App. Div. 1977), certif. denied, 75 N.J. 538 (1977); *Formal Opinion No. 6-1979.*

In considering whether a nursing home rate dispute is a "contested case" within the scope of N.J.S.A. 52:14B-2(b), it should be noted that the Medicaid statute requires that the State "provide that either the recipient or the provider shall be afforded the opportunity for a fair hearing within a reasonable time on any valid complaint." N.J.S.A. 30:4D-7(f). This statutory hearing right, however, has been interpreted by the Department of Human Services to apply only to cases involving a recipient's eligibility for assistance termination or suspension of a provider agreement, or the payment of claims for services rendered. N.J.A.C. 10:49-1.16. From the inception of the nursing home rate-setting program the Department of Human Services has consistently held to the position that a rate dispute is not suitable to formal hearing. The issues in such a case are frequently matters of estimation, judgement and policy; in addition, any rate that is set is always subject to the limitation of available appropriated funds, N.J.S.A. 30:4D-2, 30:4D-7.

Rate-setting has, indeed, long been viewed as a quasi-legislative function and, where the Legislature entrusts that rate-setting power to an administrative agency, that agency is constrained by no greater procedural requirements than would otherwise apply to the Legislature itself. *Consolidation Coal Co. v. Kandle,* 105 N.J. Super. 104, 113 (App. Div. 1969), *aff'd* 54 N.J. 11 (1969); *Public Serv. Coordinated Transport v. State,* 5 N.J. 196, 214 (1950). Accordingly, neither the Legislature nor the delegated agency would be under a duty to provide a hearing before fixing a flat rate or maximum levels of increase on a general or Statewide basis. *Jamouneau v. Harner,* 16 N.J. 500, 522 (1954), *cert. denied,* 349 U.S. 904, 75 S. Ct. 580, 99 L. Ed. 1241 (1955).

The nursing home rate-setting program, however, does not mirror the pure legislative model of setting a uniform rate across the board for all facilities regardless of individual differences. The program instead sets a certain reimbursement rate for a particular facility taking into consideration that facility's own operating expenses, property evaluation and working capital needs. The CARE regulations expressly recognize that because of unusual situations inequities may result from strict adherence to the initial rate, and they provide for review of the special circumstances of

the facility. N.J.A.C. 10:63-3. The nursing home rate-setting program is thus directed towards establishing the legal right of a *specific party* to a rate of reimbursement for services it provides to Medicaid recipients.* Moreover, by statute the facility is entitled to a reasonable rate for those services, N.J.S.A. 30:4D-7(b).

Although rate-making powers may be characterized as legislative or quasi-legislative, a rate determination in many respects will also require the exercise of quasi-judicial functions when property rights of specific facilities are at stake. *Central R. Co. v. Department of Public Utilities,* 7 N.J. 247, 257 (1951). In such instances rate-making will combine "the elements of policy making and adjudication, being a blend of prescription for the future with the disposition of a particular, immediate petition." *Yellow Cab Corp. v. City Council of Passiac,* 124 N.J. Super. 570, 580 (Law Div. 1973). It has been expressly established by case law that where the property interests of a specific facility are involved in fixing a rate of reimbursement, due process requires the affording of an opportunity for a hearing thereon by the facility. Thus, in *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 56 S. Ct. 720, 80 L. Ed. 1033 (1935), the action of the Secretary of Agriculture in prescribing maximum charges for a stockyard company's services was attacked as a confiscation of the company's property. The Court stated that the "fixing of rates is a legislative act." 298 U.S. at 50. Yet it went on to hold that

> When the Legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily. . . .
>
> . . . [T]he Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. . . . It is not difficult for . . . [administrative agencies] to observe the requirements of law in giving a hearing and receiving evidence. [298 U.S. at 51-52.]

In *Ohio Bell Tel. Co. v. Public Utilities Comm'n,* 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093 (1937), the Court reversed an order of a State Commission setting the rates chargeable by a telephone company for intrastate telephone service to its subscribers because factual data on which the Commission had relied, including the valuations of the company's land, labor, buildings and equipment, had not been disclosed to the company. The Court stated, "The right to . . . [a fair and open] hearing is one of 'the rudiments of fair play' . . . assured to every litigant by the Fourteenth Amendment as a minimal requirement. . . . There can be no compromise

* It is noteworthy that these appeal procedures for nursing home rate reimbursement are governed by the same statutory provisions which deal with hospital rate reimbursement where the Department of Health has expressly recognized the need for a formal hearing.

on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." 301 U.S. at 304-305. It is apparent from these cases that

> [W]hile rate-making is labelled a legislative process, the due process clause of the U.S. Constitution provides that no one shall be deprived of his property without due process of law, and the 'due process' which must be accorded includes the affording of an opportunity for a hearing. [*Yellow Cab Corp. v. City Council of Passaic, supra,* 124 N.J. Super. at 579.]

See also Cunningham v. Department of Civil Service, 69 N.J. 13, 21 (1975); *In re Matter of Public Hearings* (C.O.A.) 142 N.J. Super. 136, 151-152 (App. Div. 1976), *certif. denied,* 72 N.J. 457 (1976).

The type of hearing that must be afforded necessarily depends on whether adjudicative facts are at issue in the individual case. *Cunningham v. Department of Civil Service, supra,* 69 N.J. at 22-23, *Yellow Cab Corp. v. City Council of Passaic, supra,* 124 N.J. Super. at 580; Davis, *Administrative Law* §7.04 at 420-426 (1958). As noted in *Yellow Cab Corp. v. City Council of Passaic, supra,* 124 N.J. Super. at 580-582, administrative agency rate-making is a blend of quasi-judicial and quasi-legislative functions, entailing a consideration of large questions of public policy, reference to broad data from surveys, studies and experience as well as a determination of discrete facts. Where, as in the nursing home rate-setting process, final agency decisions are based on individual grounds for administrative appeal, including the factual characteristics, situation and valuation of the facility's property, an adjudicative hearing is required. Davis, *Administrative Law, supra,* §7.04 at 421.

Accordingly, you are advised that since an opportunity to be heard is required before a rate dispute concerning a specific nursing home may be finally resolved by agency decision, such a dispute constitutes a "contested case" that should be heard by an administrative law judge. Provision for hearing before an administrative law judge may be superimposed upon an informal administrative scheme for voluntary resolution of the dispute and may be substituted for both or either one of the existing appeal levels.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By CHARLOTTE KITLER
Deputy Attorney General

May 14, 1979

JOHN A. WADDINGTON, *Director*
Division of Motor Vehicles
25 South Montgomery Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 11—1979

Dear Director Waddington:

You have inquired as to whether or not a truck (or truck and trailer combination) registered in another state but found on a New Jersey highway in excess of the weight listed on its foreign certificate of registration is in violation of N.J.S.A. 39:3-84.3, which makes it unlawful for:

> any commercial motor vehicle, tractor, trailer or semitrailer [to be] *found* on a highway with a gross weight of vehicle and load *in excess of the weight limitation permitted by the certificate of registration for the vehicle* or in excess of the gross weight limitations imposed by the Title for vehicle and load or an axle weight in excess of the axle weight limitations imposed by this Title . . . . [Emphasis supplied.]

Alternatively stated, your question is whether or not the term "certificate of registration" as used in the statute was intended to encompass *foreign* registrations as well as New Jersey registrations. For the following reasons, we conclude that it was not.

Initially, it must be noted that the statute is penal and quasi-criminal in its nature, and so must be strictly construed. *State v. Gratale Brothers, Inc.,* 26 N.J. Super. 581 (App. Div. 1953). Even so, the statute must be read in relation to the mischief and evil sought to be suppressed and effect must be given to the terms of the statute in accordance with their fair and natural acceptation. *State v. Ferro,* 128 N.J. Super. 353 (App. Div. 1974).

At least as to the gross weight limitations for vehicle and load and the axle weight limitations of this statute, the intent and purpose of the law is plainly to protect our highways and highway structures from damage by overweight vehicles. *State v. Gratale Brothers, Inc., supra* at 584. Recognized in that light, such provisions have been constitutionally upheld when applied to trucks registered out-of-state as well as in-state. *Morris v. Duby,* 274 U.S. 135, 47 S. Ct. 548, 71 L. Ed. 966 (1926).[1] Such a purpose, however, is not so apparent here, where two identical trucks both registered in New Jersey and both subjecting our highways to the same load and distribution (axle weight), could be treated differently under the statute depending only upon the fees accompanying their registration application.[2] Viewed thusly, this aspect of the statute appears as merely the enforcement arm of a revenue measure (N.J.S.A. 39:3-20) the purpose of which is to

1. In this case the Supreme Court was called upon to examine an Illinois gross weight limitation similar to ours in the face of a constitutional challenge that it placed an undue burden on interstate commerce. The court sustained the limitation, finding it a reasonable and non-discriminatory means to further a legitimate state objective.

compel voluntary payment of the correct registration fee to the State of New Jersey by the owners of trucks registered *in this State. See State v. Youngstown Cartage Co.,* 105 N.J. Super. 223, 225 (Co. Ct. 1969), wherein the court recognized that "a weight in excess of the registered weight is not of itself a cause of damage to the highways." and *State v. Levitan Interstate Transport, Inc.* 58 N.J. Super. 345, 351 (Co. Ct. 1959), wherein it was noted that to not enforce N.J.S.A. 39:3-84.3 in the particular situation under review there would "make possible an evasion of the revenue provisions of N.J.S.A. 39:3-20 . . ." To apply this portion of the statute to trucks registered out-of-state, therefore, could in no way be viewed as rationally related to its purpose since the subject registration fees would be paid to the state of registration and not to New Jersey.

Moreover, since the subject provision is plainly inapplicable on its face to trucks registered in states which do not require registration based upon gross weight,[3] *State v. Olean Transp. Corp.,* 39 N.J. Super 236 (Co. Ct. 1956), a determination that our statute was intended to apply to trucks registered out-of-state appears even less viable. Such would lead to the rather anamolous result that a truck registered in a state requiring registration based upon "unladen weight" and found in New Jersey in excess of such "unladen weight" would be immune from prosecution[4] while this same truck, if registered in a state where registration is based upon gross weight and found in excess of its registered gross weight, would be subject to prosecution. Such a result cannot have been intended. Rather, it must be concluded that the legislature intended that the subject overweight provision apply only to vehicles registered in New Jersey as a means of enforcing its registration laws. *State v. Youngstown Cartage Co., supra.*

The above determination is mindful of the apparently contrary conclusions reached in *State v. Olean Transp. Corp., supra.* and *State v. Levitan Interstate Transport, Inc., supra.* Suffice it to say that unlike *State v. Youngstown Cartage Co., supra.* these decisions are not precisely on point with the situation present here. In *Olean,* for example, the only question for determination was whether or not our statute applied to a tractor registered in a state that required registration to be based upon the vehicle's "unladen weight" rather than its "gross weight."[5] The court concluded that it did not, adding in dictum, however, that in its view the statute did

2. N.J.S.A. 39:3-20 provides that:

> a. The Director is authorized to issue registrations for commercial motor vehicles . . . upon application therefor and payment of a fee based on the gross weight of the vehicle [meaning the vehicle and its load] . . . . [T]he minimum registration fee shall be $50.00 plus $8.50 for each 1,000 pounds or portion thereof in excess of 5,000 pounds.

Thus, a truck registered for 6,000 pounds (having paid a fee of $58.50), for example, could not be prosecuted under N.J.S.A. 39:3-84.3 when found on the highway weighing 5,500 pounds, whereas if only a $50.00 registration fee had been paid for this same truck, a summons could issue.

3. At least ten states, as you have indicated in your request for advice, require that registration be based upon the truck's "unladen weight."

4. This is assuming that the vehicle and load did not exceed either the maximum gross weight limitation or the axle weight limitation set forth in our statute.

5. See footnote 3.

apply to trucks registered in other states that required gross weight to be listed on registration certificates. The question presented in *Levitan* was whether or not our statute applied to a combination of a New Jersey registered tractor and a trailer registered in another state that required gross weight to be listed on its registration certificate. The court concluded that it did, specifically rejecting the defendant's contention that the statute was limited in application to only combinations of vehicles *wholly* registered in New Jersey. The situation here, on the other hand, concerns only vehicles or combinations of vehicles *wholly* registered *out-of-state.*

To whatever extent the language in either of those cases goes beyond their narrow holdings, moreover, it is found unpersuasive. Both courts base their decision at least in part on their recognition of the purpose of the act to protect our highways, but fail to realize, as recognized in *Youngstown* and as noted above, that such purpose only applies to the maximum gross weight and axle weight limitations of the act. Furthermore, the reasoning in *Levitan* appears additionally suspect for reason that it rests upon the court's fear that:

> To uphold defendant's contention is to make possible an evasion of the revenue provisions of N.J.S.A. 39:3-20, a statutory construction not to be favored. A New Jersey trucker would be enabled to register his tractor at a minimum fee and haul an out-of-state trailer and load over the New Jersey highways with immunity from any complaint for overweight of vehicle and load as evidenced by the combined certificates of registration. [*Id.* at 350.]

However persuasive such observation may have appeared at the time this decision was reached, it no longer appears so following amendment of N.J.S.A. 39:3-20 and N.J.S.A. 39:3-84.3 prohibiting the operation of combinations of New Jersey tractors and out-of-state trailers on New Jersey highways in excess of twice the gross weight listed on the New Jersey tractor's registration certificate and prescribing fines based upon such excess. L. 1963, c. 166, §§1 and 2. The "immunity" feared by the Court in *Levitan* thus no longer exists. The existence of these amendments, in fact, can be seen as evidence of a legislative disapproval of the approach taken by the court in *Levitan,* since the out-of-state trailer's registration certificate in such a situation is now irrelevant to the determination as to whether or not a violation has occurred under the statute or as to how much of a fine should be assessed. These determinations are now to be based solely upon the gross weight listed on the New Jersey tractor's certificate of registration and the total weight of the combination.

For the reasons set forth above, you are therefore advised that a truck registered in another state and found on a New Jersey highway in excess of the weight listed on its foreign certificate of registration (but within the maximum gross weight and axle weight limitations of the act) is not in violation of N.J.S.A. 39:3-84.3.

Very truly yours.
JOHN J. DEGNAN
Attorney General

By: ROBERT M. JAWORSKI
Deputy Attorney General

June 13, 1979

DR. FRED G. BURKE, *Commissioner*
Department of Education
225 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 12—1979

Dear Dr. Burke:

The Department of Education has asked for our opinion as to the validity of United States citizenship requirements for teachers under a recent decision of the United States Supreme Court in *Ambach v. Norwick,* 441 U.S. 68 (1979).

The statute governing the qualifications of a permanent teaching staff member requires an applicant to be a citizen of the United States "except that any citizen of any other country, who has declared his intention of becoming a United States citizen and to whom there has been issued a teaching certificate in accordance with law, may be employed as a teacher so long as he holds a valid teacher's certificate . . . ." N.J.S.A. 18A:26-1. The State Board of Examiners is authorized to issue a teacher's certificate to an alien who has declared his intention of becoming a United States citizen, but any such certificate may be revoked where the holder has either abandoned his efforts to become a United States citizen, or shall not have become a United States citizen within five years of the date of its issuance. N.J.S.A. 18A:26-8.1.

In *Formal Opinion No. 10—1974* we concluded that the indiscriminate ban set forth in the statutes on the employment and tenure of teachers who are aliens was constitutionally invalid in the absence of a special circumstance inherent in a particular teaching position. Our opinion was then premised on the holding of the United States Supreme Court in *Sugarman v. Dougall,* 413 U.S. 634 (1973). The Court held at that time that a broad provision of New York Civil Service law which indiscriminately prohibited the employment of aliens in the competitive civil service was in violation of the Fourteenth Amendment to the United States Constitution.

In *Ambach* the Court addressed the specific question as to the constitutional validity of a New York statutory ban on the employment of aliens as teachers in the New York public schools. That statute was in many respects similar to the governing New Jersey statutes insofar as it provides for a ban on the employment of persons as teachers who are not either citizens of the United States or have not made diligent application to become a citizen.

In *Ambach* the appellees satisfied all of the educational requirements set for certification as a public school teacher but consistently refused to seek citizenship in spite of their eligibility to do so. The Court reviewed its earlier decisions in this area and again recognized, as it had in *Sugarman,* that a state could "in an appropriately defined class of positions, require citizenship as a qualification for office." *Ambach, supra,* at 1593. The court stated that where a governmental function fulfilled a fundamental obligation of government to its constituency, it was within

the authority of a state to exclude aliens from such governmental positions. *See also: Foley v. Connelie,* 435 U.S. 291 (1978). In its application of these principles to the case at hand, the court stated:

> In determining whether, for purposes of equal protection analysis, teaching in public schools constitutes a governmental function, we look to the role of public education and to the degree of responsibility and discretion teachers possess in fulfilling that role. *See id.,* at 297. Each of these considerations supports the conclusion that public school teachers may be regarded as performing a task 'that go[es] to the heart of representative government.' *Sugarman v. Dougall, supra,* at 647.
>
> Public education, like the police function, 'fulfills a most fundamental obligation of government to its constituency,' *Foley,* at 297. The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions:
>
> 'Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a prinicipal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.' *Brown v. Board of Education,* 347 U.S. 483, 495 (1954). [*Ambach, supra,* at 76, 77.]

The Court concluded that since public school teachers perform an essential "governmental function" the New York statutory restriction bore a rational relationship to a legitimate state purpose and was consistent with the Fourteenth Amendment to the United States Constitution.

The New Jersey statutory scheme is essentially the same and serves similar purposes as the New York statutes considered in *Ambach.* You are therefore advised that those New Jersey statutes which require a teaching staff member to demonstrate that he is a citizen of the United States or has declared his intent of becoming a citizen are supported by a legitimate governmental purpose and are consitutionally valid.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

July 16, 1979

JOAN HABERLE, *Secretary Director*
Real Estate Commission
201 East State Street
Trenton, New Jersey

FORMAL OPINION NO. 13—1979

Dear Ms. Haberle:

You have asked for our opinion as to whether attorneys authorized to practice law in New Jersey are totally exempt from the licensure requirements and regulatory provisions of the Real Estate License Act. You are advised that with the exception of activities pertinent to and within the scope of their responsibilities in the practice of law, attorneys are subject to its provisions.

Your inquiry turns on an interpretation of the exemption provision of the Real Estate License Act, which states as follows:

> The provisions of this article shall not apply to any person, firm, partnership, association or corporation who, as a bona fide owner or lessor, shall perform any of the aforesaid acts with reference to property owned by him nor shall they apply to or be construed to include attorneys at law, receivers, trustees in bankruptcy, executors, administrators, or persons selling real estate under the order of any court or the terms of a deed of trust, state banks, federal banks, savings banks and trust companies located within the state, or to insurance companies incorporated under the insurance laws of this state. [N.J.S.A. 45:15-4.]

The historical development of this statutory exemption and its textual setting provide clear support for the view that it is limited to those real estate activities which are encompassed within the practice of law. This statute as originally enacted by Laws of 1921, c. 141, §2, provided as follows:

> The provisions of this act shall not apply to any person, firm, association, partnership or corporation, who as owner or lessor, shall perform any of the acts aforesaid with reference to property owned by them; nor shall the provisions of this act apply to persons holding a duly executed power of attorney from the owner for the sale, lease or exchange of real estate; nor shall this act be construed to include in any way attorneys at law; nor shall it be held to include a receiver, trustee in bankruptcy, administrator or executor, or any person selling real estate under order of any court, nor to a trustee selling real estate under a deed of trust.

It was amended by Laws of 1925, c. 243, §3, to state in part:

> [N]or shall the provisions of this act apply or be construed to include attorneys-at-law, or a receiver, trustee in bankruptcy, executor, administrator or to any person or corporation selling real estate under the order of any court, or under the terms of a deed of trust.

It is significant that the amendatory language deleted the words "in any way" with regard to the exemption provided for attorneys.

In 1929, the statutory exemption was further expanded to include state banks, federal banks, savings banks and trust companies and insurance companies. Laws of 1929, c. 341, §1. This amendment was obviously designed to enable these financial institutions to conduct their usual activities with regard to mortgages and other real estate encumbrances without running afoul of the provisions of the Real Estate License Act.

In the context of this legislative history, it is important to note that the exemption for attorneys has been grouped with those persons or institutions who by their very nature would be circumscribed in carrying out general real estate activities. For example, trustees, receivers and administrators are all authorized to carry out specific legal responsibilities under certain limited circumstances. Also, it cannot be reasonably assumed that the legislature intended to permit banking institutions and insurance companies to engage in real estate activities outside the scope of their legitimate functions as banking institutions and insurance companies. In the construction of a statute, the meaning of a doubtful phrase may be ascertained by consideration of the company in which it is found and the meaning of words which are associated with it. *Boileau v. De Cecco,* 125 N.J. Super. 263, 267 (App. Div. 1973), *aff'd* 65 N.J. 234 (1974); *Dept. of Health v. Sol Schnoll Dressed Poultry Co.,* 102 N.J. Super. 172, 177 (App. Div. 1968). Therefore, the scope of the exemption provided for attorneys may be reasonably inferred from the nature of the exemptions pertinent to the other entities enumerated in the statute. The exemption for attorneys would be limited to those activities performed in carrying out their professional responsibilities in the practice of law.

Moreover, the exemption provisions of the Real Estate License Act should be interpreted consistent with the overall legislative purpose to regulate the real estate business in the public interest. It is well established that each part of a statute should be construed in a manner consistent with the principal legislative intent. *State v. Bander,* 56 N.J. 196, 201 (1970). In the event an attorney were permitted to engage freely and without restraint in all aspects of the real estate business a regulatory void would be created. For example, licensees must maintain and make available books of accounts and records of transactions for inspection by the Real Estate Commission. N.J.A.C. 11:5-1.13. A similar requirement is imposed by court rule on attorneys with regard to monies received in the practice of law. However, "[i]ncome received . . . as a real estate agent . . . is not received from the practice of law and therefore should not be deposited in such business account." New Jersey Supreme Court Advisory Committee on Professional Ethics, Opinion No. 124. It should not be assumed that the legislature by its enactment of an exemption for attorneys intended to allow persons who happen to be attorneys to engage in the real estate business without being subject to regulation either by the Real Estate Commission or the Supreme Court of New Jersey. Rather, the more

reasonable reading of the exemption was that attorneys would be exempt from regulation by the Real Estate Commission for activities which are within the practice of law and thus regulated by the Supreme Court.

In those jurisdictions where courts have found an unlimited exemption for attorneys to engage in the business of real estate, the statutory framework is significantly different from that found in N.J.S.A. 45:15-4. In *Weinblatt v. Parkway-St. Johns Place Corp.*, 241 N.Y.S. 721, 722 (Sup. Ct. 1930), *aff'd* 243 N.Y.S. 810 (App. Div. 1930), a New York court found an unlimited exemption. The New York statute provided as follows:

> The provisions of this article shall not apply to receivers, referees, administrators, executors, guardians, or other persons appointed by or acting under the judgment or order of any court; or public officers while performing their official duties, or attorneys at law. [N.Y. Real Property Law §442-f (McKinney's 1968).]

Unlike the New Jersey statute, the language of this enactment places limits on all of the enumerated categories other than attorneys at law. Similarly, in *Kribbs v. Jackson,* 129 A. 2d 490, 495 (Sup. Ct. 1957), a Pennsylvania court held that attorneys are exempted from licensure under their act. The Pennsylvania statute contains specific limiting language pertaining to all of its enumerated exempted persons and entities, except those regarding attorneys. 63 Pa. Stat. §432(c).

Even where a statute provided no clear indication of the underlying legislative purpose, a Texas court has found the attorney exemption to be a limited one. In *Sherman v. Bruton,* 497 S.W. 2d 316 (Tex. Ct. Civ. App. 1973), the court considered a statute which provided "nor shall this Act be construed to include in any way services rendered by an attorney at law." Notwithstanding that the statute did not contain specific limiting language regarding attorneys, as in fact it did regarding public officers or employees, the court stated:

> We do not understand this language to mean that an attorney, solely by virtue of his license to practice law, is authorized to engage generally in the business of a real estate broker . . . We interpret the expression 'services rendered by an attorney at law' to mean services rendered by a licensed attorney whose engagement for legal services has created the relationship of attorney and client. [citations omitted] If a lawyer is employed to render legal services, §6(3) exempts him from the requirements of article 6573a, even though some of the services he renders as an attorney, such as negotiations for a sale or lease, would fall within the function of a real estate broker, as defined in Section 4 of that article. [497 S.W. 2d at 321.]

See also, Avent v. Stinnett, 513 S.W. 2d 89, 94 (Tex. Ct. Civ. App. 1974).

Thus an unlimited exemption for attorneys has been found to exist only where the statutory language unequivocally demonstrates a legislative purpose to permit it. We find no evidence of a legislative intent to allow

for such an unlimited exemption from the New Jersey Real Estate Act.[1] Rather, a reading of the statutory language, along with its historical development, leads us to conclude that the legislature intended to immunize attorneys from the provisions of the Real Estate License Act only with respect to those activities encompassed by the practice of law.

It is therefore our opinion that with the exception of those real estate activities carried out as part of their professional duties in the practice of law, attorneys are subject to the licensure requirements and regulatory provisions of the Real Estate License Act.[2]

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: ELISE GOLDBLAT
Deputy Attorney General

1. In addition, it should be noted that although this provision for exemption was enacted so that attorneys would not be prohibited in the performance of their duties in the practice of law, the New Jersey Supreme Court has imposed independent limitations on the real estate activities of attorneys. The New Jersey Supreme Court Advisory Committee on Professional Ethics (hereinafter referred to as Supreme Court Committee) has concluded that an attorney may not serve as an attorney in connection with any transaction initiated by him as a real estate broker. Supreme Court Committee Opinion No. 312. The Supreme Court Committee has also specifically applied this prohibition to an attorney who is also a salesperson. Supreme Court Committee Opinion No. 411. Furthermore, Disciplinary Rule 2-102(D) expressly states:

> A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business.

Thus, an attorney engaged in the real estate business is required to divorce this business from the practice of law, and services rendered as a real estate broker or salesperson should be rendered in a nonlegal capacity. *See,* Supreme Court Committee Opinion No. 124.

It is not our purpose to delineate between real estate activities engaged in by a broker or salesperson and those activities engaged in by an attorney within the practice of law. The Supreme Court of New Jersey has been vested with jurisdiction over the regulation of the practice of law. Article 6, §2, ¶3 of the 1947 New Jersey Constitution. Therefore, appropriate guidelines in this area may be provided by the Supreme Court or by its Advisory Committees.

2. To the extent this opinion is inconsistent with informal advice given to the Real Estate Commission in 1971, that informal advice is overruled and superseded by this formal opinion.

July 31, 1979

LEWIS B. THURSTON, III
Executive Director
Election Law Enforcement Commission
28 West State Street—11th Floor
Trenton, New Jersey 08608

FORMAL OPINION NO. 14—1979

Dear Mr. Thurston:

The Election Law Enforcement Commission has asked whether N.J.S.A. 19:34-45 prohibits a bank from establishing a political action committee for its employees. This inquiry was prompted by information received by the Commission from a national bank indicating that the bank intends to use its own funds for the establishment and administration of a political committee, the officers and members of which will be the bank's employees and the purpose of which is to solicit voluntary contributions from the employees. The contributions are to be maintained in a separate fund and will be used by the committee to influence the nomination or election of certain candidates for federal, State and local public office. The members of the committee will consist of its "organizers and such other individuals as may thereafter be admitted to membership." For the following reasons, you are advised that while N.J.S.A. 19:34-45 does not absolutely prohibit the establishment of such a committee, it does preclude the use of the bank's own monies to establish and administer a political action committee, and/or to solicit contributions from its employees.

Originally enacted in 1911 as part of a comprehensive election corruption practices act, N.J.S.A. 19:34-45 provides in pertinent part:

> No corporation carrying on the business of a bank . . . shall pay or contribute money or anything of value in order to aid or promote the nomination or election of any person, or in order to aid or promote the interests, success or defeat of any political party.

The statute plainly prohibits direct contributions of money or other thing of value by a bank for political purposes.

There is no legislative history of this statute which would shed light upon your inquiry. Its federal counterpart, 2 U.S.C. §441b (formerly 18 U.S.C. §610), orginally enacted in 1907, however, has an abundance of congressional history which has been examined by the Supreme Court of the United States. The federal law provides in pertinent part:

> It is unlawful for any national bank, or any corporation organized by any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever to make a money contribution in connection with the election at which Presidential and Vice-Presidential elections or a Senator or Representative in . . . Congress is to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices. . . . [2 U.S.C. §441b.][1]

In 1971, the statute was amended to define "contribution and expenditure." In doing so, Congress specifically excluded from such definition the "establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes . . ." but only if the contributions are given voluntarily and with knowledge of their intended political use.

The scope of the federal law as proscribing the establishment of political committees or funds both prior and subsequent to the 1971 amendment was examined by the Supreme Court of the United States in *Pipefitters Local Union No. 562 v. United States,* 407 U.S. 385, 92 S.Ct. 2247, 33 L.Ed. 2d 11 (1972). In that case, a union and three of its officers were convicted of conspiracy to violate 18 U.S.C. §610, the predecessor of 2 U.S.C. §441b, by maintaining a separate political fund to which union members and union employees contributed. Upholding the convictions, the Court of Appeals characterized the political fund as a "subterfuge" through which the unions made political contributions of union monies. The 1971 amendments, which expressly legalized the union activity involved, became effective after oral argument in the Supreme Court. In reversing the Court of Appeals and remanding for a new trial on the issue of voluntariness of contributions to the fund, the Court observed that the congressional purpose in enacting 18 U.S.C. §610 was not only to destroy the influence over elections exercised by holders of large aggregates of capital through financial contributions but also to prevent corporate or union officials from using corporate or union funds for contributions to political parties without the consent of the shareholders or union members. After an examination of these purposes and the extensive congressional history of the statute, it concluded that the law as originally enacted was never intended to prohibit a corporation from making, through the medium of a political fund organized by it, political contributions or expenditures so long as the monies expended were volunteered by those asked to contribute. 92 S.Ct. at 2257. However, the Court further held that:

> [N]owhere . . . has Congress required that the political organization be formally or functionally independent of union [or corporate] control or that union [or corporate] officials be barred from soliciting contributions or even precluded from determining how the monies raised will be spent. . . . When Congress

1. As applied to national banks, 2 U.S.C. §441b extends its proscriptions to political contributions affecting local and state elections as well as federal. *See United States v. Clifford,* 409 F.Supp. 1070, 1073 (E.D. N.Y. 1976). However, 2 U.S.C. §453 provides that the federal law and regulations thereunder ". . . supersede and preempt any provisions of State law with respect to election to Federal office." Thus, state laws, such as N.J.S.A. 19:34-45, which proscribe contributions to state elections are not preempted. *Cf.* 11 C.F.R. §114.2(a)(1).

> prohibited labor [or corporate] organizations from making contributions or expenditures in connection with federal elections, it was, of course, concerned not only to protect minority interests within the union [or corporate] but to eliminate the effect of aggregated wealth on federal elections. But the aggregated wealth it plainly had in mind was the general union [or corporate] treasury—not the funds donated by union [or corporate] members of their own free and knowing choice. . . . [92 S.Ct. at 2264-2265.]

Thus, the political fund need not be formally or functionally independent of union or corporate control, but the monies comprising the fund must be segregated and the contributions from members and employees must be voluntary and with the knowledge of their intended political use. 92 S.Ct. at 2264. The 1971 amendment to the Corrupt Practices Act specifically authorizing the establishment of a separate political fund was held to merely codify what was existing law and congressional intent. 92 S.Ct. at 2262.

Pertinent to your inquiry, the Court did, however, observe that the 1971 amendment appeared to make one substantive change in the prior law by authorizing the use of union or corporate monies for the establishment, administration, and solicitation of contributions for a political fund. In light of the congressional emphasis upon protecting minority union or shareholder interests and maintaining a strict segregation of monies found to be a significant motivating factor for the enactment of the original statute, "the evidence is strong . . .," observed the Court, that prior to 1971 ". . . Congress believed the costs of organization of new union political funds had to be financed [exclusively from voluntary contributions] . . . ." 92 S.Ct. at 2271.

It has been suggested that the congressional concern for protecting minority stockholders and union members from nonconsential expenditure of corporate or union funds for political purposes was at best a secondary concern. *Cort v. Ash,* 422 U.S. 82, 95 S.Ct. 2080, 2089, 45 L.Ed. 2d 26 (1975). It has also been suggested that the nature of the relationship between unions and their members may be different from that between corporations and stockholders. *Id.* However, the congressional history of the 1907 act, which did not extend to labor unions until 1943, analyzed by the Supreme Court in *Pipefitters,* does appear to support the conclusion that the 1907 act was not intended to proscribe the establishment of a voluntary political committee or fund, so long as the fund was created and supported by volunteered, noncorporate monies.

This balanced approach attributed by the Court in *Pipefitters* to Congress in fashioning the 1907 Corrupt Practices Act recognizes a sensitivity towards a need for controlling the potential corruptive use of corporate or union funds by corporate or union officials without consent of shareholders, union members or employees as well as the constitutionally required deference to the First Amendment rights of the individuals and corporate and union organizations involved. It is this balanced approach which has guided the Supreme Court of the United States in construing the scope of the 1907 act not only in *Pipefitters* but in other cases as well.

Thus, in *United States v. C.I.O.,* 335 U.S. 106, 68 S.Ct. 1349, 92 Law Ed. 1849 (1948), the Court held that the Corrupt Practices Act did not prohibit the publication of a union newspaper at the union's expense which contained a statement urging the election of a particular candidate and which was distributed to union members. On the other hand, in *United States v. International Union United Auto, etc., Workers,* 352 U.S. 567, 77 S.Ct. 529, 1 L.Ed. 2d 563 (1957), the Court held that the use of union funds to sponsor a commercial television broadcast designed to reach the general public to influence the electoral process constitutes a violation of the federal Corrupt Practices Act.

Enacting N.J.S.A. 19:34-15 three years after the 1907 federal Corrupt Practices Act, it is reasonable to assume that the New Jersey Legislature operated under the same objectives as did Congress.[2] We therefore conclude that N.J.S.A. 19:34-45 was not intended to prohibit the establishment of a separate political fund contributed to voluntarily by members of a political action committee with knowledge of the intended political use of the fund. It is further concluded, however, that a bank's corporate funds may not be used to establish, administer or solicit contributions for the political fund.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: ERMINIE L. CONLEY
Assistant Attorney General

2. It is significant that following the lead of Congress, several states have recently amended their corrupt practices laws to specifically authorize the use of corporate funds to establish and maintain a political fund. *See* Pa. Stat. Ann. Tit. 25, §3225(c); Tex. Elec. code Ann., Art. 14.06(A)(C). *See also* N.Y. Elec. Law, Art. 14, §14-116(b).

August 2, 1979

ANGELO R. BIANCHI, *Commissioner*
Department of Banking
36 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 15—1979

Dear Commissioner Bianchi:

You have inquired whether, pursuant to the statutory provisions which establish the Office of Administrative Law, hearings held on applications for the issuance of a charter to a capital stock association[1] should be conducted by administrative law judges rather than by Departmental hearing officers. You are advised that such hearings should be conducted by administrative law judges under the provisions of that Act.

1. A capital stock association is any insured State savings and loan association as defined by N.J.S.A. 17:12B-244(a).

The hearings in question are those conducted upon application by a capital stock association for a charter pursuant to N.J.S.A. 17:9A-244 *et seq.* The hearing is mandated by N.J.S.A. 17:12B-16. Widespread notice of an application for a new charter is required by N.J.S.A. 17:12B-17. The notice must be published in a newspaper which circulates in the municipality in which the association proposes to operate. Additionally, a copy of the notice must be mailed to every association which has a principal or branch office within the county of the proposed principal office site. At the hearing, the Commissioner must afford an opportunity to be heard to any party so desiring, N.J.S.A. 17:12B-19. The Commissioner shall also make such independent examination or investigation as he deems necessary, N.J.S.A. 17:12B-19.[2]

Currently, hearings on charter applications are conducted by the Departmental hearing officer. At such hearings, the applicant and any objectors are accorded the opportunity to be heard, to introduce exhibits into evidence and to present and cross-examine witnesses, N.J.S.A. 3:1-2.13(a).

Pursuant to a recent amendment to the Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.*:

> All hearings of a State agency required to be conducted as a *contested case* under this act or any other law shall be conducted by an administrative law judge assigned by the Director of the Office of Administrative Law, except as provided by this amendatory and supplementary act. [N.J.S.A. 52:14B-10(c).] [Emphasis added.]

Therefore, the key inquiry is whether the Department's charter hearings represent "contested cases" as that term is defined in the Administrative Procedure Act. If so, they will be required to be conducted under the auspices of an administrative law judge. N.J.S.A. 52:14B-2(b) defines "contested case" as:

> a proceeding, including any licensing proceeding, in which the legal rights, duties, obligations, privileges, benefits or other *legal relations of specific parties are required by constitutional right or by statute* to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their interests, *after opportunity for an agency hearing.*] [Emphasis added.]

Thus, where by statute or constitutional law, a hearing is required before a State agency may determine the legal rights of "specific parties," the matter constitutes a "contested case" which must be heard by an administrative law judge. *See Public Interest Research Group v. State of New Jersey,* 152 N.J. Super. 191, 205 (App. Div. 1977), *certif. denied,* 75 N.J. 538 (1977).

2. The charter approval procedures for capital stock associations are quite similar to those prescribed for mutual associations, banks and savings banks, N.J.S.A. 17:12B-13 *et seq.*, N.J.S.A. 17:9A-10 *et seq.* Therefore, the conclusions reached herein are likewise applicable to those proceedings.

Of primary importance, therefore, in this case is the fact that a hearing is mandated by statute, N.J.S.A. 17:12B-16, as a condition precedent to the approval of a charter for a savings and loan association, and the focus of charter hearings to a substantial degree is on the individual and specific aspects of the applicant's eligibility and capability, N.J.S.A. 17:12B-20. In drawing a distinction between a charter application of a bank or savings bank and a branch banking application, the Appellate Division in *In Re The Summit and Elizabeth Trust Co.,* 111 N.J. Super. 154, 164 (1970) stated in pertinent part:

> The Agency inquiry as to . . . [branch applications] is less stringent and, indeed a formal hearing is not a prerequisite . . . . The Commissioner may act upon plenary and completely informative data supplied to him by the applicant and any objecting bank. The crucial findings to be made are whether the interests of the public will be served and whether conditions in that locality afford reasonable promise of successful operation, N.J.S.A. 17:9A-20. [Citations omitted.][3]

In contrast to the approval of a branch application:

> [T]he issuance of a bank charter must be preceded by application, hearing, notice, publication and findings as set forth in N.J.S.A. 17:9A-9, 10, 11. In addition to requisite findings as to public interest and probable success, there must be adequate findings as to such elements as capital structure, stock subscriptions, name, location, deposit liabilities, directorship and management.[4] [*Summit and Elizabeth Trust Co., supra,* 164-65.]

In sum, because these charter application hearings are required by statute and are held in order to determine the legal rights and privileges of "specific parties," it is clear that such hearings are contested cases within the meaning of the Administrative Procedure Act. You are, therefore, advised that these charter hearings should be conducted by an administrative law judge, unless the Commissioner deems it appropriate to himself act as the hearing officer.

Very truly yours,
JOHN J. DEGNAN
Attorney General
By: MARK S. RATTNER
Deputy Attorney General

3. The characterization of a branching application for purposes of the Administrative Procedure Act was considered in *Formal Opinion No. 6,* dated March 12, 1979. Since those hearings were not required by statute nor mandated by constitutional right, *First National Bank of Whippany v. Trust Co. of Morris Cty.,* 76 N.J. Super. 1, 6 (App. Div. 1962), it was concluded that a branching hearing was not a contested case and need not be referred to an administrative law judge.

4. The requisite findings for approval of a charter for a State association are quite similar to those for approval of a charter for a bank or savings bank, *compare* N.J.S.A. 17:9A-11 with N.J.S.A. 17:12B-20 (mutual associations), N.J.S.A. 17:12B-249 (capital stock associations).

August 3, 1979

BETTY WILSON, *Acting Commissioner*
Department of Environmental Protection
Labor and Industry Building
Room 802
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPINION NO. 16—1979

Dear Ms. Wilson:

The Division of Solid Waste Administration has inquired whether all or some of the increased expenses which may accrue to local governments, including counties acting as solid waste management districts and municipalities, as a result of solid waste management plan implementation pursuant to the Solid Waste Management Act are excluded from the budgetary limitations imposed upon local governmental units by the Local Government Cap Law. For the reasons more fully set forth herein, you are hereby advised that municipal and county expenditures resulting from implementation of the Solid Waste Management Act are generally subject to the limitations imposed by the Cap Law; however, certain specific expenditures may be excluded from the Cap Law's limitations by virtue of that Act's provision for exceptions.

The Local Government Cap Law, N.J.S.A. 40A:4-45.1 *et seq.* was enacted in 1976 as part of what has commonly been referred to as the "State income tax package." The purpose of the Cap Law, as is expressly provided by statute, is to assist in controlling the spiraling costs of local government in order to protect the homeowners of the State from undue local real estate tax increases. N.J.S.A. 40A:4-45.1; *N.J. State P.B.A., Local 29 v. Town of Irvington,* 80 N.J. 271 (1979). In order to effectuate this stated purpose, the Cap Law prohibits municipalities, other than those having a municipal purposes tax levy of $0.10 or less per $100.00, from increasing their budgets by more than 5% of the preceding fiscal year's final appropriations. N.J.S.A. 40A:4-45.3. In like manner, counties are prohibited from increasing their respective tax levies in excess of 5% of the preceding fiscal year's county tax levy. N.J.S.A. 40A:4-45.4

In addition to expressly recognizing the need to control the spiraling costs of local government, the Legislature also indicated in enacting the Cap Law that efforts to limit local government spending must not so constrain local units so as to render it impossible for them to provide necessary services to their residents. N.J.S.A. 40A:4-45.1. Thus, in order to assure that the limitations imposed upon local units by the Cap Law do not unduly constrain municipalities and counties, the Legislature made provision for certain specified exceptions to such limitations. N.J.S.A. 40A:4-45.3 and 40A:4-45.4.

One of the major exceptions from the limitations imposed upon local units by the Cap Law is the exclusion for expenditures mandated after the effective date of the Cap Law pursuant to State or Federal Law. N.J.S.A. 40A:4-45.3(g) and N.J.S.A. 40A:4-45.4(e). In *Formal Opinion 3-1977,* we had occasion to interpret this statutory exception. At that time,

we concluded that the exception is intended to exclude from the Cap Law's limitation municipal and county expenditures from programs required by newly enacted legislation in order to avoid the harsh result of forcing local governments to cut other services to provide funds for newly created programs not included in previous budgets. *Formal Opinion 3-1977.* Moreover, we concluded that the only reasonable construction that could be given to these exceptions is one that would exclude only those expenditures for programs mandated by legislation enacted after the effective date of the Cap Law. *Formal Opinion 3-1977.* Such a construction gives meaning to all of the words in the statutory provisions in question and avoids a construction that would undermine the expressed legislative purpose to limit local government spending.

The Solid Waste Management Act amendments about which you have inquired were enacted on February 23, 1976. L. 1975, c. 326* Pursuant to the amendments, each county of the State is designated as a solid waste management district, N.J.S.A. 13:1E-19, and is required to develop and then implement a comprehensive ten year solid waste management plan for collection and disposal of solid waste in each district. N.J.S.A. 13:1E-20 *et seq.* The gist of your inquiry is whether expenditures incurred by municipalities or counties in implementing these solid waste management plans are exempt from the Cap Law's limitations on expenditures.

It is clear from the previous discussion contained herein relative to N.J.S.A. 40A:4-45.3(h) and N.J.S.A. 40A:4-45.4(e) that any expenditures that might be deemed mandated by the amendments to the Solid Waste Management Act do not fall within the Cap Law's exceptions for mandated expenditures inasmuch as such amendments were enacted nearly six months prior to the August 18, 1976 effective date of the Cap Law. L.1976, c. 68, §7. Although municipal and county expenditures incurred relative to implementation of the Solid Waste Management Act will in all probability be incurred after the effective date of the Cap Law, we concluded in *Formal Opinion 3-1977* that such a factor was not controlling so long as the statutory enactment in question embodying the mandate preexisted the effective date of the Cap Law.

In spite of the fact that expenditures incurred by municipalities and counties pursuant to the Solid Waste Management Act are not generally excluded from the limitations imposed by the Cap Law by virtue of N.J.S.A. 40A:4-45.3(g) and N.J.S.A. 40A:4-45.4(e), there are various exceptions contained in the Cap Law that may be relevant to excluding from the Cap Law's limitations certain expenditures that are incurred in the course of implementing a solid waste management plan. For example, specifically excluded from the Cap Law's limitations are amounts spent by a municipality or a county with respect to use, services or provision of any project, facility or public improvement for solid waste pursuant to any contract between a municipalitiy or a county and any other county, municipality, district, agency, authority, commission, instrumentality, public corporation, body corporate and politic or political sub-division of the

* The effective date of these amendments was July 1, 1976 which is based upon the enactment of the annual appropriation act, L. 1976, c. 42, eff. July 1, 1976. L. 1975, c. 326 §38.

State, N.J.S.A. 40A:4-45.3(j); N.J.S.A. 40A:4-45.4(f). Thus, although there is not a blanket exclusion from the Cap Law for expenditures incurred by local units in implementing solid waste management plans under the Solid Waste Management Act, provision is made for local units to exclude substantial portions of their expenditures relative to solid waste services.

Additionally, the Cap Law permits municipalities to exclude from their budget caps capital expenditures funded by any source other than the local property tax. N.J.S.A. 40A:4-45.3(b). Counties are provided with a similar exception that excludes from the Cap Law's limitations capital expenditures funded by any source other than the county tax levy. N.J.S.A. 40A:4-45.4(b). Accordingly, a local unit could construct solid waste facilities financed through bonding without being subject to the Cap Law's limitations. Moreover, the debt service on such bonds would also be exempt from the Cap Law for both municipalities and counties. N.J.S.A. 40A:4-45.3(d); N.J.S.A. 40A:4-45.4(d).

In municipalities, but not counties, expenditure of amounts derived from new or increased service fees imposed by ordinance are excluded from the limitations imposed by the Cap Law. N.J.S.A. 40A:4-45.3(h). Thus, any new or increased service fees derived from solid waste facilities or otherwise could be expended without limitation by the Cap Law in implementing a solid waste management plan. Yet another exception from the Cap Law is provided to municipalities for expenditure of funds constituting local matching shares in federal or state aid programs. N.J.S.A. 40A:4-45.3(b); *Formal Opinion 3-1977.* Thus, a municipality may spend an amount necessary to secure state or federal funds available for use in implementing a solid waste management plan provided that the financial share of the municipality will not increase final municipal appropriations by more than 5% of the previous year's final appropriation. Finally, municipalities are also allowed to exclude from the Cap Law's limitations expenditures of amounts approved by referendum. N.J.S.A. 40A:4-45.3(i). Thus, a municipality may opt to leave it to its voters to determine whether expenditures necessary to implement a solid waste management plan shall be blanketly excluded from the Cap Law's limitations or whether such expenditures will have to be either accommodated within the cap or else excluded through another applicable exception.

In conclusion, you are advised that municipal or county expenditures for implementation of solid waste management plans pursuant to the Solid Waste Management Act are not generally exempt from the limitations imposed upon local government spending by the Local Government Cap Law as mandated expenditures inasmuch as the pertinent amendments to the Solid Waste Management Act were enacted prior to the effective date of the Cap Law. However, you are further advised that certain expenditures incurred by a municipality or a county in implementing a solid waste management plan may be excluded from the limits imposed by the Cap Law by virtue of the various specific exceptions provided therein.

Very truly yours,
JOHN J. DEGNAN
Attorney General
By: BENJAMIN D. LAMBERT
Deputy Attorney General

August 10, 1979

ADAM K. LEVIN, *Director*
Division of Consumer Affairs
1100 Raymond Boulevard
Newark, New Jersey 07102

FORMAL OPINION NO. 17—1979

Dear Director Levin:

You have asked several questions concerning the interpretation and implementation of the New Jersey Prescription Drug Price and Quality Stabilization Act, L. 1977, c. 240, N.J.S.A. 24:6E-1 *et seq.* (hereinafter referred as "the Act"). Each of the questions will be dealt with in order.

I

Your initial inquiry is whether a pharmacist should substitute a generic drug listed on the list of interchangeable drug products (the formulary) in a situation where he has a prescription on a form not imprinted with the two choices: "substitution permissible" and "do not substitute." It is our opinion for the following reasons that a pharmacist should substitute a generic drug listed on the formulary unless the prescriber expressly prohibits substitution.

N.J.S.A. 24:6E-7 provides in pertinent part:

> Every prescription blank shall be imprinted with the words, 'substitution permissible' and 'do not substitute' and shall contain space for the physician's or other authorized prescriber's initials next to the chosen option. Notwithstanding any other law, unless the physician or other authorized prescriber explicitly states that there shall be no substitution when transmitting an oral prescription or, in the case of a written prescription, indicates that there shall be no substitution by initialing the prescription blank next to 'do not substitute' a different brand name or nonbrand name drug product of the same established name shall be dispensed by a pharmacist if such different brand name or nonbrand name drug product shall reflect a lower cost to the consumer and is contained in the latest list of interchangeable drug products published by the council; . . .

N.J.S.A. 24:6E-11 specifies penalties for any violation of the Act, and further provides:

> However, failure of the prescriber to utilize the form of prescription designated in section 8 of this act [N.J.S.A. 24:6E-7] shall not invalidate the prescription as written, if said prescription is otherwise valid.

The question arises whether the words "as written" mean a prescription on a form other than designated by the statute should be followed unless the prescriber expressly permits substitution. An analysis of the

statutory scheme and the underlying legislative history indicates that such an interpretation would be inconsistent with the purposes of the Act.

It is clear from a reading of the statute, N.J.S.A. 24:6E-7 that a prescriber is in each case required to make an express statement that no substitution is permissible. The statute does not require the prescriber to make an express statement that substitution is permissible. An instructive basis for comparison is the New York generic drug law, which states in part:

> (1) A pharmacist shall substitute a less expensive drug product . . . provided that the following conditions are met:
>
> (a) The prescription is written on a form which meets the requirements of subsection six of section sixty-eight hundred ten of this article and the prescriber places his signature above the words 'substitution permissible,' or in the case of oral prescriptions, the prescriber must expressly state that substitution shall be permitted; . . . [N.Y. Educ. Law § 6816a (McKinney).]

Unlike the New York law, the New Jersey law places the burden upon the prescriber to *prohibit* substitution. In the case of an orally transmitted prescription (of necessity not on the required form), the prescriber must explicitly prohibit substitution to prevent it from occurring.

The probable legislative intent expressed in the statutory language is reinforced by the statement on the first version of Assembly Bill No. 2021.

> We must encourage return of doctor-pharmacist health care partnership. Most doctors do not have time, nor facility, to evaluate all drugs they prescribe; pharmacists now make choice under present law, when doctors prescribe generically; a prestigious Drug Research Board's recent resolution urged that physicians be required to delegate product selection to pharmacist *except where doctors explicitly elect to make choice themselves—exactly what this bill provides.* [Emphasis added.]

For these reasons it is our opinion that notwithstanding the actual prescription form used, a pharmacist is required to substitute pursuant to the provisions of the Act unless a prescriber expressly prohibits substitution.

II

You have asked whether a pharmacist may substitute a less expensive generic drug not listed on the formulary without first securing the approval of the prescriber where the prescription specifically indicates "substitution permissible" or "substitute generic." For the following reasons, it is our opinion that a pharmacist must contact and secure the approval of a prescriber prior to substituting a particular drug unless the substituted drug is a less expensive generic equivalent listed on the formulary.

This question turns on the interpretation of N.J.S.A. 24:6E-8, which provides:

> Notwithstanding any other law, where a different brand name or nonbrand name drug product of the same established name shall reflect a lower cost to the consumer and no drug product of such established name is included in the latest list of interchangeable drug products published by the council, or where in the professional judgment of the pharmacist there is no valid proof of efficacy for the drug product prescribed, or the pharmacist's patient profile record discloses drug sensitivity, allergies or adverse reactions to the drug product prescribed, or there exists a more appropriate drug product than the drug product prescribed, a different brand name or nonbrand name drug product shall be dispensed by the pharmacist, provided, however, that such action by a pharmacist shall be authorized only if in each case the pharmacist notifies the prescriber of the drug product to be dispensed and the name of the manufacturer thereof, and receives the approval of the prescriber to substitute such drug product for the drug product prescribed. The pharmacist shall be required to indicate on the prescription the date and time of the prescriber's approval and whether the approval was communicated orally or in writing.

This statutory section was designed to deal with circumstances where a pharmacist desires to substitute a drug which is not listed as equivalent on the formulary. This would be true not only when the intended substitution would be of a lower priced drug but also when a pharmacist determines that a nonequivalent drug should be substituted for medical reasons. In each of these cases, a different drug product "shall be authorized only if in each case the pharmacist notifies the prescriber" of the drug to be dispensed "and receives the approval of the prescriber" to make the substitution.

The specific issue posed here is whether the approval of the prescriber to substitute a drug not listed on the formulary is applicable where a prescriber specifically indicates "substitution permissible" or "substitute generic." An examination of the language of the act and its legislative history indicates that prior approval must be obtained from the prescriber in such cases.

N.J.S.A. 24:6E-8 expressly includes the situation in which:

> a different brand name or nonbrand name drug product of the same established name shall reflect a lower cost to the consumer and no drug product of such established name is included in the latest list of interchangeable drug products. . . .

Where such a situation exists, substitution is "authorized only if *in each case*" the pharmacist first advised the prescriber of the product to be provided, and receives the approval of the prescriber for the specific substitution. It would not be adequate for the prescriber to state in advance "substitution permissible" or "substitute generic," since the prescriber would neither have been advised of nor have approved the actual product being substituted.

An examination of a legislative report reveals an intent to treat equivalent generic drugs not listed on the formulary and nonequivalent drugs recommended by the pharmacist in the same manner. A report prepared by Assemblyman Martin A. Herman (hereinafter referred to as the Herman Report) on Assembly Bill 1257 (an earlier similar version of the bill enacted into law) stated as follows:

> This legislation recognizes that a substantial drug interchange list will not occur overnight. As patents expire, new drugs are manufactured to compete, or a new line of generics appears, there will be a lapse time between this entry into the market place and administrative review.
>
> To meet this problem, and to encourage what should be present good pharmaceutical practices, section (5) requires: that where a doctor prescribes a drug for which there is a lower priced generic equivalent not on the list, or the pharmacist's patient profile record discloses drug sensitivity, allergies or adverse reactions to the drug product prescribed by the patient's physician or for which there is no demonstrated efficacy to the drug prescribed, the pharmacist may substitute the cheaper or more effective drug products, but only with the doctor's prior consent. [Herman Report, p. 7.]

Similarly, the Statement of the Senate Institutions, Health and Welfare Committee accompanying the bill states:

> [A]nother provision of the bill allows the pharmacist to substitute another drug for the prescribed drug, even when the drug to be substituted does not appear on the council's list, *provided* he first obtains the prescriber's approval.

The legislative purpose is clear that a pharmacist is required to obtain the specific approval of a prescriber before substituting a nonequivalent drug for reasons of efficacy, allergies or appropriateness. The legislative intent was to treat such substitutions in precisely the same manner as substitutions of equivalent drugs not listed on the formulary. It is therefore our opinion that unless a substitution is of a less expensive equivalent listed on the formulary, a pharmacist must obtain the approval of the prescriber to substitute such drug product for the product prescribed.

III

You have asked for our opinion as to the treatment of prescriptions written in other states. For the following reasons, you are advised that prescriptions written in other states should be treated under the Act in the same manner as prescriptions written in New Jersey.

Prescriptions written in other states would not generally be set forth in the format called for by the Act. Moreover, a prescriber in another state could not be presumed to have prescribed with the New Jersey Act or formulary in mind. Although the statute expressly provides that such

prescriptions would be valid notwithstanding the failure to utilize the designated form (N.J.S.A. 24:6E-11), the question remains whether such a prescription should be treated in the same manner as a New Jersey prescription with respect to substitution.

One of the policies behind the Act is to require prescribers unfamiliar with available equivalent drug products to make an express choice between the specific product prescribed and a formulary substitution. The presumption is clearly in favor of substitution. This determination having been made, prescriptions written in other states should be treated in the same manner as prescriptions written in New Jersey. The prescriber should be required to expressly prohibit substitution. Since only interchangeable drugs from the formulary may be substituted, unless the prescriber expressly authorizes a specific drug, the public is fully protected.

There are various practical considerations in support of this conclusion. Both the states of New York and Pennsylvania have generic drug laws which require the use of prescription forms containing the words "substitution permissible" or "do not substitute." N.Y. Educ. Law §6816a (1)(a) (McKinney); Pa. Stat. Ann. Tit. 35, §960.3(A) (Purdon). The Pennsylvania statute is similar to the Act in that substitution is mandated unless the prescriber expressly indicates to the contrary. There is a compelling basis for treating Pennsylvania prescriptions in the same manner as those written in New Jersey. Although the New York statute requires a prescriber to expressly authorize substitution, that statute also provides that "in the event a patient chooses to have a prescription filled by an out of state dispenser, the laws of that state shall prevail." N.Y. Educ. Law, §6816a(2). Therefore, in the case of a prescription written in New York State, the laws of that jurisdiction would call for the application of the New Jersey Act.

It is consequently clear that the substantial majority of prescriptions written in other states and received by New Jersey pharmacists will have been written in states whose own laws favor the treatment of those prescriptions in accordance with the New Jersey statute. We cannot assume that the legislature intended a contrary result. It is therefore our opinion that prescriptions written in other states and presented to pharmacists in New Jersey are to be treated in all respects in the same manner as prescriptions written in New Jersey.

IV

You have asked whether a pharmacist should dispense a less expensive generic drug listed on the formulary in a situation where the prescription specifies an inexpensive generic drug by its brand name. It is our opinion for the following reasons that where a pharmacist has a less expensive generic drug listed on the formulary in stock, he is under an obligation to substitute the less expensive generic drug even where the prescription calls for a relatively inexpensive branded generic.

The significance of this inquiry can be illustrated by reference to certain facts before the legislature in its consideration of this enactment. There was a general recognition that many major drug manufacturers who produce branded drugs also produced so-called "branded generics":

> [T]his class of drug is characterized by having a significantly lower price than the long established brand or brands but still bearing the name of a reputable maker. . . . *These drugs cost more than true generics* and acutally represent some drug manufacturer's answer to the increase in generic prescribing by physicians.
>
> . . . .
>
> One would assume that in addition to the extra profit that may be made by establishing a drug product line designated as a 'Branded Generic' are these considerations: . . . that acknowledging among themselves that generically equivalent drugs can be produced at much lower costs, that while they will so promote their product to doctor and pharmacist alike, 'Branded Generic' is another way of still holding out . . . 'that only brand names will do the job . . .'—'*Prescribe generically . . . but not quite generically . . .*' In other words, use our product. *Don't compare price.* We'll do it for you. [Herman Report, pp. 42-44.] [Emphasis added.]

The issue therefore posed is whether a pharmacist must substitute a lower priced generic drug for the prescribed "branded generic" where the branded generic is not the lowest priced product listed on the formulary. The language of the statute as well as the legislative history expressed in the Herman Report indicates that such a substitution should be made. N.J.S.A. 24:6E-7 states that "a different brand name or nonbrand name drug shall be dispensed" by the pharmacist if the product "shall reflect a lower cost to the consumer" and is contained on the formulary. In addition, the Herman Report reflects the understanding that true generics generally are less expensive than branded generics and an implicit purpose to maximize consumer savings. There is no expression of legislative purpose to exempt prescriptions for branded generics from the requirements of the Act where a less expensive equivalent true generic drug is available for sale to the consumer.

It should be parenthetically noted that the Act is designed towards assuring the safety and interchangeability of all drugs listed on the formulary. *See* N.J.S.A. 24:6E-6. Where a pharmacist has a lower priced listed generic equivalent in stock, there would be no reason to deny the consumer the savings of the true generic. Although a consumer may opt for a branded generic, the statute is quite clear that this is a choice to be made by the consumer. *See* N.J.S.A. 24:6E-7. You are therefore advised that where a pharmacist has a less expensive generic drug listed on the formulary in stock, he is under an obligation to substitute the less expensive generic drug, even where the prescription calls for a relatively inexpensive branded generic.

* * *

In summary, you are advised with respect to all of your inquiries as follows: The Act requires substitution of a less expensive generic drug product listed on the formulary for the brand product prescribed, unless the prescriber expressly prohibits substitution. This is true even where a prescription, whether written in New Jersey or out of state, does not use

the form of prescription set forth in the Act. Where a pharmacist desires to substitute a drug product not listed on the formulary including the substitution of a less expensive equivalent drug product, a pharmacist must obtain the specific prior approval of a prescriber even where express general authorization for generic substitution has been given. Finally, substitution is mandated where a prescription calls for a relatively inexpensive branded generic drug and the pharmacist has in stock a less expensive generic drug listed on the formulary.

Very truly yours,
JOHN J. DEGNAN
Attorney General
By: THEODORE A. WINARD
Assistant Attorney General

August 28, 1979

GEORGE H. BARBOUR, *President*
Board of Public Utilities
101 Commerce Street
Newark, New Jersey 07102

FORMAL OPINION NO. 18—1979

Dear President Barbour:

You have inquired as to whether the Hackensack Meadowlands Development Commission (HMDC) can direct the flow of solid waste sought to be disposed of in the Hackensack Meadowlands District (District), to specific waste disposal facilities within said District. It is our opinion that N.J.S.A. 13:17-1 *et seq.* vests such authority in the HMDC.

The HMDC was established in 1968 by the enactment of the Hackensack Meadowlands Reclamation and Development Act, N.J.S.A. 13:17-1 *et seq.* (hereinafter the "Act"), to oversee the orderly, comprehensive reclamation and development of approximately 21,000 acres of marsh and meadowlands which were declared to be a "land resource of incalculable opportunity for new jobs, homes and recreational sites, N.J.S.A. 13:17-1. The Legislature declared that these land resources needed "special protection from air and water pollution and *special* arrangement for the provision of facilities for the disposal of solid waste". *Id.* (Emphasis added.) Thus, solid waste managment in the District was to be one of HMDC's main concerns and the Act vested it with broad authority to deal with this problem. N.J.S.A. 13:17-1 et seq.; *Mun. San. Landfill Auth. v. HMDC,* 120 N.J. Super. 118 (App. Div. 1972); *Kearny v. Jersey City Incinerator Auth.,* 140 N.J. Super. 279 (Ch. Div. 1976).

The Act authorizes the HMDC to formulate a master plan for development in the District. In doing so it must provide disposal facilities for solid waste generated within or brought into the District. N.J.S.A. 13:17-10; N.J.S.A. 13:17-11. The HMDC is also authorized to adopt codes

and standards for the disposal of solid waste. N.J.S.A. 13:17-11. It may acquire, construct, maintain and/or operate solid waste facilities and charge and collect fees for the use of these facilities. N.J.S.A. 13:17-10. Additionally, it is authorized to eliminate existing landfilling techniques and develop new disposal technology. N.J.S.A. 13:17-1; N.J.S.A. 13:17-9(a); N.J.S.A. 13:17-10; N.J.S.A. 13:17-11(a); *Mun. San. Landfill Auth. v. HMDC, supra.* Finally, the Act expressly provides that the written consent of the HMDC is required before anyone can treat or dispose of solid waste in the District. N.J.S.A. 13:17-10(d).

It is clear from the above that the regulatory scheme established by the Act vests the HMDC with broad power to regulate waste treated and disposed of in the District. This includes the authority to control the flow of solid waste within the District. To conclude otherwise would seriously frustrate the legislative intent of the Act by impairing the HMDC's ability to effectively eliminate existing disposal techniques of a less environmentally sound nature, *i.e.,* landfilling, and develop and implement new technology in the waste disposal field such as resource recovery. Thus, it is apparent that in order to permit the HMDC to carry out its mandate regarding waste disposal in the District and the orderly development and reclamation of the region, the Legislature intended that the HMDC would have the authority to control the flow of waste within its boundaries.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

August 28, 1979

ANN KLEIN, *Commissioner*
Department of Human Services
Capital Place One
222 South Warren Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 19—1979

Dear Commissioner Klein:

A question has arisen as to the authority of special policemen at Marlboro State Hospital to patrol the perimeter roads adjacent to that institution. You are advised that special policemen at Marlboro Hospital have the authority to patrol the perimeter roads adjacent to the institution as a means to insure the preservation of order on institutional property and to facilitate the apprehension and return of escapees.

The Commissioner of the now Department of Human Services with the approval of the Attorney General may appoint special policemen for

each state institution. The powers and duties of special policemen are set forth in N.J.S.A. 30:4-14 as follows:

> [W]ithin the territory prescribed and for the time limited he [special policeman] shall have the same powers as a constable of the county or a police officer of a city in criminal cases. *His special duty shall be to preserve order in and about the institution* with power to arrest and hold any offender against the public peace within the limits of his commission. [Emphasis supplied.]

N.J.S.A. 30:4-160 provides that the New Jersey state hospitals shall include the state hospital at Marlboro and "all farms, grounds or places where the inmates thereof may from time to time be maintained, kept, housed or employed."

A resolution of this question turns on a determination of the meaning of the phrase "about the institution" in the above cited statute. Although there is no helpful legislative history, it is instructive to note that where the legislature enacted analogous statutes describing the territorial jurisdiction of special state police forces, it stated its intent to include the streets adjacent to state property. For example, N.J.S.A. 52:17B-9.2 grants authority to the State Capitol police "at, around and between state grounds." Also, N.J.S.A. 18A;6-4.5 empowers campus police officers at the respective state colleges "on contiguous streets and highways." In order to discern the legislative intent, statutes dealing with the same subject matter should be construed together. *Loboda v. Clark Tp.,* 40 N.J. 424, 435 (1963). It is reasonable to assume that by its use of the phrase "in and *about* the institution", the legislature intended not only to encompass the existing buildings and lands of the hospital but also all of the perimeter roads and streets surrounding the hospital premises. It may therefore be concluded that the duties and authority of a police officer enumerated in N.J.S.A. 30:4-14 extended to the perimeter roads of the State institution so long as the exercise of authority on these perimeter roads relates to the primary responsibility of special policemen to preserve institutional order.

This conclusion is reinforced by N.J.S.A. 30:4-116 which provides that:

> The chief executive officer of any state institution, or any subordinate officer or employee of the institution appointed by him in writing as a special officer, shall have power to arrest without warrant any inmate committed thereto by order of any court, who shall leave such institution, without first obtaining a parole or discharge, and return him or her to the institution. *For purpose of retaking, the chief executive officer or special officer may go to any place either within or without the state, where the escaped inmate may be.* [Emphasis added.]

It is well established that in interpreting the scope of an administrative officer's powers, an officer should be deemed to have, in addition to the express authority conferred on him, such incidental authority as may be

reasonably necessary to achieve the desired legislative objectives. *Cammarata v. Essex County Park Commission,* 26 N.J. 404, 411 (1960). It would be unreasonable to assume that hospital policemen could effectively prevent escapes and return wanderers without patrolling the roads adjacent to the hospital property.

For these reasons, you are advised that the jurisdiction of special policemen appointed at State intitutions extends to and includes the perimeter roads adjacent to those institution so long as the exercise of authority on such perimeter roads is consistent with the primary responsibility to preserve institutional order. In addition, special policemen have the incidental authority to patrol the perimeter roads contiguous to those institutions as a necessary means to preserve order on the institution premises and to further the apprehension and return of escapees and wanderers.

Very truly yours,
JOHN J. DEGNAN
Attorney General
By: THEODORE A. WINARD
Assistant Attorney General

October 1, 1979

ANN KLEIN, *Commissioner*
Department of Human Services
Capital Place One
222 South Warren Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 20—1979

Dear Commissioner Klein:

The Division of Youth and Family Services has asked for an opinion as to whether it may refuse to process the adoption application of a married couple solely because they have refused to consent in advance to blood transfusions for their children should they become necessary. The applicants are Jehovah's Witnesses and such consent would violate their religious beliefs. It is our opinion that the Division of Youth and Family Services may take into account a refusal to consent to a blood transfusion for a prospective adopted child along with other pertinent factors bearing on the best interests of the child, but a refusal to provide such consent alone should not be determinative of the best interests of the child in all cases.

It is axiomatic that the primary consideration "in awarding custody of a child is the promotion of the best interests and welfare of the child." *In re Adoption of E,* 59 N.J. 36, 45 (1971). N.J.S.A. 9:3-37. Further, it

is fundamental that determination of the best interests of the child cannot be made "on the basis of speculative and sweeping generalizations." *In re Adoption of E, supra,* 59 N.J. at 56. The decision must be made "in a highly individualistic manner," according to the needs and circumstances of the particular child. *Id.* "Each case is decided on its own facts and circumstances." *Fantony v. Fantony,* 21 N.J. 525, 537(1956).

In identifying the best interests of the individual being considered for adoption, "the paramount considerations are the child's safety, happiness and mental, physical and emotional welfare." *Hoy v. Willis,* 165 N.J. Super. 265, 276 (App. Div. 1978). Any number of factors applicable to these considerations may be relevant to the ultimate evaluation. The income and financial ability to support the child, as well as the living conditions of the prospective adopting family, are important. *See In re Adoption by B,* 63 N.J. Super. 98, 105 (App. Div. 1960). The educational level, work record and marital relationship of those wishing to adopt may be part of the evaluation. *See id.; In re Guardianship of B.C.H.,* 108 N.J. Super. 531, 539 (App. Div. 1970). The psychological attachments formed by the child are often of vital importance. *Sorentino v. Family & Children's Society,* 72 N.J. 127 (1976). Questions of ethics and morality, insofar as they relate to the child's well-being, may also play a part in the decision. *In re Adoption of E, supra,* 59 N.J. at 49-50. Religion, too, may be relevant, and ". . . when coupled with other considerations may be a factor to be weighed by the court in determining the advisability of granting an adoption of a child, that factor barring special circumstances . . . is not and cannot be controlling." *Id.* at 50.

The refusal of prospective adopting parents to consent, in advance, to a blood transfusion for their adoptive child is an insufficient reason to disqualify them from consideration for adoption. The likelihood that a particular child would need a blood transfusion is not great. Moreover, if a blood transfusion should become necessary, a court would exercise its *parens patriae* power to order the transfusion in the best interest of the child. *State v. Perricone,* 37 N.J. 463 (1962), *cert. den.* 371 U.S. 890 (1962); *see John F. Kennedy Memorial Hospital v. Heston,* 58 N.J. 576 (1971). Where a transfusion becomes necessary, then, the State has adequate means at its disposal to protect the child's physical well-being.

On the other hand, the religious practice of the prospective adoptive parents should not always be ignored. It may be considered as a factor in the decision. *See In re Adoption of E, supra,* 59 N.J. at 47-50. The best interests of the child would undoubtedly permit the Division to elect not to place a hemophiliac child for adoption in the home of Jehovah's Witnesses. By the same token, however, the best interests of the child may differ depending on a prior relationship with the adopting parents. For example, a prospective adoptive child may have formed psychological attachments in a foster home which has provided love, guidance and physical well-being. To prohibit an adoption in such a case solely because of a possibility that a blood transfusion may be needed in the future clearly would be inconsistent with the best interests of the child.*

In conclusion, a refusal by Jehovah's Witnesses to consent to provide blood transfusions should not be used by the Division of Youth and Family Services as the sole basis on which to prohibit adoptions by those

persons. However, a refusal to consent to blood transfusions may be taken into account along with other pertinent factors bearing on the best interests of the child.

Very truly yours,
JOHN J. DEGNAN
Attorney General
By: JOSEPH M. GORRELL
Deputy Attorney General

* An administrative policy to impose a blanket prohibition on the adoption of children by Jehovah's Witnesses also raises questions under the Freedom of Religion Clause of the First Amendment to the United States Constitution. Since the likelihood or the need for a transfusion is remote and could in any event be ordered by a court, there is some question whether there would be a constitutionally sufficient justification in furtherance of the best interests of the child for such an absolute ban.

October 9, 1979

CHRISTOPHER DIETZ, *Chairman*
New Jersey State Parole Board
Whittlesey Road
Trenton, New Jersey

FORMAL OPINION NO. 21—1979

Dear Chairman Dietz:

On September 1, 1979 the New Jersey Code of Criminal Justice became effective. The Code substantially revises and codifies the State's criminal law and also impacts on the parole process. As a result, you have asked for our advice with regard to the interpretation of N.J.S.A. 2C:43-9(b) and 2C:46-2 insofar as those statutes bear on the parole revocation process under the jurisdiction of the State Parole Board. In particular, you inquire whether N.J.S.A. 2C:43-9(b) prohibits the forfeiture of credit for time served on parole ("street time") and whether the Parole Board has the authority to revoke parole where a parolee has failed to pay a fine in the manner directed by the Board. It is our opinion that the forfeiture of "street time" on the reimprisonment of an offender upon revocation of his parole is prohibited by the Code. The Parole Board however does retain its preexisting authority to revoke parole because of the failure of a parolee to pay a fine.

Prior to the enactment of the Penal Code, N.J.S.A. 30:4-123.24 provided for the forfeiture of "street time" upon the revocation of parole by the Parole Board. This meant an offender, whose parole had been revoked and then reincarcerated, would lose credit against his sentence for all or part of the time spent on parole. The maximum expiration date of the sentence ordinarily would be administratively extended. The specific

reason for the revocation of the parole would determine the precise amount of the forfeiture. *Bonomo v. New Jersey State Parole Board,* 104 N.J. Super. 226 (App. Div. 1969).

In 1968 a Criminal Law Revision Commission was created by the Legislature and charged with the responsibility of developing a new comprehensive criminal code. The Commission recommended that the practice of forfeiting "street time" upon parole revocation be abolished. The Commission stated:

> A change in existing law is effected by Section 2C:43-9c concerning the period of time which an offender could be required to serve in prison or on reparole, following a revocation of parole. The longer of either the parole term or the maximum sentence, viewed from the date of conviction, governs. It is this period for which the offender may be re-imprisoned upon revocation of parole or subjected to supervision upon re-parole. Time served successfully upon parole prior to revocation serves to reduce the parole term and the maximum sentence despite a later revocation; the offender is not required to 'back up' and serve again in prison any time that he has served upon parole.
>
> We think that this arrangement serves the sense of justice which offenders share with other men and that it is, therefore, desirable in itself and a constructive influence upon correction." [Vol. II. *Final Report of the New Jersey Criminal Law Revision Commission,* p. 322.]

The legislature adopted that recommendation and N.J.S.A. 2C:43-9(b)* provides:

> If an offender is recommitted upon revocation of his parole, the term of further imprisonment upon such recommitment and of any subsequent reparole or recommitment under the same sentence shall be fixed by the parole board *but shall not exceed the original sentence* determined from the date of conviction. [Emphasis added.]

Consequently, it is clear that the maximum expiration date of a sentence may not be extended. The forfeiture of "street time" upon the revocation of an offender's parole would no longer be permissible.

With regard to the question concerning fine payments, the Parole Board is authorized by N.J.S.A. 30:4-123.15 to release an inmate on parole upon condition that any fine imposed on such inmate be paid through the probation office of the county of commitment in amounts to be fixed by the Parole Board. The failure of an inmate to pay such a fine in the manner directed by the Board would be sufficient cause for the revocation of parole.

* N.J.S.A. 2C:43-9(c) was redesignated as N.J.S.A. 2C:43-9(b) by the Amendments to the Code approved on August 29, 1979. L. 1979, c. 178.

The Code also deals with the imposition and collection of fines. In those instance where an individual is delinquent in the payment of his fine, N.J.S.A. 2C:46-2(a) provides in pertinent part:

> When a defendant sentenced to pay a fine or make restitution defaults in the payment thereof or of any installment, the court, upon the motion of the person authorized by law to collect the fine or restitution, the motion of the prosecutor or upon its own motion, may recall him, or issue a summons or a warrant of arrest for his appearance. After a hearing, the court may reduce the fine or restitution, suspend it, or modify the payment or installment plan, or, if none of these alternatives is warranted, may impose a term of imprisonment to achieve the objective of the sentence. The term of imprisonment in such case shall be specified in the order of commitment.

Thus, a court is empowered to impose one of several alternatives, including imprisonment, on an individual for his failure to pay a fine. In light of this authority of a sentencing court, your inquiry is whether the Board's authority derived from N.J.S.A. 30:4-123.15 to revoke parole for the failure to pay a fine has been repealed by the Criminal Code. It is our opinion that the Board retains its authority in this area.

It is clear that the express terms of N.J.S.A. 2C:46-2 do not prohibit the Parole Board from exercising its authority to revoke the parole of a parolee who is delinquent in the payment of a fine. To construe N.J.S.A. 2C:46-2 to do so would suggest that the mechanism for the revocation of parole set forth in N.J.S.A. 30:4-123.15 has been impliedly repealed by the Criminal Code. In establishing the underlying legislative intent, repeals by implication are not favored. In the absence of an express repealer, there must be a clear showing of a legislative purpose to effect a repeal. *New Jersey State P.B.A. v. Morristown,* 65 N.J. 160, 164 (1974). A review of the legislative history reveals a Criminal Law Revision Commission recommendation that the payment of a fine should be a matter for the sentencing court and not for the parole authority. Vol. II, *Final Report, supra,* at 351. It further stated that N.J.S.A. 30:4-123.15 be expressly repealed. This recommendation was not accepted by the legislature and the authority of the Parole Board to revoke parole for the failure to pay a fine has been left intact.

In addition, although both N.J.S.A. 30:4-123.15 and N.J.S.A. 2C:46-2 are designed to insure that fines be paid, the legislative purposes behind the enforcement mechanism set forth in those statutes are quite different. A sentencing court under N.J.S.A. 2C:46-2 is given broad authority to supervise an offender in order to insure compliance with its sentence. The Parole Board is charged with the responsibility to revoke parole in those cases where a parolee has given evidence by his conduct that he is unfit to be further at liberty. N.J.S.A. 30:4-123.23. In appropriate cases the failure of a parolee to pay a fine in the manner directed by the Parole Board shall constitute sufficient cause for revocation of parole. N.J.S.A. 30:4-123.15 and N.J.S.A. 2C:46-2 therefore have distinct and independent legislative objectives. We cannot assume therefore that the legislature by

its enactment of the Code intended to modify the existing authority of the Parole Board to revoke parole for the failure to pay a fine.

In conclusion, you are advised that the Code of Criminal Justice prohibits the forfeiture of "street time" in cases of parole revocation. You are further advised that the Parole Board continues to retain the authority to revoke parole in appropriate cases where a parolee fails to make fine payments in the manner directed by the Board.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

October 11, 1979

JOHN A. WADDINGTON, *Director*
Division of Motor Vehicles
25 South Montgomery Street
Trenton, New Jersey

FORMAL OPINION NO. 22—1979

Dear Director Waddington:

You have asked whether certain Division of Motor Vehicles license suspension proceedings should be conducted by administrative law judges under the Administrative Procedure Act. You have also asked whether the Division may conduct "pre-hearing conferences" in certain cases in order to attempt to resolve them informally with the consent of the parties prior to formal hearing. For the following reasons, it is our opinion that both of these questions should be answered in the affirmative.

I

It is essential to identify the specific type of case to which you refer. Such a case arises when the Division is notified by a court that a motorist has been convicted of a traffic violation or other violation of the Motor Vehicle Code (N.J.S.A. 39:1-1 *et seq.*). Pursuant to N.J.S.A. 39:5-30,[1] the Director has the authority to sanction the offending motorist; with possible sanctions including probation, warning, driver improvement school, and suspension. Notice of proposed suspension is sent to the motorist and a

1. Point system suspensions pursuant to N.J.S.A. 39:5-30.3 also fall within this general category. The point system functions by assigning a specific number of points for each conviction of a traffic violation as set forth in N.J.A.C. 13:19-10.1 *et seq.* When a motorist accumulates 12 or more points within a three-year period, suspension is proposed. Credits are available in particular circumstances, e.g., three credits for each 12-month period of violation-free driving, etc.

"hearing" (sometimes referred to as an "interview" or "conference") is conducted upon request by a hearing officer or "driver improvement analyst" designated by the Director. The motorist normally may introduce evidence of mitigating circumstances, his need for a license, and anticipated hardships resulting from a suspension. At the recommendation of his designee, the Director then provides an appropriate sanction.

A recent amendment to the Adminstrative Procedure Act mandates that:

> All hearings of a State agency required to be conducted as a contested case under this act or any other law shall be conducted by an administrative law judge assigned by the Director of the Office of Administrative Law, except as provided by this amendatory and supplementary act. [N.J.S.A. 52:14B-10(c).]

Thus, the key inquiry is whether the Division's hearings in these cases represent "contested cases" as that term is defined in the Administrative Procedure Act. If so, they will be required to be conducted by an administrative law judge, rather than by Division hearings officers.

At the outset it must be recognized that:

> Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. [*Bell v. Burson,* 402 U.S. 535, 539 (1971).]

In recognition of this fact, the drafters of the Administrative Procedure Act specifically indicated that license revocation proceedings, with certain exceptions, are to be considered as "contested cases." Thus, N.J.S.A. 52:14B-11 mandates that:

> No agency shall revoke or refuse to renew any license unless it has first afforded the licensee an opportunity for hearing in conformity with the provisions of this act applicable to contested cases . . . Any agency that has authority to suspend a license without first holding a hearing shall promptly upon exercising such authority afford the licensee an opportunity for hearing in conformity with the provisions of this act.
>
> This section does not apply (1) where a statute provides that an agency is not required to grant a hearing in regard to revocation, suspension or refusal to renew a license, as the case may be; or (2) where the agency is required by any law to revoke, suspend or refuse to renew a license, as the case may be, without exercising any discretion in the matter, on the basis of a judgment of a court of competent jurisdiction; or (3) where the suspension or refusal to renew is based solely upon failure of the licensee

> to maintain insurance coverage as required by any law or regulation.[2]

See also N.J.A.C. 13:19-1.13, incorporating this language almost verbatim into the Division's own regulations.

The only question then is whether license suspension cases fall within any of these three exceptions. N.J.S.A. 39:5-30 provides that the Director may suspend or revoke a driver's license for any violation of the Motor Vehicle Code "after due notice in writing of such proposed suspension, revocation or prohibition and the ground thereof." The statute then authorizes the Director to summon witnesses "to give testimony *in a hearing* which he holds *looking toward* a revocation of a license" (emphasis supplied) and to delegate the actual conduct of said hearing to designated employees, who shall then recommend to him "in writing, whether the said licenses or certificates shall or shall not be suspended or revoked." Likewise, N.J.S.A. 39:5-30.3 (governing point system suspensions) states that:

> An accumulation of 12 points within a 3 year period may cause a driver to be subject to a hearing . . . on a rule to show cause why his driver's license should not be suspended. . . .

Clearly, neither statute provides that the Director "is not required to grant a hearing" and, in fact, the implication in each is to the contrary.[3] Under both statutes, the Director, after being informed of a licensee's conviction under the Motor Vehicle Act, has complete discretion as to whether, and in what form, an administrative sanction should be imposed. Lastly, none of these cases concern suspensions for failure to maintain insurance. The license suspension proceedings in the present situation, therefore, falling as they do within none of the exceptions listed in N.J.S.A. 52:14B-11, should be conducted as "contested cases" before administrative law judges.

2. A comparable provision in the Federal Administrative Procedure Act, 5 U.S.C.A. 558(c), which states that "[w]hen application is made for a license required by law, the agency . . . within a reasonable time, shall set and complete [contested case-type] proceedings," has been literally interpreted as independently mandating contested case-type hearings in all license application situations, *United States Steel Corp. v. Train,* 556 F. 2d 822, 833-34 (7 Cir. 1977), *New York Path. & X-Ray Lab, Inc. v. Immigration & N.S.,* 523 F. 2d 79, 82 (2 Cir. 1975). *But see Anti-Pollution League v. Castle,* 572 F. 2d 872, n. at 879 (1 Cir. 1978); *Marathon Oil v. Environmental Protection Agency,* 564 F. 2d 1253, n. at 1260-61 (9 cir. 1977), holding that such provision is primarily concerned merely with setting forth the *timing* of administrative hearings in those license suspension cases which otherwise fall within the definition of a "contested case."

3. The holding in *Tichenor v. Magee,* 4 N.J. Super. 467 (App. Div. 1949) that a hearing is discretionary under N.J.S.A. 39:5-30 no longer appears viable, and particularly in light of judicial pronouncements in more recent cases championing the individual's right to a hearing in license suspension situations. *E.g., Bell v. Buson, supra; Bechler v. Parsekian,* 36 N.J. 242 (1961); *Kantor v. Parsekian,* 72 N.J. Super. 588 (App. Div. 1962).

II

With reference to your question concerning the informal settlement of license suspension proceedings, the Administrative Procedure Act provides that:

> Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, or consent order. [N.J.S.A. 52:14B-9(d).]

Since no law prohibits an informal disposition prior to hearing it is clear that the Division may conduct "pre-hearing conferences." In the event an informal voluntary disposition cannot be agreed to after such a conference, a "contested case" hearing should be conducted by an administrative law judge.

It is, therefore, our opinion that Motor Vehicle license suspension hearings held pursuant to N.J.S.A. 39:5-30 should be conducted by administrative law judges as "contested cases." It is further our opinion that the Division of Motor Vehicles may conduct "pre-hearing conference" in an attempt to informally dispose of these license suspension proceedings with the consent of the parties.

Very truly yours,
JOHN J. DEGNAN
Attorney General
By: ROBERT M. JAWORSKI
Deputy Attorney General

October 17, 1979

LOUIS J. GAMBACCINI, *Commissioner*
Department of Transportation
1035 Parkway Avenue
Trenton, New Jersey

FORMAL OPINION NO. 23—1979

Dear Commissioner Gambaccini:

You have asked whether it would be lawful for insurance companies to be involved in the support of public bond issues. The immediate occasion for your inquiry was the selection of the chairman of the board of a major insurance company to head up a Citizens' Coalition to campaign for passage of the Transportation Rehabilitation and Improvement Bond Issue by the voters on November 6. For the following reasons, it is our opinion that there would be no statutory impediment to insurance companies' involvement in public bond referenda.

The controlling statute in this situation is N.J.S.A. 19:34-32 which makes it a misdemeanor[1] for insurance corporations or associations doing

1. Under the terms of the newly enacted Penal Code, a misdemeanor shall constitute for purposes of sentencing a crime of the fourth degree. N.J.S.A. 2C:43-1(b).

business in New Jersey, as well as their officers, directors, stockholders, attorneys or agents to:

> [D]irectly or indirectly, pay or use, or offer, consent or agree to pay or use, any money or property for or in aid of any political party, committee, organization or corporation, or for or in aid of any candidate for political office, or for nomination for such office, or for any political purpose whatsoever, or for the reimbursement or indemnification of any person or money or property so used. . . .

While it is clear that contributions to or in aid of political parties, committees, organizations or candidates would violate the above provision, the answer to your inquiry turns on whether the statute's prohibition on corporate payments for "any political purpose whatsoever" should be interpreted as barring corporate contributions in support of or opposition to a public referendum.

The meaning of the phrase "for any political purpose whatsoever" may be determined by its textual setting in the statutory provision. It is immediately preceded by a ban on corporate contributions for or in aid of a political party or organization, a candidate for political office or for nomination to a political office. All of the items enumerated have a distinctly partisan political character. When general words follow specifically named things of a particular class, the general words should be understood as limited to things of the same class or the same general character. *Transcontinental Gas Pipe Line Corp. v. Dept. of Conservation.* 43 N.J. 135, 146 (1964). It may therefore be assumed that the legislature only intended to prohibit corporate contributions made to or in aid of essentially partisan political objectives and not to embrace a nonpartisan public referendum on an issue of statewide importance. This reading of the statute is also consistent with the rule of statutory construction that in the event of an ambiguity, a criminal statute should be afforded the narrowest possible effect (*State v. Alvearío,* 154 N.J. Super. 135 (App. Div. 1977); *State v. Brenner,* 132 N.J.L. 607, 611 (E. & A. 1945)), which in this case is again to limit its application to only partisan political contributions and expenditures.

This conclusion is supported by case law which stands for the proposition that a statutory ban on corporate political contributions to aid or assist in a public referendum would raise serious questions under the Freedom of Speech Clause of the First Amendment to the United States Constitution. In *First National Bank of Boston v. Belotti,* 98 S.Ct. 1407 (1978), a Massachusetts statute restricted corporate contributions in support of a public referendum to only instances when an issue "materially affected" a corporation's business, property or assets. The United States Supreme Court held the statute to be in violation of the First Amendment since the speech which is protected by the Freedom of Speech Clause would include that of a corporation informing the public on matters of general interest. Although the Court acknowledged a legitimate government interest in preventing the corruption of elected officials (which led to the enactment of laws regulating corporate participation in partisan elections),

it concluded that there was insufficient justification to restrict corporate contributions and expenditures for the purpose of influencing a vote on a public referendum. The Court stated:

> [T]here has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda. . . . Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections [citations omitted] simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it. . . . [98 S.Ct. at 1423.]

In this instance, an interpretation of N.J.S.A. 19:34-32 to prohibit corporate contributions toward the passage or defeat of a public bond referendum would be clearly inconsistent with the decision of the Court in *Belotti.*

The decision of the United States Court of Appeals in *Schwartz v. Rommes,* 495 F. 2d 844 (2d Cir. 1974), dealt with a New York statute which is almost identical to N.J.S.A. 19:34-32. In that case the New York Telephone Company's financial contributions to a committee in support of a proposed state transportation bond issue were challenged as violative of the state statute. The court held that contributions to a nonpartisan transportation bond referendum were not encompassed within the meaning of "any political purpose whatsoever." The court noted that:

> Corporate funds paid to a candidate or political party have the potential of creating debts that must be paid in the form of special interest legislation or administrative action. In contrast, when the issue is one to be resolved by the public electorate monies paid by a corporation for public expression of its views create no debt or obligation on the part of the voters to favor a corporate contributor's special interest. [495 F. 2d at 851.]

2. An analogous statute in N.J.S.A. 19:34-45 provides that no corporation carrying on the business of a bank, savings bank, cooperative bank, trust, trustee, savings indemnity, safe deposit, insurance, railroad, street railway, telephone, telegraph, gas, electric light, heat or power, canal or aqueduct company or having the right to condemn land or franchises in public ways shall pay or contribute money to aid the nomination or election of any person or to aid or promote the interests of any political party. There is in this instance no prohibition on contributions or expenditures "for any political purpose whatsoever" and the ban is directed solely to persons and political parties. Consequently, there also would be no legal impediment to contributions and expenditures by the corporations enumerated in that statutory section to influence the vote on a nonpartisan public referendum.

Although we conclude there would be no statutory impediment under the election laws, it should be made clear that the Board of Public Utilities could determine in individual instances to disapprove such expenditures as allowable expenses in a rate case.

The Court of Appeals concluded that to construe the statute in any other manner would raise serious questions as to its constitutionality.

In sum, it may be assumed to be the legislative purpose that the New Jersey statute serves the same valid objectives as comparable statutes interpreted by the courts. The legislative ban on corporate contributions for "any political purpose whatsoever" in N.J.S.A. 19:34-32 would not, therefore, include a prohibition on aid or assistance to a nonpartisan public referendum. You are therefore advised that an insurance corporation and its officers or agents are not prevented from providing financial or other support toward the passage of the 1979 Transportation Rehabilitation and Improvement Bond Issue.[2]

Very truly yours,
JOHN J. DEGNAN
Attorney General
By: THEODORE A. WINARD
Assistant Attorney General

October 23, 1979

SIDNEY GLASER, *Director*
Division of Taxation
West State and Willow Streets
Trenton, New Jersey 08625

FORMAL OPINION NO. 24—1979

Dear Director Glaser:

You have asked whether a surviving spouse who was less than 55 years old at the time of his or her senior citizen spouse's death is entitled to the additional annual homestead rebate of $50 on attaining age 55. You are advised that unless the surviving spouse is over 65, or is permanently and totally disabled, or was 55 at the time of his or her eligible spouse's death, the surviving spouse is not eligible for the additional $50 rebate.

All residents and citizens of New Jersey are entitled to homestead rebates on real property owned and used as a principal residence. N.J.S.A. 54:4-3.80. Additionally:

> *If such citizen and resident* of this State is of the age of 65 or more years, or is less than 65 years of age yet permanently and totally disabled, as "disabled" is defined in the "New Jersey Gross Income Tax Act" (54A:1-2f), or *is the surviving spouse of a deceased citizen and resident of this State* who during his lifetime received a real property tax deduction pursuant to this act or P.L. 1963, c. 172 (C. 54:4-8.40 et seq.), upon the same conditions, with respect to real property, notwithstanding that said surviving spouse is under the age of 65 and is not permanently and totally

> disabled, *provided that said surviving spouse was 55 years of age or older at the time of death of said citizen* and resident and remains unmarried, said taxpayer *shall* annually, upon proper claim being made therefor, *be entitled to an additional rebate*. . . . [N.J.S.A. 54:4-3.80a.] [Emphasis added.]

The constitutional authority for the statute is found in Art. VIII Sec. 1, para. 5 of the New Jersey Constitution which provides for the homestead rebates as follows:

> The Legislature may adopt a homestead statute which entitles homeowners, residential tenants and net lease residential tenants to a rebate or a credit of a sum of money related to property taxes paid by or allocable to them at such rates, and subject to such limits, as may be provided by law. Such rebates or credits *may include a differential rate or credit to citizens and residents who are* of the age of 65 or more years, or less than 65 years of age who are permanently and totally disabled according to the provisions of the Federal Social Security Act, or are *55 years of age or more and the surviving spouse* of a deceased citizen or resident of this State who during his lifetime received, or who, upon the adoption of this amendment and the enactment of implementing legislation, would have been entitled to receive a rebate or credit related to property taxes. [Emphasis added.]

You have suggested that a comparison of the underlined passages in the above-quoted statutory and constitutional provisions reveals that the language of the constitutional authorization is broader than the statutory enactment. An examination of the legislative history of these two provisions, however, indicates that the Constitution was amended with the specific intent of authorizing additional rebates for senior citizens and surviving spouses with the precise requirements of the statute in mind (i.e., age 55 or older at the death of the senior citizen spouse). N.J.S.A. 54:4-3.80 was originally enacted as part of L. 1976, c. 72. Between its referral to the Assembly Taxation Committee of the same year, 24 separate actions on this bill (A 1330, 1976) were taken by the legislature. Thus, the bill was frequently amended and carefully considered. The bill originally contained language providing for the additional senior citizen rebate which extended that additional rebate to surviving spouses who were 55 at the time of their senior citizen spouse's death.

On May 13, 1976 the Attorney General issued *Formal Opinion No. 15—1976* which concluded that the additional senior citizen rebate set forth in A-1330 violated the constitutional mandate in Art. VIII, Sec. 1, para. 1 requiring uniformity in property taxation. At that time, Art. VIII, Sec. 1, para. 5 of the Constitution only provided as follows:

> The Legislature may adopt a homestead statute which entitles homeowners, residential tenants and net lease residential tenants to a rebate or a credit of a sum of money related to property taxes paid by or allocable to them at such rates, and subject to such limits, as may be provided by law.

The reaction to the *Formal Opinion* was swift. On the very same day the Senate Revenue Finance and Appropriations Commitee deleted the unconstitutional language from the pending bill. However, on May 19, 1976 the Senate restored the provisions providing for additional senior citizen rebates. On May 24, 1976, Assembly Concurrent Resolution No. 109 which was eventually passed and adopted by the voters amending and adding the second sentence to Art. VIII, Sec. 1, para. 5 of the Constitution was introduced. The intention of the proposed constitutional amendment clearly was to make differential senior citizen rebates constitutional. This intention was expressly set forth in the sponsor's statement on the concurrent resolution:

> The purpose of this amendment is to provide for a differential homestead rebate or credit on property taxes for senior citizens, disabled persons or their surviving spouses. The senior citizen and disabled homestead rebate or credit, under this amendment, follows the person who otherwise qualifies.
>
> The Constitutional Amendment is *designed to eliminate questions of interpretation of the language granting differential homestead tax rebates or credits for senior citizens, the disabled and surviving spouses* which have arisen by virtue of a recent opinion of the Attorney General which seriously affects the application of differential homestead exemptions for senior citizens *presently provided for in Assembly Committee Substitute Official Copy Reprint, for Assembly Bill No. 1330 of 1976 now pending before the Legislature.* [Emphasis added.]

The subsequent history of ACR 109 1976 and A 1330, 1976 are so inextricably intertwined that one can reasonably conclude that they were viewed by the Legislature as part of a package granting to surviving spouses additional rebates consistent with the statutory formulation. ACR 109 passed in the Assembly on July 2. A 1330 passed in the Assembly on July 7. Both were passed in the Senate on July 8. The Governor approved the statute on August 30, 1976. The voters approved the constitutional amendment on November 2, 1976.

It is an established principle of statutory construction that contemporaneous enactments of the Legislature are to be read consistently and harmoniously whenever possible. *Department of Labor and Industry v. Cruz.* 45 N.J. 372, 377 (1965). By similar reasoning, the same principle should also apply in the interpretation of a constitutional amendment proposed to the people contemporaneously with the enactment of a statute *in pari materia.* The usual situation in which this principle is applied is the case of a statute enacted subsequent to the formal adoption of a constitutional provision. The principle would appear even more applicable in the present situation of statutory and constitutional provisions approved contemporaneously by the Legislature and directed to the same subject matter.

Therefore, it is our opinion that the Legislature intended Art. VIII, Sec. 1, para 5 of the Constitution to only authorize the additional rebate provided for by N.J.S.A. 54:4-3.80 for surviving spouses who are 55 or

more at the time of a senior citizen spouse's death. The constitutional provision does not provide authorization to grant a senior citizen homestead rebate to a surviving spouse who attains age 55 after the death of the eligible senior citizen spouse.*

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: JOSEPH C. SMALL
Deputy Attorney General

* In any event, the constitutional amendment in Art. VIII, Sec. 1 para. 5, is permissive in character and authorizes the legislature to enact in its discretion a homestead rebate law which may include rebates to residents who are "55 years of age or more and the surviving spouse." It is clear that pursuant to this constitutional authorization, the legislature could enact a statute which was more restrictive than the constitutional provision. Therefore, a legislative determination to limit the rebate to only that class of surviving spouse who is at least 55 at the time of the death, of his or her spouse would be consistent with the constitutional amendment even if it could be read to permit the legislature to extend the benefit to surviving spouses who were under that age at the time of their spouse's death.

October 23, 1979

WILLIAM H. FAUVER, *Commissioner*
Department of Corrections
Whittlesey Road
Post Office Box 7387
Trenton, New Jersey 08628

FORMAL OPINION NO. 25—1979

Dear Commissioner Fauver:

In *Formal Opinion No. 21-1979,* dated October 9, 1979, it was concluded that the forfeiture of credit for time served on parole (street time) on the reimprisonment of an offender upon revocation of his parole is prohibited by the Code of Criminal Justice. As a result of that opinion, you have asked whether a parolee should continue to receive credit toward his sentence for a period of time during which he has absconded from and avoided parole supervision. For the following reasons, it is our opinion that credit for time served on parole may not be claimed for a period of time during which a parolee has unlawfully absconded and absented himself from parole supervision.

N.J.S.A. 2C:43-9(b) provides:

> If an offender is recommitted upon revocation of his parole, the term of further imprisonment upon such recommitment and of any subsequent reparole or recommitment under the same sentence shall be fixed by the parole board *but shall not exceed the original sentence* determined from the date of conviction. [Emphasis added.]

Although the statutory language provides that the term of further imprisonment upon revocation of parole should not exceed the original sentence, it is well established that a "mere lapse of time without imprisonment or other restraint contemplated by the law does not constitute service of a sentence." *Anderson v. Corall,* 263 U.S. 193, 196, 44 S.Ct. 43, 68 L.Ed. 247 (1923). A parolee remains in the constructive custody of the superintendent of the institution from which he was paroled and under the immediate supervision of the State Parole Board. N.J.S.A. 30:4-123.15; *Anderson, supra.* Therefore, time served on parole would constitute the service of a sentence. *Anderson, supra; Zerbst v. Kidwell,* 304 U.S. 359, 58 S.Ct. 872, 82 L.Ed. 399 (1938). On the other hand, an unlawful absence from such custody and supervision would not constitute the service of a sentence. Rather, such an occurrence may be compared to an escape of a prisoner or to the reincarceration of a parolee for a subsequent offense. In either event, the running of the original sentence would clearly be tolled. *Anderson, supra; Zerbst, supra; Shaw v. Hatrak,* 164 N.J. Super. 414, 418, 419 (App.Div. 1978). Consequently, an administrative extension of a maximum expiration date of a sentence on the recommitment of a parolee to coincide with the period of time during which the parolee has unlawfully absented himself, would not increase the original sentence in contravention of N.J.S.A. 2C:43-9(b).

This conclusion is supported by principles of statutory construction. It is clear that legislation should not be interpreted in a manner to reach unreasonable or absurd results. *State v. Gill,* 47 N.J. 441, 444 (1966). Were an absconder to be given credit for a period of time during which he was not under parole supervision, he could avoid recommitment at all if he avoided recapture until his maximum sentence had expired.[1] The Legislature certainly cannot be assumed to have intended such an absurd result. Another principle of statutory construction is that primary regard must be given to the fundamental purpose for which the legislation was enacted and the spirit of the law will control over a literal reading of its terms. *N.J. Builders, Owners and Managers Assn. v. Blair,* 60 N.J. 330, 338 (1970). The overall legislative objective to insure the public safety by preventing the commission of offenses through the deterrent influence of sentences and the confinement of offenders would be frustrated if a parolee were to be given credit toward his sentence for a period of time during which he has absconded from and avoided parole supervision. N.J.S.A. 2C:1-2(b)(3).

This conclusion draws further support from a review of the legislative history of the statute.[2] The N.J. Criminal Law Revision Commission in

1. An absconder from parole supervision may not be charged with escape under the new Code. N.J.S.A. 2C:29-5(a).

2. N.J.S.A. 2C:43-9(c), recommended by the Commission, was substantially identical to N.J.S.A. 2C:43-9(b), which was ultimately enacted.

providing recommendations to the Legislature perceived the extension of a maximum expiration date of a sentence for a minor violation of parole to be unjustifiably harsh. Vol. II, *Final Report of the New Jersey Criminal Law Revision Commission,* p. 322. The Commission stated that under the terms of its proposed revision:

> [T]*ime served successfully* upon parole prior to revocation serves to reduce the parole term and the maximum sentence despite a later revocation; the offender is not required to 'back up' and serve again in prison any time that he has served upon parole. [*Final Report* at 322.][3] [Emphasis supplied.]

Thus, although it was the objective of the Commission to eliminate the dual effect of both a recommitment of a parolee and the forfeiture of credit for time served successfully on parole, it is readily apparent that it was not its purpose to provide credit on parole for the time during which a parolee has avoided parole supervision. The Commission could not have contemplated the period during which a parolee remained unlawfully absent from parole supervision as being "time served successfully on parole." The Legislature enacted N.J.S.A. 2C:43-9(b) as recommended by the Criminal Law Revision Commission and it may be presumed that it was conversant with and accepted the Commission's recommendations as its own.

For these reasons, it is our opinion that a parolee, on revocation of parole, may not receive credit on a sentence for a period of time during which he has unlawfully absconded and absented himself from parole supervision. Therefore, the maximum expiration date of the original sentence may be administratively extended upon revocation of parole for a period of time equal to the time during which a parolee has unlawfully absented himself from parole supervision.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: ROBERT A. SHIRE
Deputy Attorney General

3. The Commission noted that where the revocation was based upon the commission of a crime while on parole, a separate sentence could additionally be imposed upon conviction for the crime.

November 9, 1979

WILLIAM FAUVER, *Commissioner*
Department of Corrections
Whittlesey Road
P. O. Box 7387
Trenton, New Jersey 08628

CHRISTOPHER DIETZ, *Chairman*
New Jersey State Parole Board
Whittlesey Road
P. O. Box 7387
Trenton, New Jersey 08628

FORMAL OPINION NO. 26—1979

Gentlemen:

You have requested our advice as to whether a sentence to the state prison can be aggregated with a sentence to a county correctional institution for the purpose of determining a single parole eligibility date. Further, assuming the propriety of such aggregation, you have inquired as to the appropriate manner of awarding commutation credits on such a combined sentence. For the following reasons, you are advised that the New Jersey State Parole Board is vested with the authority to determine a single parole eligibility date on a combined sentence required to be served in the state prison. You are also advised that commutation credits provided in N.J.S.A. 30:4-140 should be credited to an inmate on aggregated terms of confinement required by law to be served in the state prison.

In August 1978 the legislature adopted a new comprehensive Penal Code for the State of New Jersey to become effective on September 1, 1979. N.J.S.A. 2C:1-1 *et seq.* With regard to the question at hand, the Code of Criminal Justice provides a means for the determination at the place of confinement of offenders sentenced under its provisions. N.J.S.A. 2C:43-10. A person sentenced to a term of imprisonment of less than one year should be committed to the jail, penitentiary or workhouse of the county in which he is convicted, except that in a county of the first class having a workhouse or penitentiary no sentence of greater than six months shall be made to a county jail. N.J.S.A. 2C:43-10(c). An offender sentenced to a term of imprisonment of one year or greater should be committed to the Department of Corrections and incarcerated in the state prison, except than an offender may be committed to a county penitentiary or workhouse where the sentence does not exceed 18 months. N.J.S.A. 2C:43-10(a), (b). It is therefore clear from this statutory scheme that the place of confinement is determined by the length of the sentence imposed by the court.[1] Furthermore, where a person is sentenced to more than one term of imprisonment and the sentences are consecutive, N.J.S.A.

1. It should be noted that an individual may be sentenced to an indeterminate term of incarceration. The parole authority with respect to such sentences resides in the appropriate Board of Trustees and not the State Parole Board. *See* N.J.S.A. 30:4-146 et seq., 30:4-153 *et seq.*

2C:43-10(d) provides that "the terms shall be aggregated for the purpose of determining the place of imprisonment . . . ."[2]

In order to determine the role of the Parole Board under this amended statutory scheme, it is necessary to briefly review the existing authority of that agency. The Parole Board has been given the duty to determine the time and conditions under which persons serving sentences in the state prison may be released on parole.[3] N.J.S.A. 30:4-123.5. Further, the Parole Board has been vested with the responsibility to determine the parole of inmates sentenced to county correctional institutions where an inmate has been sentenced to a term having a maximum greater than one year and who has served at least one year of such term.[4] N.J.S.A. 30:4-123.35. In sum, therefore, the Parole Board is the paroling authority for offenders sentenced to confinement in the state prison or to county correctional facilities for a period of one year or more.

A reading of the statutory authority of the Parole Board together with the newly imposed requirements regarding the place of confinement of inmates would, therefore, lead to the following conclusions. An offender sentenced to multiple consecutive county sentences that total 12 months

2. While the statute does not provide a definition of consecutive terms of incarceration, it should be noted that sentences which are concurrent in part and consecutive in part may properly be aggregated for purposes of the calculation of parole eligibility dates. *Formal Opinion No. 8—1977. Memorandum Opinion of Attorney General 1959—P-4.* There is no reason why the same result should not obtain for purposes of determining the place of imprisonment under an aggregated sentence. Therefore, multiple county sentences or a multiple state/county sentence, which are concurrent in part and consecutive in part, may be aggregated in order to determine where the offender is to be confined.

3. N.J.S.A. 30:4-123.5 provides in pertinent part:

> It shall be the duty of the board to determine when, and under what conditions, subject to the provisions of this act, persons now or hereafter serving sentences having fixed minimum and maximum terms or serving sentences for life, in the several penal and correctional institutions of this State may be released upon parole.

This statute defines the Board's parole jurisdication with respect to inmates serving minimum-maximum terms in state institutions. Such inmates are state prison inmates since N.J.S.A. 2A:164-17 requires that all sentences to the state prison be for a minimum-maximum term. *Cf.* N.J.S.A. 30:4-148; 30:4-155. The Penal Code does away with minimum-maximum terms. Rather, an offender is sentenced for a specific term of years, N.J.S.A. 2C:43-6; 2C:43-7. However, this change in the style of sentencing was not meant by the legislature to delimit the Board's jurisdiction with respect to inmates sentenced under the Penal Code and committed to the state prison. N.J.S.A. 2C:43-9(a).

4. The pertinent part of N.J.S.A. 30:4-123.35 provides:

> any prisoner in a county penitentiary serving a term having a maximum greater than a year and who has served at least one year of such term shall be permitted to make application to the board for parole.

The statute refers to inmates serving sentences in the county penitentiaries. However, parole eligiblity is available to inmates of county jails and county workshouses on the same conditions applicable to inmates of county penitentiaries under N.J.S.A. 30:4-123.35. *Davis v. Heil,* 132 N.J. Super. 283 (App. Div. 1975), *aff'd* 68 N.J. 423 (1975).

or greater in the aggregate would be confined in the state prison unless a county has a penitentiary or workhouse. Thus, the State Parole Board would be the paroling authority for such an inmate, since he would in all likelihood be confined in the state prison and the total aggregate length of sentences imposed is greater than one year. N.J.S.A. 30:4-123.35. It is furthermore clear that where the total of multiple county sentences in the aggregate exceeds 18 months, an individual would be required to be confined in the state prison (N.J.S.A. 2C:43-10(d), N.J.S.A. 2C:44-5(a)(2)), and the Parole Board would be the paroling authority for such an offender. In any case where it is determined by a court to be appropriate to impose consecutive sentences in whole or in part to state and county correctional institutions (N.J.S.A. 2C:44-5), an offender should be confined in the state prison since the total aggregate sentence would be in excess of one year. The Parole Board would in this case as well be the paroling authority, since the offender is confined in the state prison and the total aggregate length of sentences is greater than one year. In all of the above cases, therefore, an offender is within the authority of the Parole Board and it may determine a single parole eligibility date for the aggregated sentence required to be served in the state prison.

There is no similar statutory provision which provides for the aggregation of sentences for the determination of the place of confinement prior to the enactment of the Criminal Code. It is our opinion, however, that the same conclusion should obtain in those cases as well. N.J.S.A. 30:4-123.10 provides in pertinent part:

> Whenever, after the effective date of this act, 2 or more sentences to run consecutively are imposed at the same time by any court of this State upon any person convicted of crime herein, there shall be deemed to be imposed upon such person a sentence the minimum of which shall be the total of the minimum limits of the several sentences so imposed, and the maximum of which shall be the total of the maximum limits of such sentences. For purposes of determining the date upon which such a person shall be eligible for consideration for release on parole, the board shall consider the minimum sentence of such person to be the total aggregate of all the minimum limits of such consecutive sentences and the maximum sentence of such person to be the total aggregate of all of the maximum limits of such consecutive sentences.
>
> With regard to consecutive sentences imposed upon prisoners prior to July 3, 1950, and also with regard to consecutive sentences imposed upon prisoners subsequent to July 3, 1950, by different courts at different times, all such consecutive sentences, with the consent of the prisoner, may be aggregated by the board to produce a single sentence, the minimum and maximum of which shall consist of the total of the minima and maxima of such consecutive sentences. Such aggregation shall be for the purpose of establishing the date upon which such prisoner shall be eligible for consideration for release on parole.

It is clear that minimum-maximum consecutive sentences required to be served in the state prison may be aggregated for purposes of determination of a single parole eligibility date on both sentences. Although the express terms of the statute do not refer to the aggregation of state prison sentences with consecutive sentences to county correctional institutions, the decision of the Supreme Court of New Jersey in *Cain v. New Jersey State Parole Board,* 78 N.J. 253 (1978), provides a compelling analogy. The court held in that case that consecutive sentences to a county correctional institution, irrespective of the length of each term, may be aggregated for purposes of the determination of a single parole eligibility date under N.J.S.A. 30:4-123.10. The fixed term imposed in a sentence to a county institution is to be taken as both a minimum and maximum for the purposes of aggregation under the statute.

Consequently, it would seem reasonable to assume that the Parole Board should similarly have jurisdiction to aggregate and determine a single parole eligibility date for consecutive sentences to the state prison and to a county correctional institution which in the aggregate total one year or more. An inmate sentenced to consecutive state and county sentences would be within the authority of the Parole Board on account of the state prison sentence even without regard to the length of the consecutive county sentence. Also, N.J.S.A. 30:4-123.10 expressly provides that all consectutive minimum-maximum sentences may be aggregated for the purpose of determining parole eligibility. It is clear from *Cain* that county sentences may be regarded as minimum-maximum sentences for the purposes of aggregation. Secondly, sentence aggregation for minimum-maximum terms is essentially for the purpose of determining a point at which, during the service of a sentence, an offender may be released from confinement in a custodial facility.[5] To require an inmate to shuttle between the state prison and a county penal facility in order to serve a portion of a sentence to that facility before total release from confinement would frustrate the underlying legislative benefit conferred by the provision for aggregation of sentences. *In re Fitzpatrick,* 9 N.J. Super. 511 (Cty. Ct. 1950), *aff'd* 14 N.J. Super. 213 (App. Div. 1951). Finally, the aggregation of sentences under these circumstances would have the beneficial effect of harmonizing the treatment of inmates sentenced prior to the effective date of the Penal Code with those sentenced after that date.

In sum, the Parole Board has the authority to determine a single parole eligibility date for an inmate who is sentenced to either consecutive terms in the state prison and in a county correctional facility or to multiple terms in a county correctional facility which in the aggregate total more than one year. This conclusion is consistent with the underlying holding of the Supreme Court of New Jersey in *Cain* that criminal offenders should be considered for parole release by the State Parole Board without regard to the length of their individual sentences if the aggregate total of those sentences is for a duration of greater than one year.

5. Parole has been defined as a procedure whereby a prisoner is permitted to serve the final portion of his sentence *outside* the gates of the institution on certain terms and conditions in order to prepare him for his eventual return to society. *In re Clover,* 34 N.J. Super. 181, 188 (App. Div. 1955).

You further inquire, assuming state and county consecutive sentences and multiple county sentences should be aggregated for determining the place of incarceration in the state prison, as to the appropriate manner of providing commutation/good time credits on an aggregated sentence. It is necessary to briefly review the legislative provision for commutation and good time credits in both state and county correctional institutions in order to put this question in the proper context. Prior to the enactment of the Penal Code, inmates of the state prison serving minimum-maximum sentences received commutation credits for continuous orderly deportment. This served to reduce both the minimum and maximum terms of such sentence. N.J.S.A. 30:4-140. The entire appropriate statutory entitlement was credited to the inmate as of his commitment to the state prison and was subject to divestment only if the inmate engaged in flagrant misconduct, *Formal Opinion No. 16—1976.* Similarly, inmates serving sentences in county jails and penitentiaries were permitted to receive, on account of good conduct, a remission with respect to the service of their sentences. N.J.S.A. 2A:164-24. Both of these statutes, then, enhance the ability of officials to maintain discipline in correctional facilities. Since these statutes were not repealed by the legislature when it enacted the Code of Criminal Justice, it is evident that the legislature intended these credits to be applied to sentences imposed under the Code.

Although inmates of both state and county correctional institutions are eligible to receive credits for good behavior, the statutory scheme for the award of credits is different. An inmate of a county correctional institution cannot receive more than one day of credit in the remission of his sentence for every six days of his sentence, regardless of the length of the sentence. On the other hand, commutation credits are remitted to inmates of state correctional institutions on a progressive schedule linked directly by N.J.S.A. 30:4-140 to the length of the sentence in years or a fractional part thereof. Therefore, the place of confinement mandated by law is determinative of the manner in which good time credits are received by an inmate.

It is evident on the face of N.J.S.A. 30:4-140 that the legislature has directed prison officials to remit the progressive time credits upon any person committed to any state correctional institution. Where an offender by reason of his term of imprisonment is deemed to be a state prison inmate, he should receive commutation credits as of the date that his sentence requires confinement in the state prison. In the case of multiple state prison/county correctional institution sentences, an inmate should be awarded the progressive commutation credits set forth in N.J.S.A. 30:4-140 on the total aggregated sentence for which an inmate must be confined in the state prison. Where N.J.S.A. 2C:43-10 mandates that a sentence or multiple sentences to a county correctional institution be served in the state prision, commutation credits provided under N.J.S.A. 30:4-140 should be awarded to an inmate as of the date that such county inmate must be confined in the state prison.

In conclusion, it is our opinion that the State Parole Board has the authority to compute a single parole eligibility date on an aggregated sentence required to be served in the state prison. It is further our opinion that the Department of Corrections should award commutation credits

provided by N.J.S.A. 30:4-140 on the full aggregated sentence required to be served in the state prison.

Very truly yours,
JOHN J. DEGNAN
Attorney General
By: THEODORE A. WINARD
Assistant Attorney General

December 20, 1979

JOANNE E. FINLEY, M.D., M.P.H.
Commissioner of Health
Department of Health
Health and Agriculture Building
Trenton, New Jersey 08625

FORMAL OPINION NO. 27—1979

Dear Dr. Finley:

You have asked whether regulations recently adopted by the Public Health Council of the Department of Health with respect to smoking in certain public places have been superseded by provisions of the State's new criminal code.

The Public Health Council, which consists of eight members appointed by the Governor, is empowered, among other functions, to adopt "such reasonable sanitary regulations *not inconsistent with* the provisions of this act or *the provisions of any other law of this State* as may be necessary properly to preserve and improve the public health in this State." (Emphasis added.) Such regulations are designated as the State Sanitary Code. N.J.S.A. 26:1A-7. The Sanitary Code "may cover any subject affecting public health, or the preservation and improvement of public health and the prevention of disease in the State of New Jersey," including, among other designated functions, "prohibiting nuisances hazardous to human health." *Ibid.*

In December 1978 a public hearing on proposed smoking regulations was conducted by former Judge Goldmann on behalf of the Council. Following the submission of an extensive Report and Recommendations, the Council in April 1979 adopted smoking regulations substantially as proposed in a notice published in the New Jersey Register in November 1978. N.J.A.C. 8:15-1.1 *et seq.* Essentially, the regulations which apply to certain restaurants, retail food stores, health care facilities, and places of public assembly or attendance, require the owner or operator of such establishments to restrict smoking to designated "smoking permitted" areas and to provide adequate mechanical means of ventilation of smoke in these areas. They are scheduled to go into effect on January 1, 1980.

The Sanitary Code regulations contain a specific reference to the provision of the new Code of Criminal Justice that imposes quasi-criminal

penalties against persons who smoke in certain public places. N.J.A.C. 8:15-1.5(c). N.J.S.A. 2C:33-13 reads in full as follows:

> a. Any person who smokes or carries lighted tobacco in or upon any bus or other conveyance, other than in the places provided, is a petty disorderly person.
>
> b. Any person who smokes or carries lighted tobacco in any public place, including but not limited to places of public accommodation, where such smoking is prohibited by municipal ordinance under authority of R.S. 40:48-1 and 40:48-2 or by the owner or person responsible for the operation of the public place, and when adequate notice of such prohibition has been conspicuously posted, is guilty of a petty disorderly persons offense. Notwithstanding the provisions of 2C:43-3, the maximum fine which can be imposed for violation of this section is $200.00.
>
> c. *The provisions of this section shall supersede any other statute and any rule or regulation adopted pursuant to law.* [Emphasis added.]

This provision replaced a more narrow provision of Title 2A that prohibited smoking or carrying lighted tobacco only in buses or trolley cars and made violations punishable by a maximum fine of $25. N.J.S.A. 2A:170-65.

The issue here is whether the subsection of N.J.S.A. 2C:33-13 that "supersedes any other statute and any rule or regulation adopted pursuant to law" serves to invalidate the Sanitary Code regulations in question. Obviously, this repealing clause cannot be read literally, for to do so would mean the obliteration of every other existing law and regulation. On the other hand, there can be no doubt from the language of this clause that it was intended to be far-reaching. Since the superseding clause of N.J.S.A. 2C:33-13 does not explicitly designate that "statutes, rules or regulations" intended to be repealed, it is appropriate in attempting to ascertain the precise scope of this clause to seek whatever guidance may be gleaned from the statute's legislative history. As the court stated in *Cath. Char., Dio. of Camden v. Pleasantville,* 109 N.J. Super. 475, 485 (App. Div. 1970), "It is . . . clear that when uncertainties or ambiguities exist it is appropriate for the court, in order to ascertain legislative intent, to examine the history of the enactments, including any statements attached to the bills which were enacted into law."

The legislative history of N.J.S.A. 2C:33-13 unequivocally establishes a legislative intent to supersede the Sanitary Code regulations at issue. A statement on the Assembly bill that culminated in N.J.S.A. 2C:33-13 states that its purpose is "to clarify that smoking in a public place is to be governed by the municipal ordinance or by the owner or person responsible for the operation of the pubic place." Any doubt left by this statement respecting the intent to preclude regulation of smoking in public places by government bodies other than municipalities is dispelled by the statement filed by the Senate Judiciary Committee. That statement avers that the purpose of N.J.S.A. 2C:33-13 is "to clarify that smoking in a public place is to be governed by the municipal ordinance or by the owner or

person responsible for the operation of the public place and *not by rule or regulations of an executive agency. The amendment would preclude enforcement of smoking regulations by an executive agency.*" (Emphasis added.)

We are mindful of the significant public health objectives underlying adoption of the Sanitary Code smoking regulations. As noted at the outset, however, the very statute pursuant to which the regulations were adopted states that Code regulations promulgated by the Public Health Council must be consistent with State statutes. *See Borden's Farm Products v. Board of Health,* 36 N.J. Super. 104, 114 (Law Div. 1955). In view of the unequivocal evidence of legislative intent to preclude the Council from adopting or enforcing regulations respecting smoking in public places, it must be concluded that the Sanitary Code regulations in question are superseded by N.J.S.A. 2C:33-13.

For these reasons, it is our opinion that the regulations promulgated by the Public Health Council dealing with smoking in public places in N.J.A.C. 8:15-1.1 *et seq.* have been superseded by the Code of Criminal Justice. Accordingly, the regulations may not be implemented or enforced.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

January 10, 1980

JOSEPH P. LORDI, *Chairman*
Casino Control Commission
379 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 1—1980

Dear Chairman Lordi:

You have inquired with regard to the legality of a backgammon tournament which a casino hotel operator proposes to sponsor at its business premises. The hotel operator is currently undecided as to whether or not to charge a nominal admission fee to the tournament or to permit free participation by the contestants. We have concluded that the proposed backgammon tournament would not violate the criminal laws of New Jersey provided that no admission fee is charged, either directly or indirectly, for participation in the tournament.

The backgammon tournament format at issue is fairly standard and has been utilized at casinos throughout the world, including Las Vegas, Monte Carlo and Paradise Island in the Bahamas. Backgammon is a game in which a series of counters are moved over a board with the object of placing all the counters in a prescribed position. The movement of the

counters is governed by the roll of dice. The results of a throw of the dice are applicable only to the contestant on behalf of whom the dice are thrown. Certain positioning of the counters in the course of the game will increase the probability of victory. A player who is adept at manipulating his or her counters to attain favorable positions has an advantage. Nonetheless, no matter how skilled a player is, she or he can only manipulate the counters in conformity to the roll of the dice. Hence, an unskilled player who attains a series of favorable throws of the dice can defeat a more skilled player whose throws of the dice preclude advantageous movement of her or his counters.

The sponsor of the proposed tournament intends to conduct the contest on a limited participation basis. The number of entries will be finite. Each player will engage in a single game of backgammon with another player. The loser is eliminated from the competition, while the winner goes on to play another round against another player. The single elimination process is repeated in a series of rounds until only one player remains undefeated. He or she is the winner of the competition. The tournament itself consists of a number of such single elimination contests so that each player has more than one opportunity to win. The winners of these various competitions are rewarded with valuable prizes, including substantial quantities of cash.

The purpose of the tournament is to promote commercial activity at the hotel and casino in which the tournament is being conducted. Additional spinoff benefits may accrue to other enterprises doing business in the general area. The tournament's sponsors hope to schedule it at a period when lessened commercial activity is anticipated at the hotel-casino.

New Jersey's Constitution establishes an antigambling policy. *N.J. Const.* (1947), Art. IV, §7, par. 2; *see F.O. No. 9, 1978.*[1] The Legislature has effectuated this policy through a series of statutory enactments. Those enactments applicable in the criminal context are embodied in the provisions of N.J.S.A. 2C:37-1 *et seq.* which superseded, on September 1, 1979, N.J.S.A. 2A:112-1 *et seq.* and N.J.S.A. 2A:121-1 *et seq. See* N.J.S.A. 2C:98-2.

Pursuant to N.J.S.A. 2C:37-2 promoting gambling is a criminal offense punishable by a scale of sanctions which range from a third degree crime to a disorderly persons offense. Criminal liability for maintaining a place where gambling activity is taking place is created by N.J.S.A. 2C:37-4.

1. The constitutional prohibition on legislatively authorized gambling provides:

> 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 casted 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 . . . . [*N.J. Const.* (1947), Art. IV. §7, par. 2.]

Casino gambling, state lotteries to aid education and raffles and bingo games sponsored by charitable organizations have been exempted from this anti-gambling proscription. *N.J. Const.* (1947), Art. IV, §7, par. 2(A), (B), (C).

N.J.S.A. 2C:37-1(b) provides:

> "Gambling" means staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the actor's control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

This definition requires that a participant must risk "something of value" before any gambling can occur. "Something of value" is separately defined in N.J.S.A. 2C:37-1(d) as such items as money or tokens or such intangible forms of consideration as extensions of credit or free entries into games for which a charge is generally exacted.[2] If the participants in the backgammon tournament were required to pay any admission fee directly or indirectly, then they would be "risking" something of value on their chances of success in the tournament. However, the absence of any admission fee would preclude a finding that any gambling activity could occur because the backgammon players would not be risking "something of value." This same analysis would apply to the question of whether the backgammon tournament was a "lottery," within the meaning of N.J.S.A. 2C:37-1 *et seq.* Lotteries are defined as a specialized form of gambling scheme in which "something of value" is tendered as a consideration for participation. N.J.S.A. 2C:37-1(h). Once again, the absence of an admission fee establishes that nothing of value, as defined in the Code of Criminal Justice, will be transferred by the participants to the promoters or sponsors of the backgammon tournament. It seems clear that the definition of "something of value" in N.J.S.A. 2C:37-1(d) means that mere participation, or presence, by a contestant will not constitute "consideration" sufficient to support the existence of a lottery in violation of the criminal law. This is consistent with recent views on the scope of the concept of "consideration" in the gambling and lottery context. *See, e.g., F.O. No. 9, 1978.*

Finally, the promotors of the backgammon tournament have asserted that, "no betting of any kind on the players or the outcome will be permitted or sanctioned." This is essential because any betting, including the formation of pools or "auctions" in which monies are divided based upon the results of the tournament, would constitute "gambling" within the meaning of N.J.S.A. 2C:37-1(b). The promotors or facilitators of any such pools or auctions would be criminally liable for promoting gambling in violation of N.J.S.A. 2C:37-2. If the hotel-casino operators know that such gambling activity is taking place on portions of their premises open to the general public, then they and the hotel-casino will be criminally liable under N.J.S.A. 2C:37-4 for maintaining a gambling resort. *See*

2. N.J.S.A. 2C:37-1(d) provides:

> "Something of value" means any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly comtemplating transfer of money or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.

N.J.S.A. 2C:37-1(j). Provided that no such activity is permitted and that no admission fee is assessed either directly or indirectly such as by conditioning participation on the purchase of any goods or services, the proposed backgammon tournament will not contravene the criminal laws of New Jersey.

Very truly yours,
JOHN J. DEGNAN
Attorney General
By: EDWIN H. STIER
Assistant Attorney General

January 18, 1980

MR. BARRY SKOKOWSKI
Acting Director
Div. of Local Government Services
Department of Community Affairs
363 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 2—1980

Dear Mr. Skokowski:

You have raised questions as to whether municipalities and counties are permitted to enter into agreements with non-profit corporations to provide for the investment of deferred compensation funds or to participate in commercially managed investment firms providing plans for deferred compensation. You are hereby advised that municipalities and counties are not authorized to enter into agreements with either non-profit or commercially-operated organizations which provide for the investment of deferred compensation funds.

Any municipality or county may set up a deferred compensation plan for its employees. N.J.S.A. 43:15B-1 *et seq.* A local unit which establishes such a plan must designate one or a group of its public officials or its governing body as the "named fiduciary" responsible for implementing the plan. The named fiduciary is empowered to take "any steps reasonably necessary to implement the plan *consistent with this act* (emphasis added)" and with the requirements of the Internal Revenue Service. N.J.S.A. 43:15B-3(e). N.J.S.A. 43:15B-3(a) requires that the employer (the local unit) shall invest all moneys from the plan which are not needed for immediate payment of benefits in one of three specific ways: interest-bearing securities in which savings banks of the State are authorized to invest their funds; deposits in interest-bearing accounts; or deposits in the State of New Jersey Cash Management Fund. N.J.S.A. 43:15B-3(b) further provides that if the State creates a deferred payment compensation plan, the local units may participate in that plan. (Such a plan was created

through the enactment of L. 1978, c. 39, N.J.S.A. 52:18A-163 *et seq.*) However, N.J.S.A. 43:15B-1 *et seq.* contains no specific provision authorizing the local units to enter into agreements with organizations offering deferred compenation plans.

In fact, the legislative history of the act clearly indicates that the Legislature did not intend to permit such activity. When the act was first introduced on February 9, 1976, as A-1475, it authorized local units to invest deferred compensation funds in interest-bearing securities in which savings banks of the State were authorized to invest their funds or to make deposits in interest-bearing accounts. Additionally, the bill specifically authorized the investment of such funds in plans which involved either the purchase of a group annuity contract from an insurance company or

> b. Entering into a trust and other agreements with a national non-profit organization offering a deferred compensation plan as a service to employers. [A-1475, §5b.]

Clearly, this version of the bill would have permitted the use of outside deferred compensation plans by local units as an alternative to investment in interest-bearing securities in which savings banks of the State might invest their funds, to deposits in interest-bearing accounts or to the purchase of group annunity contracts.

In April of 1977, a bill, S-3223, was introduced to create the State of New Jersey Cash Management Fund and to permit local units to deposit their moneys in the Fund instead of in approved banks or trust companies.* Subsequently, on June 27, 1977, the Senate amended A-1475. The amendment deleted section 5 of the bill, which permitted use of national non-profit deferred compensation plans, and added a new section 3 which permitted the local units to invest in the New Jersey Cash Management Fund or in any State deferred compensation plan which might be created in the future. Further, on December 1, 1977, the Senate also deleted from the bill a separate paragraph, originally part of §5, which permitted the employer to enter into an agreement with an entity designated by the employee to provide for the investment of amounts of deferred compensation. *See* Governor's comments to Assembly Bill No. 1475, December 1, 1977. These amendments clearly indicate that the Legislature intended to remove from the local units the option of using private deferred compensation plans or investment services and instead to limit the investment or deposit of unneeded deferred compensation funds by such units to other specific, statutorily delineated categories of investment.

Such an interpretation is supported by a comparison of N.J.S.A. 43:15B-1 *et seq.*, with the express language in N.J.S.A. 52:18A-163 *et seq.*, which established the New Jersey State Employees Deferred Compensation Board. In contrast to the provisions of N.J.S.A. 43:15B-1 *et seq.*, the latter statute explicitly provides that the New Jersey State Employees Deferred Compensation Board may contract.

* S-3223 was enacted and was signed into law on November 2, 1977, as L. 1977, c. 281. It established the State and New Jersey Cash Management Fund, N.J.S.A. 52:18A-90.4, and authorized local units to participate therein. N.J.S.A. 40A:5-14.

> [w]ith one or more private organizations for the administration of all or part of the [deferred compensation] plan, including the management and investment or either thereof of deferred and deducted salary funds . . . . [N.J.S.A. 52:18A-167(a)(2).]

The Board's decision to make such a contract is subject to the prior approval of the State Investment Council. *Id.* The statute also provides that such private organizations may not distribute information about any deferred compensation program or benefits without prior approval from the Division of Investment. N.J.S.A. 52:18A-167(d).

Thus, where the Legislature intended to authorize the use of private deferred compensation plans, it did so through an explicit, regulated scheme. N.J.S.A. 43:15B-1 *et seq.* lacks any such specific authorization for the use of private deferred compensation organizations. Further, since specific permissive language was actually deleted from the original bill, it is reasonable to conclude that the Legislature did not intended to permit local entities to participate in privately operated plans or to permit named fiduciaries of the local units to make agreements with non-profit entities for the investment of deferred compensation funds. Rather, the statutory scheme provides that local entities are to invest any deferred compensation funds, not immediately required for use, only in those types of investments which the Legislature has expressly described in the act.

In conclusion, you are advised that counties and municipalities are not authorized to participate in commercially managed deferred compensation plans or to enter into agreements with non-profit corporations to provide for the investment of deferred compensation funds. You are further advised, however, that such local units may participate in any deferred payment compensation plan established by the State for the State's employees and, through such a plan, in any deferred compensation plans administered and managed by private organizations with whom the New Jersey State Employees Deferred Compensation Board may contract.

Very truly yours,
JOHN J. DEGNAN
Attorney General
By: SUSAN L. REISNER
Deputy Attorney General

January 18, 1980

MR. BARRY SKOKOWSKI
Acting Director
Div. of Local Government Services
Department of Community Affairs
363 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 2—1980

Dear Mr. Skokowski:

You have raised questions as to whether municipalities and counties are permitted to enter into agreements with non-profit corporations to provide for the investment of deferred compensation funds or to participate in commercially managed investment firms providing plans for deferred compensation. You are hereby advised that municipalities and counties are not authorized to enter into agreements with either non-profit or commercially-operated organizations which provide for the investment of deferred compensation funds.

Any municipality or county may set up a deferred compensation plan for its employees. N.J.S.A. 43:15B-1 *et seq.* A local unit which establishes such a plan must designate one or a group of its public officials or its governing body as the "named fiduciary" responsible for implementing the plan. The named fiduciary is empowered to take "any steps reasonably necessary to implement the plan *consistent with this act* (emphasis added)" and with the requirements of the Internal Revenue Service. N.J.S.A. 43:15B-3(e). N.J.S.A. 43:15B-3(a) requires that the employer (the local unit) shall invest all moneys from the plan which are not needed for immediate payment of benefits in one of three specific ways: interest-bearing securities in which savings banks of the State are authorized to invest their funds; deposits in interest-bearing accounts; or deposits in the State of New Jersey Cash Management Fund. N.J.S.A. 43:15B-3(b) further provides that if the State creates a deferred payment compensation plan, the local units may participate in that plan. (Such a plan was created through the enactment of L. 1978, c. 39, N.J.S.A. 52:18A-163 *et seq.*) However, N.J.S.A. 43:15B-1 *et seq.* contains no specific provision authorizing the local units to enter into agreements with organizations offering deferred compenation plans.

In fact, the legislative history of the act clearly indicates that the Legislature did not intend to permit such activity. When the act was first introduced on February 9, 1976, as A-1475, it authorized local units to invest deferred compensation funds in interest-bearing securities in which savings banks of the State were authorized to invest their funds or to make deposits in interest-bearing accounts. Additionally, the bill specifically authorized the investment of such funds in plans which involved either the purchase of a group annuity contract from an insurance company or

> b. Entering into a trust and other agreements with a national non-profit organization offering a deferred compensation plan as a service to employers. [A-1475, §5b.]

Clearly, this version of the bill would have permitted the use of outside deferred compensation plans by local units as an alternative to investment in interest-bearing securities in which savings banks of the State might invest their funds, to deposits in interest-bearing accounts or to the purchase of group annunity contracts.

In April of 1977, a bill, S-3223, was introduced to create the State of New Jersey Cash Management Fund and to permit local units to deposit their moneys in the Fund instead of in approved banks or trust companies.* Subsequently, on June 27, 1977, the Senate amended A-1475. The amendment deleted section 5 of the bill, which permitted use of national non-profit deferred compensation plans, and added a new section 3 which permitted the local units to invest in the New Jersey Cash Management Fund or in any State deferred compensation plan which might be created in the future. Further, on December 1, 1977, the Senate also deleted from the bill a separate paragraph, originally part of §5, which permitted the employer to enter into an agreement with an entity designated by the employee to provide for the investment of amounts of deferred compensation. *See* Governor's comments to Assembly Bill No. 1475, December 1, 1977. These amendments clearly indicate that the Legislature intended to remove from the local units the option of using private deferred compensation plans or investment services and instead to limit the investment or deposit of unneeded deferred compensation funds by such units to other specific, statutorily delineated categories of investment.

Such an interpretation is supported by a comparison of N.J.S.A. 43:15B-1 *et seq.*, with the express language in N.J.S.A. 52:18A-163 *et seq.*, which established the New Jersey State Employees Deferred Compensation Board. In contrast to the provisions of N.J.S.A. 43:15B-1 *et seq.*, the latter statute explicitly provides that the New Jersey State Employees Deferred Compensation Board may contract.

> [w]ith one or more private organizations for the administration of all or part of the [deferred compensation] plan, including the management and investment or either thereof of deferred and deducted salary funds . . . . [N.J.S.A. 52:18A-167(a)(2).]

The Board's decision to make such a contract is subject to the prior approval of the State Investment Council. *Id.* The statute also provides that such private organizations may not distribute information about any deferred compensation program or benefits without prior approval from the Division of Investment. N.J.S.A. 52:18A-167(d).

Thus, where the Legislature intended to authorize the use of private deferred compensation plans, it did so through an explicit, regulated scheme. N.J.S.A. 43:15B-1 *et seq.* lacks any such specific authorization for the use of private deferred compensation organizations. Further, since specific permissive language was actually deleted from the original bill, it is reasonable to conclude that the Legislature did not intended to permit

* S-3223 was enacted and was signed into law on November 2, 1977, as L. 1977, c. 281. It established the State and New Jersey Cash Management Fund, N.J.S.A. 52:18A-90.4, and authorized local units to participate therein. N.J.S.A. 40A:5-14.

local entities to participate in privately operated plans or to permit named fiduciaries of the local units to make agreements with non-profit entities for the investment of deferred compensation funds. Rather, the statutory scheme provides that local entities are to invest any deferred compensation funds, not immediately required for use, only in those types of investments which the Legislature has expressly described in the act.

In conclusion, you are advised that counties and municipalities are not authorized to participate in commercially managed deferred compensation plans or to enter into agreements with non-profit corporations to provide for the investment of deferred compensation funds. You are further advised, however, that such local units may participate in any deferred payment compensation plan established by the State for the State's employees and, through such a plan, in any deferred compensation plans administered and managed by private organizations with whom the New Jersey State Employees Deferred Compensation Board may contract.

Very truly yours,
JOHN J. DEGNAN
Attorney General
By: SUSAN L. REISNER
Deputy Attorney General

January 25, 1980

JERRY FITZGERALD ENGLISH, *Commissioner*
Department of Environmental Protection
Labor and Industry Building
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPINION NO. 3—1980

Dear Commissioner English:

The Solid Waste Administration has requested an opinion interpreting the Solid Waste Management Act and the Solid Waste Utility Control Act of 1970, to determine whether solid waste management districts, acting pursuant to solid waste management planning, have the authority to require that solid waste generated within the districts be directed to specific waste disposal facilities. Please be advised that the planning districts have authority to formulate a solid waste management plan showing the destination of wastes generated within the districts, and that the New Jersey Department of Environmental Protection has final authority to approve and render operative such a plan. Similarly, the Board of Public Utilities Commissioners may designate a solid waste management district as a franchise area to be served by one or more persons engaged in solid waste disposal, and in this manner the B.P.U. may exercise control over the destination of the waste stream.

At the outset, it is important to recognize that environmentally sound

solid waste disposal, as well as the efficient and economical provision of solid waste collection and disposal services, are matters which directly affect the public health, safety and welfare. N.J.S.A. 13:1E-2, N.J.S.A. 48:13A-2. *Hackensack Meadowlands v. Mun. Landfill Authority,* 68 N.J. 451 (1975); *Southern Ocean Landfill v. Ocean Tp.,* 64 N.J. 190 (1974). The Legislature has therefore enacted a comprehensive scheme mandating the strict regulation of all solid waste collection and disposal operations. N.J.S.A. 13:1E-1 *et seq.,* N.J.S.A. 48:13A-1 *et seq.* To ensure environmental quality, the Act prohibits any person from engaging "in the collection or disposal of solid waste" without obtaining approval from the DEP. N.J.S.A. 13:1E-5(a). Moreover, in order to assure the economic integrity of the operation, no person may engage "in the business of solid waste collection or solid waste disposal until a certificate of public convenience and necessity" is issued by the B.P.U., N.J.S.A. 48:13A-1, 6 *et seq.* In combination, these statutes provide for a far-reaching regulatory program designed to remedy the "grave problem" to the public health generated by improper solid waste collection and disposal. N.J.S.A. 13:1E-2.

The Act initiates this overall solid waste management scheme by mandating a regional planning approach as a basis for solid waste collection and disposal throughout the State. N.J.S.A. 13:1E-2, 4, 5, 20 *et seq.* This planning required by the Act consists of several distinct stages, and commences with the promulgation by the DEP of "general guidelines sufficient to initiate the solid waste management process by solid waste management districts . . ." N.J.S.A. 13:1E-6(a)(3). These "planning districts" are coincidental with the twenty-one counties and the Hackensack Meadowlands Development Commission. N.J.S.A. 13:1E-19.

The next step in the planning process is actual plan formulation and development by the planning districts. N.J.S.A. 13:1E-20, 21. This entails comprehensive planning studies to obtain regional data, including an inventory and appraisal of all facilities within the district. N.J.S.A. 13:1E-21. The waste disposal needs of the region, as well as a strategy to be applied in meeting same, are also to be developed, N.J.S.A. 13:1E-21, and a site plan depicting the location of "suitable sites to provide solid waste facilities" to meet such regional needs must be prepared. N.J.S.A. 13:1E-21(b)(3). It is also required that during this planning process, the districts analyze the "solid waste collection systems and transportation routes" within the respective districts. N.J.S.A. 13:1E-21(a)(4). The clear objective is thus to commence formulation of a management plan which most effectively and economically controls waste collection and disposal. N.J.S.A. 13:1E-2, 6, 7, 20 *et seq.*

After the district plan is formulated, the plan must then be submitted to the public for comment at a public hearing. N.J.S.A. 13:1E-23(c), N.J.S.A. 13:1E-24(c)(e). Thereafter, the district must "adopt or reject, in whole or in part, the solid waste management plan." N.J.S.A. 13:1E-23(e). Any plan so adopted must include all facilities approved by the DEP during the district's period of initial plan formulation. N.J.S.A. 13:1E-4(b).

Finally, after promulgation of the guidelines and after these prior stages of plan development, public hearings, and adoption of a plan in whole or in part by a district, the planning scheme is concluded by submission of the plan to the Commissioner of the DEP for review and final

approval. The Commissioner has authority to modify, reject or approve such plans, and to set forth the procedures to be followed by a district upon remand of the plan. N.J.S.A. 13:1E-24. In the final analysis, the Commissioner is authorized to "adopt and promulgate any modification or replacement he deems necessary with respect to the solid waste management plan." N.J.S.A. 13:1E-24(g). This power is to be exercised so as to encourage "maximum practicable use of resource recovery" facilities. N.J.S.A. 13:1E-6(a)(3), 6(b)(1), N.J.S.A. 13:1E-21(b)(2). The districts must then implement the plan ordered and approved by the Commissioner. N.J.S.A. 13:1E-24(f).

It is against the background of this mandatory planning system that the question herein presented must be considered. Review of the Act demonstrates that the actual authority granted to the districts is to plan for solid waste management within the district, and subsequently to implement the respective solid waste management plans. N.J.S.A. 13:1E-20 *et seq.* As an integral part of this planning process, the district is to develop a strategy to most effectively provide waste disposal services to the region. N.J.S.A. 13:1E-21(b)(2). The districts are to consider, among others, such planning elements as transportation routes, economic impacts, suitable sites, and encouragement and implementation of resource recovery. N.J.S.A. 13:1E-21. The apparent intent of such comprehensive planning is to coordinate solid waste management on a regional and State-wide basis. N.J.S.A. 13:1E-2. The management plan developed by the district may therefore provide for the channelization of wastes to specific facilities if such planning is reasonably deemed to best effectuate the regional strategy so formulated. District planning may thus provide an effective blueprint setting forth the disposal sites for wastes generated within the region. See, N.J.S.A. 13:1E-20, 21 and N.J.S.A. 13:1E-2(c), where the Act refers to "particular facilit[ies] . . . [which have been] designated [in the plan] as the place of disposal . . .".

Since the DEP is required, after approval of the plan, to register only those facilities (including collection and disposal operations) which conform to the district plan, any new registration may be conditioned upon receipt of wastes as directed in the district plan. N.J.S.A. 13:1E-4, 5, 26. Moreover, the registrations of existing facilities, in appropriate instances, may be amended by the DEP to reflect the provisions of the district plan, N.J.S.A. 13:1E-5(c), thereby bringing present facilities into compliance with the legislative objective and planned concept to direct waste in such a manner as to effect environmentally sound and economically efficient solid waste management. As a result of district planning, a waste management strategy directing the solid waste stream to specific facilities may be developed by the districts. After approval of such a district plan by the DEP, the strategy may be implemented by the respective districts, N.J.S.A. 13:1E-4, 20 *et seq.*

Similarly, the B.P.U. is integrally involved in this management process. Not only can the B.P.U. designate a district as a "franchise area to be served by one or more persons engaged in solid waste collection . . . [and] disposal," but also by regulating the rate structures of solid waste facilities, the B.P.U. can encourage a marketplace where the new and established operators may be motivated towards conformity with the district plan. N.J.S.A. 48:13A-5, N.J.S.A. 48:13A-4, 7; N.J.S.A. 13:1E-2, 22, N.J.S.A. 48:2-25. In this manner, the strategy directing wastes to specific disposal/processing facilities can be further effectuated.*

It is therefore our opinion that the Solid Waste Management Act and the Solid Waste Utility Control Act establish the authority of the solid waste districts through their comprehensive planning to direct the flow of wastes to selected destinations. The exercise of administrative authority by the DEP can effectuate compliance with the district plans, and the B.P.U. can either directly franchise an area, or otherwise influence the marketplace through rate-setting in such a manner as to affect the flow of waste materials throughout the districts. N.J.S.A. 13:1E-1 *et seq.*, N.J.S.A. 48:13A-1 *et seq.* N.J.S.A. 48:2-1 *et seq.* Therefore, through the combined abilities of the districts, the DEP and the B.P.U., solid waste generated within a district may be directed to specific waste disposal facilities.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: NATHAN M. EDELSTEIN
Deputy Attorney General

* The overall management scheme set forth in the Act and the Utility Act involving regulation of both the environmental and economic aspects of solid waste collection, utilization and disposal may necessitate control over the flow of wastes from point of generation to final disposal. *See, Public Hearing Before New Jersey Legislature Senate Committee(s) on Energy, Agriculture and Environment and County and Municipal Government on Senate Bill No. 624* (Solid Waste Management)(1974) (Statement of Senator Matthew Feldman); N.J.S.A. 13:1E-2, N.J.S.A. 48:13A-2. If, for example, the complex technology associated with resource recovery is to be phased in throughout the State, as required in the Act, N.J.S.A. 13:1E-2, 6, 21, then the waste stream must be directed in such a manner as to encourage the development of these facilities. *Cf. In re Combustion Equipment Associates, Inc.*, 169 N.J. Super. 305 (App. Div. 1979). The means selected by the Legislature to accomplish such a comprehensive waste management program is regional planning, from which will be determined "the most efficient, sanitary and economical ways of collection, disposing, limiting, and utilizing solid waste . . ." N.J.S.A. 13:1E-2(b)(6), *see also,* N.J.S.A. 48:13A-2, 5. These regional plans then form the basis against which any application for a solid waste collection or disposal registration must be evaluated by the DEP, N.J.S.A. 13:1E-4, 26, and upon which the B.P.U. is to exercise its licensing authority, N.J.S.A. 48:13A-5, 6.

January 31, 1980

MR. BARRY SKOKOWSKI
Acting Director
Div. of Local Government Services
Department of Community Affairs
363 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 4—1980

Dear Mr. Skokowski:

You have inquired as to whether amounts to be raised by a municipality to cover an anticipated deficit in the budget of a municipally owned or operated utility are to be considered as exempt from the municipality's cap under the Local Government Cap Law. For the reasons set forth below, you are advised that those amounts which a municipality may appropriate in anticipation of a deficit in its utility budgets for a forthcoming fiscal year are not exempt from a municipality's budget cap.

Municipalities are by statute authorized to establish or acquire and to own or operate various types of public utilities. N.J.S.A. 40:62-1 *et seq.* Further, they are authorized to establish rental or other charges for such services as may be provided by such utilities. N.J.S.A. 40:62-13; N.J.S.A. 40:62-77. The revenues generated by the operation of such utilities as well as the appropriations made for such operations are required to be set forth in a separate section of the budget of any municipality which owns or operates such a utility. N.J.S.A. 40A:4-33. Such appropriations are further required to be separated into at least three categories, specifically operations, interest and debt retirement, and deferred charges and statutory expenditures. N.J.S.A. 40A:4-34. Additionally, all moneys derived from the operation of such a utility, as well as any other moneys applicable to its support, are to be segregated and kept in a separate fund known as a "utility fund" and are, subject to N.J.S.A. 40A:4-35, to be applied only to the payment of the operating and upkeep costs and the debt service charges of the utility. N.J.S.A. 40A:4-62.

In the event that the operation of a municipally owned or operated public utility has resulted or will result in a deficit, then a municipality is required to include in its utility budget an appropriation sufficient to cover such a deficit. N.J.S.A. 40A:4-35. The purpose underlying this requirement would clearly appear to be a furtherance of the general policy of the Local Budget Law, N.J.S.A. 40A:4-1 *et seq.*, that all local governing bodies operate on a "cash basis" and accordingly appropriate sufficient moneys in their annual budgets to meet all anticipated expenditures during the course or the fiscal year. N.J.S.A. 40A:4-2; N.J.S.A. 40A:4-3.

N.J.S.A. 40A:4-45.3(e) excludes from a municipality's budget cap any amounts appropriated to fund a preceding year's deficit. It provides as follows:

> In the preparation of its budget a municipality shall limit any increase in said budget to 5% over the previous year's final appropriations subject to the following exemptions:

* * *

> e. Amounts required for funding a *preceding year's* deficit; . . . [Emphasis supplied.]

As was noted in *Formal Opinion No. 3—1977*, p. 9, the apparent intent of the Legislature in providing for such an exclusion was to exempt from the spending limitation established by the Local Government Cap Law any amounts necessary to fund *deficits from preceding years* created by the failure of local governments to realize revenues anticipated for such years. Futher, as was noted in that opinion, the exclusion created by N.J.S.A. 40A:4-45.3(e) serves to ensure that appropriations made to cover a preceding year's deficit which has resulted from a shortfall in the collection of anticipated revenues in the preceding year, whether for general municipal or municipal utility purposes, will not occasion cuts in other government services in the following year. *Formal Opinion No. 3—1977*, p. 9.

In construing a statute, it is clear that the language in the provision is to be given its ordinary and well-understood meaning unless an explicit indication exists to the contrary. *Service Armament Co. v. Hyland*, 70 N.J. 550 (1976); *Safeway Trails, Inc. v. Furman*, 41 N.J. 467 (1964), *cert. denied* 370 U.S. 14, 85 S. Ct. 144, 13 L. Ed. 2d 84. In reading N.J.S.A. 40A:4-45.3(e) in light of this principle, it is evident from the plain and ordinary meaning of the language in the provision that the Legislature intended that the exclusion set forth therein apply only to deficits which had arisen in a preceding fiscal year and not to deficits which are anticipated in the coming fiscal year. *Formal Opinion No. 3—1977* reflects this conclusion. Such a conclusion is also supported by the fact that where the Legislature has intended to encompass both existing and anticipated deficits in a statutory provision, it has done so explicitly in a manner which indicates that it intends to encompass both. *See* N.J.S.A. 40A:4-35. Further, whereas not excluding appropriations to cover a preceding year's deficit from a municipality's cap might well have the consequence of reducing the appropriations available for other necessary governmental services, such is not the case with regard to anticipated deficits since a governing body which owns or operates a public utility can for a forthcoming fiscal year increase the rental or other charges it makes for the services provided by the utility to ensure that the revenues available to the utility will meet the cost of such a utility. *See, e.g.*, N.J.S.A. 40:62-13; N.J.S.A. 40:62-77. A municipality may then, without being restricted under the Local Government Cap Law, to appropriate such revenues to offset anticipated costs in the operations of the utility. You are, therefore, advised that a municipality may not exclude from its budget cap any amounts appropriated to cover an anticipated deficit in the budget of a municipal owned or operated utility.

Very truly yours,
JOHN J. DEGNAN
Attorney General
By: DANIEL P. REYNOLDS
Deputy Attorney General

February 26, 1980

HON. DONALD P. LAN
Secretary of State
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 5—1980

Dear Secretary Lan:

You have requested an opinion as to whether a candidate for election to the Legislature must meet the qualifications for office set forth in the State Constitution by election day or by the day he assumes office. For the reasons set forth herein, you are advised that a candidate for the Senate or General Assembly must satisfy the minimum age requirement at the time that he is sworn into office, that he must have met the respective citizenship and residency qualifications by election day, and that he must be entitled to the right of suffrage on the day that he files a certificate of acceptance with the Secretary of State, be that at the time of filing a petition or upon accepting a write-in nomination.

The qualifications for eligibility for the Legislature are set forth in *N.J. Const.*, Art. IV, §1, par. 2:

> No person shall be a member of the Senate who shall not have attained the age of thirty years, and have been a citizen and resident of the State for four years, and of the district for which he shall be elected one year, next before his election. No person shall be a member of the General Assembly who shall not have attained the age of twenty-one years and have been a citizen and resident of the State for two years, and of the district for which he shall be elected for one year, next before his election. No person shall be eligible for membership in the Legislature unless he be entitled to the right of suffrage.

Thus, a candidate for either the General Assembly or the Senate must meet a set of three general qualifications:

1. minimum age requirement (Senate—30 years; General Assembly—21 years),
2. citizenship and residency requirements (Senate—"citizen and resident of the State for four years, and of the district . . . one year"; General Assembly—"citizen and resident of the State for two years, and of the district . . . one year"), and a
3. requirement that he be entitled to the right of suffrage.

The general rule is that the time as of which eligibility to an office is to be determined is to be discovered in applicable statutes or constitutional provisions. *Murray v. Murray,* 7 N.J. Super. 549, 556 (Law Div. 1950). In this case, the phrase "next before his election" would not appear to qualify the respective minimum age requirements; indeed, such a coupling would not provide a sensible phrase sequence [*e.g.* "shall . . . have attained the age of thirty years, . . . next before his election"]. Since the minimum age is a requisite to "membership" in the Legislature, it must

be assumed, in the absence of any further qualifier, that it must be satisfied by the time that the individual will be sworn into office. *Cf. Wurtzel v. Falcey,* 69 N.J. 401 (1976).

However, the phrase "next before his election" manifestly is intended to apply to the citizenship and residency requirements. Accordingly, by election day, a candidate for the Senate must "have been a citizen and resident of the State for four years and of the district . . . one year," and a candidate for General Assembly must "have been a citizen and resident of the State for two years and of the district . . . one year." These citizenship and residency requirements are computed backwards from election day.

The Constitution also sets forth as a requirement of membership in either house of the Legislature that the person be "entitled to the right of suffrage." A separate provision of the Constitution defines those persons who shall be entitled to the right of suffrage, *N.J. Const.,* Art. II, par. 3(a).* Although the Constitution provides no definitive guide as to the time when this constitutional requirement must be satisfied, the procedural provisions of the election laws do impose certain requirements. In this regard, a candidate for the Legislature is obliged to file a petition with the Secretary of State to appear either on the primary election ballot or directly on the general election ballot. N.J.S.A. 19:13-3, 19:13-9, 19:23-6, 19:23-14. A candidate nominated for office in a petition must annex to such petition a certificate indicating, among other things, that "the candidate is a resident of and a legal voter in the jurisdiction of the office for which the nomination is made." N.J.S.A. 19:13-8, 19:23-15. Likewise, an individual nominated by write-in votes must thereafter file a similar certificate of acceptance. N.J.S.A. 19:23-16. In view of these statutory requirements, a candidate for the Legislature must be entitled to the right of suffrage at the time of filing a petition or, alternatively, at the time of filing a certificate accepting a write-in nomination.

You are therefore advised that a candidate for election to the Legislature must meet the qualifications for office set forth in the *New Jersey Constitution,* Art. IV, §1, par. 2 as follows: he must satisfy the minimum age requirement by the day he is sworn into office; he must meet the citizenship and residency requirements by election day, and he must be entitled to the right of suffrage on the day that he files a certificate with the Secretary of State accepting the nomination, be it as an accompaniment to his petition or in response to a write-in vote.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: JANICE S. MIRONOV
Deputy Attorney General

*Art. II, par. 3(a) reads in relevant part:

> Every citizen of the United States, of the age of 18 years, who shall have been a resident of this State and of the county in which he claims his vote 30 days, next before the election, shall be entitled to vote for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to a vote of the people.

See also, N.J.S.A. 19:4-1, 19:31-5.

February 29, 1980

JERRY F. ENGLISH, *Commissioner*
Department of Environmental Protection
P.O. Box 1390
Trenton, New Jersey 08625

FORMAL OPINION NO. 6—1980

Dear Commissioner English:

Our advice has been requested on certain questions pertaining to the expanded implementation of the permit requirements of the Waterfront Development Law. N.J.S.A. 12:5-1, *et seq.* The threshold question is whether the Waterfront Development Law authorizes the Department of Environmental Protection to regulate development on uplands adjacent to navigable waters or streams. It is our opinion that the statute provides jurisdiction to regulate any development on the "water-front" portion of uplands adjacent to navigable waters or streams.

N.J.S.A. 12:5-3, the key operative provision of the law, provides as follows:

> All plans for the development of any water-front upon any navigable water or stream of this State or bounding thereon, which is contemplated by any person or municipality, in the nature of individual improvement or development or as a part of a general plan which involves the construction or alteration of a dock, wharf, pier, bulkhead, bridge, pipe line, cable, or any other similar or dissimilar water-front development shall be first submitted to the Department of Environmental Protection. No such development or improvement shall be commenced or executed without the approval of the Department of Environmental Protection first had and received, or as hereinafter in this chapter provided.

Thus, the statute requires State approval for any "water-front development" that is either similar or dissimilar to the specifically mentioned types of development. The inquiries therefore are, what area is physically encompassed by the term waterfront and what constitutes development.

The Waterfront Development Law was passed in 1914. The legislative history reveals that it was passed in response to a need for the State to assume a direct role in the regulation of harbor development for competitive economic reasons. In its 1914 Fourth Preliminary Report to the Legislature prior to passage of the legislation, the temporary New Jersey Harbor Commission recommended direct State control over the "waterfront, the waterways and the upland adjacent thereto". *Fourth Preliminary Report of the New Jersey Harbor Commission,* p. 6 (1914). Clearly, then, the perceived need for this remedial law was to regulate uplands as well as water areas.

This conclusion is reinforced by the unambiguous dictionary meaning accorded to the term waterfront. According to Webster's New Collegiate Dictionary (1977 ed.) it means "land, land with buildings, or a section

of a town fronting or abutting on a body of water". *Black's Law Dictionary* (4th ed. 1968), defines waterfront as "land or land with buildings fronting on a body of water". See *City of Long Beach v. Lisenby,* 175 Cal. 575, 166 P. 333, 335, cited in *Black's.* Thus, without reasonable doubt the term waterfront as used in the Waterfront Development Law, was intended to include the uplands adjacent to navigable waters or streams.

On the ancillary question of what constitutes "development" requiring a permit, the listing of specific structures in N.J.S.A. 12:5-3 followed by the statement "or any other similar or dissimilar water-front development", can reasonably be viewed as inclusive of all structures of whatever type under the permit requirement. Under this view, the specific examples are seen as merely illustrative of typical waterfront structures, but by no means intended by the Legislature as exhaustive or limiting in any way. In its *Fourth Preliminary Report* the Harbor Commission also touched upon this issue and called for State approval of any improvement or construction whatever. *Fourth Preliminary Report of the New Jersey Harbor Commission,* p. 9 (1914). Thus, consistent with the expressed legislative purpose to remedy the perceived evil of unregulated waterfront development, it may be concluded that the Legislature intended to require a permit for all structures erected in the waterfront area. To conclude otherwise and give the term development a limited meaning obviously would tend to frustrate the essential underlying purpose of the Waterfront Development Law.

Your second inquiry is to what extent does the waterfront extend, and in particular, may the Department extend it by rule or otherwise to 1000 feet from the water. While it is certain that the concept of regulating a waterfront includes regulating development on uplands, the concept or term waterfront is elusive in its precise spatial definition. However, in light of the purpose of the law in promoting and safeguarding water oriented activities and in light of the direct waterfront nature of the specific examples of development mentioned in N.J.S.A 12:5-3, it must be concluded that the waterfront to be regulated under the law is no larger than the area of the first substantial land use that directly adjoins the water and not an area extending 1000 feet inland. Since regulation of the first substantial land use (or area where that potential use will take place) is enough to promote and protect water oriented activities by insuring access, availability to dockage, etc., and since it is also large enough by definition, to encompass any development as called for by N.J.S.A. 12:5-3, the law does not contemplate regulation extending automatically 1000 feet inland.*

It is also necessary to address the nature of the substantive standards to be adopted by the Department in its administration of the permit requirements of the Waterfront Development Law. The permissible scope

* More precise definition of the waterfront should be undertaken by administrative rule. For example, a rule regulating at least the first 100 feet would be appropriate since it can reasonably the assumed that the first significant land use will occupy at least that large an area (a typical building lot is in excess of 100 feet deep). Moreover, the rule could indicate that where the potential area for the first significant land use extends more than 100 feet inland, a permit will be required for that entire use of the waterfront, subject to a reasonable maximum distance limitation.

of such regulations lies in an understanding of the legislative purpose in enacting the Waterfront Development Law. That purpose was to promote the development and revitalization as well as to safeguard the port facilities and waterfront resources for the public's overall economic advantage. Fourth Preliminary Report, *supra.* The Waterfront Development Law therefore justifies the adoption of standards to insure access to the State's waterways for all water-dependent uses and, conversely, standards discouraging nonwater-dependent uses from usurping the waterfront. Futhermore, a variety of other considerations may come into play in the determination of an appropriate use in a particular case so long as they are in furtherance of the essential purposes underlying the Waterfront Development Law. For example, the development of extensive high rise housing on the waterfront would not be consistent with the legislative purpose to insure access to waterways for water dependent uses and at the same time denial of a permit may serve the purpose of protecting the scenic or aesthetic appearance of the waterfront. In summary, therefore, so long as regulations adopted under the Waterfront Development Law are designed to carry out and are in futherance of the primary intent of the Waterfront Development Law, they may be permissibly used to control the exercise of administrative discretion in the issuance of waterfront development permits.

In summation, it is our advice that the Department may regulate the portion of uplands adjacent to the State's navigable waterways that constitutes the waterfront, but that the waterfront is a relatively narrow strip of land whose precise geographical limit should be defined by rule in accordance with the criteria set forth in this opinion. In addition the substantive standards that are to be used to guide Department permit decisions under the Waterfront Development Law must be in accord with the Legislature's intent to promote the development, revitalization and safeguarding of the waterfront for the public's overall economic wellbeing.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: JOHN M. VAN DALEN
Deputy Attorney General

March 28, 1980

MR. BARRY SKOKOWSKI
Acting Director
Div. of Local Government Services
Department of Community Affairs
363 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 7—1980

Dear Mr. Skokowski:

A question has arisen with regard to whether payments made for municipal services provided to newly constructed redevelopment or housing projects undertaken pursuant to the Urban Renewal Corporation and Association Law of 1961, the Urban Renewal Nonprofit Corporation Law of 1965, or the New Jersey Housing Finance Agency Law may be excluded from the budget cap of a municipality. For the reasons set forth herein, you are advised that any revenue generated by such payments for services provided to redevelopment projects constructed pursuant to the Urban Renewal Corporation Law of 1961 and the Urban Renewal Nonprofit Corporation Law of 1965, which is in excess of the amount of revenue which was generated by the payment of taxes on improvements located on the property prior to the construction of such new projects would fall outside of a municipal budget cap. You are further advised, for the reasons set forth herein, that any revenue generated by such payments for services provided to housing projects constructed pursuant to the New Jersey Housing Finance Agency Law which is in excess of the amount of revenue which was generated by the payment of taxes on the property, and any improvements situated thereon, prior to the construction of such projects would also be outside of a municipal budget cap.

The Urban Renewal Corporation and Association Law of 1961, N.J.S.A. 40:55C-40 *et seq.,* and the Urban Renewal Nonprofit Corporation Law of 1965, N.J.S.A. 40:55C-77 *et seq.,* were enacted for the purpose of encouraging the investment of private capital, and the participation of private enterprise and civic minded citizens respectively, in the restoration and elimination of blighted areas in the State's municipalities. N.J.S.A. 40:55C-41; N.J.S.A. 40:55C-78. To accomplish these purposes, the two acts authorize municipalities to enter into special financial arrangements with urban renewal corporations, urban renewal associations, and urban renewal nonprofit corporations for the purpose of having such corporations or associations undertake projects for the redevelopment of such blighted areas. N.J.S.A. 40:55C-49 to 64; N.J.S.A. 40:55C-92 to 96. In order to enter into such special financial arrangements, such corporations must meet certain requirements set forth in the acts, N.J.S.A. 40:55C-54; N.J.S.A. 40:55C-55.1; N.J.S.A. 40:55C-88, and must also submit an application to the municipality for approval of the projects which they desire to undertake. N.J.S.A. 40:55C-58; N.J.S.A. 40:55C-91. Upon municipal approval of a project, the municipality then enters into a financial agreement with the corporation or association. N.J.S.A. 40:55C-59; N.J.S.A. 40:55C-92. In such agreements, the municipality agrees to exempt from

taxation any improvements constructed or acquired by such a corporation or association. N.J.S.A. 40:55C-59(b); N.J.S.A. 40:55C-92(b). The corporation or association agrees to undertake the approved project and, in the case of the Urban Renewal Corporation and Association Law, to limit the profits or dividends payable to the association or corporation, or, in the case of the Urban Renewal Nonprofit Corporation Law, to pay any profits to the municipality.

Further, the two acts specifically provide that improvements made by an urban renewal corporation or an urban renewal association pursuant to such an agreement are to be exempt from taxation for certain periods of time as set forth in the acts. N.J.S.A. 40:55C-65; N.J.S.A. 40:55C-97. In lieu of making normal tax payments, an urban renewal corporation or association is instead required to make payment to the municipality of *"an annual service charge for municipal services supplied to the project."* *Id.* The amount of such payments is to be a percentage of the annual gross revenues of the project or, alternatively, if such an amount cannot be calculated, a percentage of the total cost of the project. *Id.*

The New Jersey Housing Finance Agency Law, N.J.S.A. 55:14J-1 *et seq.*, contains similar provisions with regard to housing projects financed by the agency. N.J.S.A. 55:14J-30. The law provides that the governing body of any municipality in which such a housing project is to be located may provide that such project shall be exempt from real property taxation provided that the sponsor of the project shall enter into an agreement with the municipality *"to make payments to the municipality in lieu of taxes for municipal services."* N.J.S.A. 55:14J-30(b). Such agreements may provide for the payment by the sponsor to the municipality of up to 20% of the annual gross revenue from each project situated in the municipality. *Id.*

The Local Government Cap Law, N.J.S.A. 40A:4-45.1 *et seq.*, was enacted for the purpose of limiting the annual increase in spending by municipalities and counties without constraining these bodies to the point of rendering the provision of necessary governmental services impossible. N.J.S.A. 40A:4-45.1. To accomplish this purpose, the Legislature established an overall limitation on annual increases in spending by local governing bodies but also set forth certain specified exceptions to this limitation. N.J.S.A. 40A:4-45.3; N.J.S.A. 40A:4-45.4.

One of these exceptions, set forth at N.J.S.A. 40A:4-45.3(h), provides that a municipality may exclude from its budget cap the expenditure of amounts derived from new or increased service fees imposed by ordinance. The evident intent of this exception is to permit a municipality to expend the increase in income generated from new sources of revenue while not altering the basic restraint which the Local Government Cap Law places on spending supported by existing revenue sources. In this respect, this exception is similar in intent to the exception provided by N.J.S.A. 40A:4-45.3(a) which exempts from a municipality's budget cap the amount of new revenue generated by the increase in a municipality's valuations based solely on applying the municipality's preceding year's general tax rate to the assessed value of new construction or improvements. *See Formal Opinion No. 3-1977,* and *City of Clifton v. Laezza,* 149 N.J. Super. 97, 100 (App. Div. 1977). It is also clear that the exemption provided for the expenditure of revenues generated by new or increased service fees was

intended by the Legislature to encompass only the net increase in revenues derived from such new or increased fees and not to include the revenues being generated by fees already in existence.

Since payments made pursuant to N.J.S.A. 40:55C-65, N.J.S.A. 40:55C-97 and N.J.S.A. 55:14J-30(b) are expressly for the purpose of paying for municipal services provided to newly constructed redevelopment and housing projects, they clearly fall within both the language and the evident intent of N.J.S.A. 40A:4-45.3(h). Clearly, to the extent that payments made pursuant to N.J.S.A. 40:55C-65 and N.J.S.A. 40:55C-97 generate revenue for a municipality in excess of the amount of revenue which was generated by tax payments on any improvements located on the site of such projects prior to the construction of the new projects, they constitute new service fees which provide new sources of income for the municipality. Similarly, to the extent that payments made pursuant to N.J.S.A. 55:14J-30(b) generate revenue in excess of the amount of revenue generated by taxes paid on the property, and any improvements situated thereon, prior to the construction of such projects, they also constitute new service fees which provide new sources of revenue for a municipality. Furthermore, excluding the expenditure of such increased amounts of revenue derived from such payments from a municipality's budget cap would also be consistent with the overall purposes of the Local Government Cap Law. Since such an exclusion would only be equal to the amount of new revenue derived from payments made for services provided to newly constructed redevelopment or housing projects, it would not alter the basic restraint which the Local Government Cap Law imposes upon increases in spending and, in turn, the taxes required to support such spending. Accordingly, such an exclusion would not undermine the relief which the statute is intended to provide to the State's municipal taxpayers.

Alternatively, by not permitting the exclusion of such amounts from the cap limitation, the other purpose of the statute of not restraining municipalities to the point of rendering the provision of necessary governmental services impossible would be frustrated. Construction of redevelopment and housing projects undertaken pursuant to N.J.S.A. 40:55C-40 *et seq.*, N.J.S.A. 40:55C-77 *et seq.*; and N.J.S.A. 55:14J-1 *et seq.*, creates a need for additional municipal services. In fact, as noted, the explicit purpose of the payments to be made pursuant to N.J.S.A. 40:55C-65, N.J.S.A. 40:55C-97 and N.J.S.A. 55:14J-30(b) is to compensate the municipality for providing such services to such newly constructed projects. Were the additional amount of revenue generated by such payments made pursuant to these statutory provisions not excluded from a municipality's cap, the result would be that the municipality would have to provide additional services to such projects without the benefit of the increase in revenues which such projects generate for the municipality. Such a result would seem clearly contrary to the express purpose of the law as set forth in N.J.S.A. 40A:4-45.1 of not restraining municipalities to the point where they cannot provide necessary governmental services. Thus, in addition to clearly falling within the specific language of N.J.S.A. 40A:4-45.3(h), the exclusion of expenditures of the additional amount of revenue derived from such payments from a municipality's budget cap for municipal services provided to such projects would also be consistent with

the overall purposes of the statute.

In calculating the amount of such payments for municipal services which may be excluded from a municipality's spending limitation, it is evident, as noted above, that only the net increase in revenues generated by the payment of such fees may be excluded from the limitation. While the revenues which were generated by the improvements on property on which new redevelopment projects are constructed and the revenues which were generated by the property, and improvements situated thereon, on which new housing projects are constructed prior to the construction of such projects were real property taxes and not service fees, it is necessary and reasonable to treat such prior real property taxes as preexisting sources of revenue in calculating the net increase in revenues generated by such fees.* Such treatment is necessary in order to carry out both the clear intent of the specific exemption set forth in N.J.S.A. 40A:4-45.3(h) and the overall scheme of the Local Government Cap Law. Accordingly, in calculating the amount of such payments which may be excluded from a municipality's spending limitation, an appropriate adjustment must be made to deduct the amount of real property taxes so generated prior to the construction of the project from the amount of fees generated by the project to obtain the net increase in revenue which may be excluded from the municipality's spending limitation.

In conclusion, you are advised that the expenditure of revenue generated from payments made for municipal services provided to newly constructed redevelopment projects pursuant to the provisions of the Urban Renewal Corporation and Association Law and the Urban Renewal Nonprofit Corporation Law which is in excess of the amount of revenue which was generated by real property taxes on improvements located on the project site prior to the construction of such projects may be excluded from a municipality's budget cap. You are further advised that the expenditure of revenue generated from payments made for municipal services provided to newly constructed housing projects pursuant to the New Jersey Housing Finance Agency Law which is in excess of the amount of revenue which was generated by real property taxes on the property and any improvements located thereon prior to the construction of such projects may also be excluded from a municipality's budget cap.

Very truly yours,
JOHN J. DEGNAN
Attorney General
By: DANIEL P. REYNOLDS
Deputy Attorney General

* The tax exemption provided by N.J.S.A. 40:55C-65 and N.J.S.A. 40:55C-97 applies only to the improvements constructed in a redevelopment project and not the underlying land which continues to be taxed in the same manner as other real property. Thus, in calculating the increase in revenues generated by the payment of service fees in lieu of taxes under these two provisions, the increase would be the amount by which such payments exceed any taxes which were paid on any improvements which may have been located on the site of such a project prior to the construction of such a project. In contrast, in the instance of a new housing project which is exempt from taxation by virtue of N.J.S.A. 55:14J-30(b), both the land on which such a project is constructed and the improvements constructed thereon are exempt from taxation. Accordingly, in calculating the net increase in revenues generated by payments made in lieu of taxes pursuant to N.J.S.A. 55:14J-30(b), the increase would be the amount by which such payments exceed any taxes which were paid on the property and any improvements situated thereon prior to the construction of such a project.

April 1, 1980

JERRY FITZGERALD ENGLISH, *Commissioner*
Department of Environmental Protection
Labor and Industry Building
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPINION NO. 8—1980

Dear Commissioner English:

You have requested an opinion as to whether there is any statutory or legal impediment to purchasing property at a price in excess of the appraised value. You are hereby advised that there is no statutory impediment restricting the Commissioner from exercising reasonably based administrative discretion to purchase property at a price in excess of appraised value.

The Legislature has enacted three separate laws dealing with the acquisitions of property by the Commissioner of the Department of Environmental Protection with funds realized from the sale of "Green Acres Bonds". They are N.J.S.A. 13:8A-1; 19 and 35. Under all three bond issues, the Commissioner is authorized to utilize the proceeds of the sale of the bonds to acquire lands for recreation and conservation purposes. The acts further provide that the lands may be acquired by purchase or otherwise on such terms and conditions as the Commissioner shall determine. N.J.S.A. 13:8A-6; 27 and 40. The guidelines to be utilized by the Commissioner in acquiring property are set forth in N.J.S.A. 13:8A-23 and 39. They include inter alia, seeking a reasonable balance among all areas of the State for recreational and conservation facilities; limiting acquisition to predominantly open and natural lands, and avoiding acquisition of lands actively devoted to agriculture.

The Commissioner, in connection with the acquisition of lands by the State, is granted the authority to do all things necessary or useful and convenient including making arrangements for and directing engineering, inspection, legal, financial . . . and other professional services, estimates and advice; and prescribing rules and regulations to implement any provisions of the act. *See* N.J.S.A. 13:8A-16 and 53. As part of the Commissioner's authority to obtain estimates, we are informed two independent appraisals are obtained from a prequalified list of appraisers to estimate the fair market value of the property. The appraisers are required

to notify the property owner and offer the property owner the opportunity to accompany the appraiser during his inspection of the property. The appraisals once completed are reviewed in accordance with the procedures as set forth in the Appraisal and Appraisal Review Manual of the Division of Right of Way at the Department of Transportation.

The appraisals and a certification by the Department of Transportation form the basis for negotiations with the owner of the property proposed to be acquired. Both the appraisals and the review express the opinions of the appraisers as to their estimate of fair market value. In most instances the appraisal has relied upon comparable sales to estimate market value. They are aids to the Commissioner in ascertaining just compensation to be paid for the property.

The authority of the Commissioner of Environmental Protection to acquire lands is similar to that granted by N.J.S.A. 27:7-22 to the Commissioner of Transportation. The Department of Transportation, through the exercise of executive discretion, has made provisions for the acquisition of property in excess of the estimates of just compensation. The Department of Transportation defines any settlement made or authorized by the responsible official which is in excess of the estimate of just compensation, as an administrative settlement. The Department requires that the rationale for the settlement be set forth in writing. The extent of the written explanation is a judgement determination, consistent with the situation, circumstances and amount of money involved.

Furthermore, the determination of how much the state will offer for a given piece of property always requires a judgment as to the likely outcome of condemnation proceedings with regard to that property in the event the state is forced to exercise its power of eminent domain. Those circumstances which lead to the conclusion that a condemnation award would likely be in excess of the state's appraised value would also warrant a voluntary acquisition in excess of that amount. The conclusion that such a possibility exists would be based on factors such as a rereview of all current appraisal information, examination of all current sales information, appraisal reports and other pertinent information supplied by the landowner. In all cases, therefore, an acquisition at a price in excess of the appraised value should be justified on its individual merits and properly documented.

In conclusion, therefore, broad authority has been vested in the Commissioner in the disbursement of public funds for the acquisition of property under the Green Acres statutes. It is our opinion there would be no statutory impediment to the Commissioner reasonably exercising her discretion based on adequate and documented justification to acquire property at a price in excess of the state's appraised valuation.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: ROBERT P. GRABOWSKI
Deputy Attorney General

April 3, 1980

MR. BARRY SKOKOWSKI
Acting Director
Division of Local Government Services
363 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 9—1980

Dear Mr. Skokowski:

You have asked for our opinion concerning the meaning of an Act dealing with the disclosure of the identity of stockholders or partners prior to the award of a contract to be paid out of public funds.

In 1977, the Legislature enacted a law which requires corporations or partnerships to disclose the identity of major stockholders or partners prior to the award of a contract, the cost of which is to be paid out of public funds. N.J.S.A. 52:25-24.2 provides in relevant part as follows:

> [N]o corporation or partnership shall be awarded any contract nor shall any agreement be entered into for the performance of any work or the furnishing of any materials or supplies, the cost of which is to be paid with or out of any public funds, by the State or any county, municipality or school district, or any subsidiary or agency of the State, or of any county, municipality or school district, or by any authority, board, or commission which exercises governmental functions, *unless prior to the receipt of the bid* or accompanying the bid of said corporation, or said partnership, there is submitted a statement setting forth the names and address of all stockholders in the corporation or partnership who own 10% or more of its stock, of any class or of all individual partners in the partnership who own 10% or greater interest therein, as the case may be. [Emphasis added.] [N.J.S.A. 52:25-24.2.]

The essential question posed is whether the filing of a disclosure statement is applicable in an instance where an agreement is to be entered into with a public agency after public advertisement for competitive bids or whether the statutory requirement extends to any instance where the performance of work or the furnishing of materials is to be paid with or out of public funds. The question therefore more sharply drawn is whether the term "bid" should be interpreted to mean the taking of competitive bids after public advertisement or whether it should be given its more general meaning of an offer to perform work or to supply materials.

This State has a well established legislative scheme governing the making of contracts by the State and by local governmental units. This scheme includes the Local Public Contracts Law, N.J.S.A. 40A:11-1 *et seq.*, the Public School Contracts Law, N.J.S.A. 18A:18A-1 *et seq.*, and statutes such as N.J.S.A. 52:32-2 which govern contracts for construction, alteration or repair of state buildings and N.J.S.A. 52:34-6 *et seq.* which govern the award of State contracts. These statutes are all aimed at preserving

the integrity of the process by which public contracts are awarded. *Hillside Tp. v. Sternin,* 25 N.J. 317, 322 (1957).

The disclosure requirement mandated in the Act was also designed to further the integrity of the competitive bidding process. In *George Harms Construction Co. v. Borough of Lincoln Park,* 161 N.J. Super. 367 (Law Div. 1978), the court held that the submission of a disclosure statement under the Act is a mandatory and material part of the award of a contract let by competitive bids and cannot be waived or cured. The court noted:

> The Legislature in enacting N.J.S.A. 52:25-24.2 expressed its clear purpose to insure that all members of a governing body and the public be made aware of the real parties in interest with whom they are asked to contract. Thus the public, as well as public officials, can identify any real or potential conflicts of interest arising out of the awarding of public contracts, or can identify those bidders who lack the requisite responsibility. . . .
>
> The [Local Public Contracts Law] provides the framework for the solicitation of public bids. The 1977 statute evinces a supervening requirement imposed on the bidding framework . . . . [*George Harms Construction Co. v. Borough of Lincoln Park, supra,* at 372-73.]

It is therefore clear that the court concluded that the disclosure act was an integral part of the overall process for competitive bidding in the Local Public Contracts Law.

Since the statute which requires the disclosure of the identity of principal partners or stockholders complements and serves the same salutary purpose as laws governing the award of contracts by the State, local school boards and local governing bodies, it is reasonable to assume the Legislature intended the term "bid" to be interpreted in a manner consistent with those related laws. In the Local Public Contracts Law the term "bid" is used to denote an offer resulting from the scheme of publicly advertised bidding. *See, e.g.* N.J.S.A. 40A:11-4. Likewise, the Local School Contracts Law and the laws governing State contracts use the term "bid" to refer to an offer made in the context of publicly advertised bidding. N.J.S.A. 18A:18A-5(d), 37; N.J.S.A. 52:34-6; N.J.S.A. 52:32-2. By contrast, offers made without such public advertising are referred to as "negotiated prices" or "quotations." N.J.S.A. 40A:11-5(3), 6.1; N.J.S.A. 18A:18A-37; N.J.S.A. 52:34-9(e).[1] "The import of any word or phrase is to be gleaned from . . . statutes in *pari materia.*" *State v. Brown,* 22 N.J.

1. Legislative committee statements to L. 1977, c. 33 (A-22) indicate that the bill was aimed at "bid contracts" of the various governmental bodies named in the bill. *Assembly Municipal Government Committee, Statement to Assembly No. 22* (1976); *Senate State Government, Federal and Interstate, Relations and Veterans Affairs Committee, Statement to Assembly No. 22* (1976). In the context of the scheme created in pre-existing laws governing public contracts, of which the Legislature was surely aware, the term "bid contract" would refer to a contract awarded through public advertisement and competitive bidding.

405, 415 (1956). Therefore, the term bid should be construed to have been used in the Act in the same sense as it was used in these statutes regarding public contracts.

Further support for this conclusion is found in statutes enacted contemporaneously with L. 1977, c. 33. Within a few months of March, 1977, the date on which L. 1977, c. 33 was approved, the Legislature enacted two other statutes relating to the awarding of public contracts, both of which use the term "bid" to refer to publicly advertised competitive bids. One of the statutes, L. 1977, c. 53, adopted on April 5, 1977, was a series of amendments to the Local Public Contracts Law. Among the amendments was the deletion of the phrase "lowest responsible bidder" where the phrase had referred to a solicited quotation rather than a competitive bid. The Legislature replaced this phrase with the expression "lowest responsible quotation received." L. 1977, c. 53, §4. This change further emphasizes the distinction between a "bid" and an offer arrived at without public advertisement. On June, 2, 1977, the Legislature enacted L. 1977, c. 114 (N.J.S.A. 18A;18A-1 *et seq.*), the Public School Contracts Law, which specifies a scheme of competitive bidding to be used by public school districts in awarding contracts. Like the Local Public Contracts Law, L. 1977, c. 114 uses the term "bid" to refer to publicly advertised bids and refers to other offers as "negotiated prices" or "quotations". *See* N.J.S.A. 18A:18A-5(d), 37.

Since L. 1977, c. 33 and the two statutes discussed above were enacted in the same session of the Legislature and all deal with the award of public contracts, it is reasonable to assume that they all use the term "bid" in the same sense.

> Application of the rule that statutes in pari materia should be construed together is most justified . . . in the case of statutes relating to the same subject that were passed at the same session of the legislature. [2A Sutherland, *Statutory Construction,* §51.03, at 299 (4th Ed. 1973).]

Reading the three statutes together, it is clear that the term "bid" as used in L. 1977, c. 33 means an offer made after public advertisement for competitive bids.

In summary, therefore, it is our opinion that a disclosure statement should be submitted only in an instance where a statute requires public advertisement for competitive bids. The disclosure requirement is thus limited to those proposed contracts over the dollar amount for which competitive bidding is mandated. Similarly, the disclosure requirement would apply to the performance of work such as professional services only in those instances where the governing statutes require such contracts to be advertised for competitive bids.[2]

2. In the case of the Local Public Contracts Law, for example, public advertisement for bids is required, with certain specified exceptions, for contracts involving expenditures in excess of $2,500, N.J.S.A. 40A:11-3, 4, and contracts for professional services are not required to be awarded through competitive bidding. N.J.S.A. 40A:11-5(i)(a).

Finally, although the Act only requires disclosure statements where publicly advertised bidding is involved, we note that the Act does not prohibit the imposition of more extensive disclosure requirements than those mandated by the Act. The purpose of the disclosure statements is to make the members of the governing body aware of the real parties in interest with whom they are dealing and to identify "any real or potential conflicts of interest arising out of the awarding of public contracts." *Statement on the Bill, Assembly No. 22* (1976); *George Harms Constr. Co. v. Bor. of Lincoln Pk., supra,* at 372. Clearly, a voluntary administrative extension of the disclosure requirement to include nonadvertised bidding should be encouraged as a means to further protect the integrity of the government's procurement process.

Very truly yours,
JOHN J DEGNAN
Attorney General
By: SUSAN L. REISNER
Deputy Attorney General

May 1, 1980

MR. BARRY SKOKOWSKI
Acting Director
Div. of Local Government Services
Department of Community Affairs
363 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 10—1980

Dear Mr. Skokowski:

You have requested advice as to the proper construction of the provisions of N.J.S.A. 40A:4-46 which provide as follows:

> A local unit may make emergency appropriations, after the adoption of a budget, for a purpose which is not foreseen at the time of the adoption thereof, or for which adequate provision was not made therein. Such an appropriation shall be made to meet a pressing need for public expenditures to protect or promote the public health, safety, morals or welfare or to provide temporary housing or public assistance prior to the next succeeding fiscal year.

Specifically, you have inquired as to whether the word "or" in the first sentence of N.J.S.A. 40A:4-46 is to be read disjunctively or conjunctively. Construing the term disjunctively would permit the making of an emergency appropriation by a local unit for either a purpose which is not foreseen at the time of the adoption of the local unit's budget or

for a purpose for which adequate provision was not made in such a budget. Construing the term conjunctively would mean that an emergency appropriation could be made only if the purpose for which the appropriation was made was not foreseen at the time of the adoption of the local unit's budget and if adequate provision was not made for that purpose in the budget. For the reasons set forth herein, you are advised that the term "or" in N.J.S.A. 40A:4-46 should be read conjunctively and that an emergency appropriation can only be made if the purpose for which it is made was not foreseen at the time of the adoption of the local unit's budget and a pressing need for public expenditure exists.

In construing a statutory provision, it is essential that the construction rendered be consistent with, and not frustrate, the basic policy of the statute as a whole. *New Jersey Builders, Owners and Managers Ass'n. v. Blair,* 60 N.J. 330 (1972). N.J.S.A. 40A:4-46 is part of what is commonly known as the Local Budget Law. N.J.S.A. 40A:4-1 *et seq.* This statute governs preparation, adoption and implementation of the budgets of all local units, *i.e.,* municipalities and counties in the State of New Jersey. It prescribes the manner in which they are to be arranged and the manner in which such budgets may be modified following their initial adoption. It provides that all such budgets shall be prepared on a "*cash basis.*" N.J.S.A. 40A:4-3. A "cash basis" budget is defined in the law as a budget which ensures that there will be sufficient cash collected to meet all debt service requirements, to pay for all necessary operations of the local unit for the fiscal year and to cover all mandatory payments required to be made during the year. N.J.S.A. 40A:4-2. The statute also provides that no moneys may be expended unless a proper appropriation is contained in the budget and that the expenditure is not in excess of that appropriation. N.J.S.A. 40A:4-57; *State v. Boncelet,* 107 N.J. Super. 444, 449-450 (App. Div. 1969). Further, that part of the Local Budget Law known as the Local Government Cap Law, N.J.S.A. 40A:4-45.1 *et seq.,* limits the amount by which a local governing body's budget may increase annually. As well, the statute specifically sets forth the procedures which must be followed by a local unit in adopting its annual budget. N.J.S.A. 40A:4-4 to 4-10. It requires that a public hearing be conducted following advertisement of the budget to ensure that the taxpayers of the local unit will have an opportunity to comment upon and present objections to the proposed budget. N.J.S.A. 40A:4-6, 7 and 8.

The purpose underlying these requirements is to ensure that a municipality, in carrying out its financial affairs, will make ends meet within its fiscal year and will not make expenditures which will depart from the amounts appropriated in the budget for that year. *State v. Boncelet, supra* at 450. By prescribing the manner in which local budgets are to be administered, the statute serves to inculcate sound business principles and practices into municipal economic administration as well as providing members of the taxpaying public with a better understanding of the financial affairs of local government. *Kotlikoff v. Tp. of Pennsauken,* 131 N.J. Super. 590 (Law Div. 1974).

It is clear, upon consideration of the above-noted provisions of the Local Budget Law and the policies they are intended to serve, that N.J.S.A. 40A:4-46 must be read to require that an emergency appropriation can

only be adopted if an emergent situation arises which was not foreseen at the time of the adoption of the budget and for which adequate provisions do not exist in the budget. First, the "cash basis" budget requirement which underlines the entire Local Budget Law is explicitly intended to ensure that a county or a municipality make sufficient appropriations in its annual budget to provide for all necessary services for the coming year. N.J.S.A. 40A:4-2. Since tax bills are prepared on the basis of the size of such appropriations, N.J.S.A. 40A:4-17, it is essential that the appropriations be sufficient to cover an entire year. Further, this requirement serves to prevent deficit spending and the borrowing which generally ensues from emergency appropriations to meet current operations. To construe N.J.S.A. 40A:4-46 to include appropriations which should properly have been included in the local unit's annual budget would clearly serve to subvert this requirement.

Secondly, construing N.J.S.A. 40A:4-46 to encompass only sudden and unforeseen expenditures serves to protect the participation which the local unit's taxpayers are intended to have in the budget making process. The Local Budget Law requires that such taxpayers be given an opportunity to be heard concerning the manner in which the budget is made up. N.J.S.A. 40A:4-8. To permit emergency appropriations to be made after this process has been completed for purposes which should have been anticipated and provided for in the budget would undermine such public participation in the budget process. It would allow a local governing body to expend more for its basic operations than the taxpayers were advised it would during the budget adoption process.

Third, N.J.S.A. 40A:4-46 should not be interpreted to undermine the policy of the Local Government Cap Law. That law is intended to control the increase in the cost of local government and accordingly to place a limit on increases in the amounts appropriated for basic governmental services from one year to the next. N.J.S.A. 40A:4-45.1; *N.J. State P.B.A., Local 29 v. Town of Irvington,* 80 N.J. 272, 289-290 (1979). To permit the adoption of emergency appropriations to provide additional moneys above a local governing body's cap limitation to fund basic services for which appropriations could and should have been made in the annual budget adopted at the beginning of the year clearly would frustrate this purpose.

Thus, it is evident from a consideration of the legislative policies which underlie the Local Budget Law that N.J.S.A. 40A:4-46 was not intended to provide a means for making appropriations for which provision could have been made in the annual budget of a local governing unit. Rather, in enacting this provision, the Legislature clearly contemplated that only those expenditures which are necessitated by sudden, unanticipated and unforeseen circumstances for which adequate provision could not have been made in the annual budget would be included within its scope.

Moreover, a review of the specific language of N.J.S.A. 40A:4-46 clearly reinforces the conclusion that this is the proper construction. It is well established that, in ascertaining the intent of a statute, primary reference must be made to the language of the statute, *Lane v. Holderman,* 23 N.J.304 (1957), and that such language must be read in accordance with its plain, ordinary and well-understood meaning. *Service Armanent Co. v. Hyland,* 70 N.J. 550 (1976); *Safeway Trails, Inc. v. Furman,* 41 N.J. 467,

cert. denied 379 U.S. 14, 85 S. Ct. 144, 13 L. Ed. 2d 84. The term "emergency" is defined in *Webster's New Dictionary of the American Language, Second College Edition,* 1972, as a "sudden, generally unexpected occurrence or set of circumstances demanding immediate action." This definition indicates that the commonly understood meaning of the word is that of something sudden and unforeseen. Further, N.J.S.A. 40A:4-46 provides that such an appropriation shall be made to meet a "pressing need." Clearly, this contemplates something other than the types of expenditures which a local governing body would routinely make for its normal governmental operations.

Further, the courts of this State have construed the term "emergency" in a manner consistent with this definition. In *Scatuorchio v. Jersey City Incinerator Authority,* 14 N.J. 72, 87 (1953), the court noted, in construing the term "emergency" as used in R.S. 40:50-1, that it should be given its generally accepted meaning unless inconsistent with the manifest intent of the Legislature or unless a different meaning is expressly indicated. Further, the court went on to state that, in general parlance, the term "emergency" means a "sudden or unexpected occurrence or condition calling for immediate action." *Scatuorchio v. Jersey City Incinerator Authority, supra* at 88. Finding that the circumstances in the case indicated that the situation before the court was neither sudden nor unforeseeable, the court concluded that no true emergency existed. *Scatuorchio v. Jersey City Incinerator Authority, supra* at 90 to 93.

Similarly, in construing those statutory provisions relating to the making of emergency appropriations by boards of education under N.J.S.A. 18A:22-21, and its predecessor, R.S. 18:6-55, the courts have also held that the term "emergency" is to be read as "a sudden or unexpected occurrence or condition calling for immediate action." *Bd. of Ed. of Elizabeth v. Elizabeth,* 13 N.J. 589, 593 (1953); *Newark Teachers Assoc. v. Bd. of Education,* 108 N.J. Super. 34, 47 (Law Div. 1969). In each case, although the literal language of the statutes in question provided that an additional appropriation could be made where the appropriation made in the annual budget had been underestimated *or* where an appropriation was necessary to meet an emergency, *see* N.J.S.A. 18A:22-21, the courts held that an additional appropriation could be made after the adoption of an annual budget only in the event that an "emergency," as defined by the courts, existed and further noted that, in the orderly conduct of school affairs, budgeting must be an annual process except for real emergencies. *Bd. of Ed. of Elizabeth v. Elizabeth, supra* at 593-594; *Newark Teachers Assoc. v. Bd. of Education, supra* at 47.

Finally, with regard to judicial construction of the Local Budget Law itself, the courts have held that additional expenditures may be incurred by a local governing unit following the adoption of its budget in the event of "bona fide emergencies," *Home Owners Construction Co. v. Glen Rock,* 34 N.J. 305, 315 (1961), or where a judgement requiring expenditures is entered following the adoption of the unit's annual budget. *In re Salaries Prob. Off. Bergen County,* 58 N.J. 422 (1971). *See also Lyons v. Bayonne,* 101 N.J. L. 455 (S. Ct. 1925); *Murphy v. West New York,* 130 N.J.L. 341 (S. Ct. 1943) and *Mount Laurel Township v. Local Finance Board,* 166 N.J. Super. 254 (App. Div. 1978), *aff'd* 79 N.J. 397 (1979) in which the decisions

reflect a judicial view that emergencies are sudden and unforeseen occurrences for which the making of appropriations in an annual budget could not have been anticipated.

Thus, it is clear that N.J.S.A. 40A:4-46 must be construed to require that an emergency appropriation may be made only for a purpose which was not foreseen at the time that the local governing body's budget was adopted. While the literal language of the provision may provide that such an appropriation can be made for a purpose which is not foreseen at the time of the adoption of its budget *or* for which adequate provision was not made in such a budget, it is well established that the words "and" and "or" are often used interchangeably and that "or" may be construed as the conjunctive "and" if to do so is consistent with the legislative intent of the statute in which it is used. *Red Bank Regional Ed. Ass'n. v. Red Bank Regional High School Bd. of Ed.*, 151 N.J. Super. 435 (App. Div. 1977), *aff'd* 78 N.J. 122 (1978); *State v. Holland,* 132 N.J. Super. 17 (App. Div. 1975). As indicated above, construing the word "or" in N.J..S.A. 40A:4-46 as "and" is clearly consistent with the overall legislative intent and policy of the Local Budget Law, with the commonly understood meaning of the language in N.J.S.A. 40A:4-46 and with the judicial decisions which have been rendered regarding N.J.S.A. 40A:4-46 and other similar statutes. For these reasons, you are hereby advised that an emergency appropriation pursuant to N.J.S.A. 40A:4-46 can only be made for a purpose which was not foreseen at the time of the adoption of a local unit's budget and for which adequate provision was not made therein.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: DANIEL P. REYNOLDS
Deputy Attorney General

May 28, 1980

WILLIAM H. FAUVER, *Commissioner*
Department of Corrections
P.O. Box 7387, Whittlesey Road
Trenton, New Jersey 08628

FORMAL OPINION NO. 11—1980

Dear Commissioner Fauver:

You have asked for our advice as to whether to work credits and/or commutation credits should be awarded to sex offenders sentenced for offenses committed under Title 2A prior to its repeal by the Penal Code. You have also asked whether those sex offenders who are subsequently resentenced under the Penal Code may be granted work credits and/or commutation credits. In the event these credits are available, the further question raised is whether they should be provided from the date of the

original sentence under Title 2A prior to its repeal by the Penal Code or from the date of a resentence under the Penal Code. For the following reasons, you are advised that commutation credits should not be remitted to sex offenders sentenced under Title 2A for an offense committed prior to the effective date of the Penal Code. You are also advised, however, that sex offenders resentenced under the Penal Code should be granted commutation credits from the date of a resentence under Penal Code. Finally, sex offenders may be awarded work credits in remission of sentence for appropriate documented work performed on and subsequent to the effective date of a resentence under the penal Code.

A brief discussion of the historical development of the pertinent statutes is necessary to put these questions in the proper perspective. N.J.S.A. 2A:164-10 provided that no statute relating to the remission of a sentence by way of commutation time for good behavior or for work performed should apply to any person committed as a sex offender but that provision could be made for monetary compensation to be paid in lieu of remission of sentence for work performed. In August 1978 the legislature enacted a comprehensive revision of the criminal laws of the State known as the Penal Code to be effective on September 1, 1979. N.J.S.A. 2C:1-1 *et seq.* The preexisting ban on the award of commutation credits and work credits to sex offenders was reenacted in N.J.S.A. 2C:47-6. In August 1979 the legislature enacted several amendments to the Penal Code including an express repeal of N.J.S.A. 2C:47-6, Laws of 1979, c. 178, §147. Therefore, on the effective date of the Penal Code the preexisting statutory prohibition on the award of commutation and/or work credits in remission of sentence was no longer part of the statutory law.

Prior to the enactment of the Penal Code, inmates in the state prison serving minimum-maximum terms received commutation credits for continuous orderly deportment. The entire statutory entitlement was credited to the inmate as of the date of his commitment to the state prison. Credits were subject to divestment only after the inmate had engaged in flagrant misconduct. N.J.S.A. 30:4-140 provides in pertinent part:

> For every year or fractional part of a year of sentence imposed upon *any person committed to any state correctional institution for a minimum-maximum term* there shall be remitted to him from both the *maximum and minimum* term of his sentence, for continuous orderly deportment, the progressive time credits indicated in the schedule herein . . . ." [Emphasis supplied.]

Clearly, the statute was restricted to those inmates in the state prison serving determinate minimum and maximum terms. *In re Zienowicz,* 12 N.J. Super. 563, 573 (Cty. Ct. 1951). *See also Torres v. Wagner,* 121 N.J. Super. 457, 459 (App. Div. 1972). Sex offenders, on the other hand, were sentenced to indeterminate terms. Consequently, in addition to an express ban in N.J.S.A. 2A:164-10, there existed no affirmative authority to credit sex offenders with commutation time for good behavior.

The major change effected by the Penal Code is that sex offenders are now sentenced to a specific term of years rather than to an indeterminate term. N.J.S.A. 2C:47-3(b) provides:

> In the event that the court shall sentence a person as provided herein, the court shall notwithstanding set the sentence in accordance with Chapters 43 and 44 of this code.

A sex offender would now be sentenced to a determinate term in the same manner as are other inmates incarcerated in state correction facilities. Therefore, in addition to a legislative repeal of the preexisting ban on the award of commutation credits to sex offenders, credits may not be remitted against the specific term of such a sentence.[1]

It is clear, however, that commutation credits should not be awarded to those sex offenders now serving indeterminate terms under sentence imposed prior to the effective date of the Penal Code. At the time of the imposition of those sentences, there existed an express prohibition on the award of commutation credits to sex offenders and the affirmative authority to award commutation credits was limited to inmates serving a specific minimum and maximum term of years. Furthermore, an award of commutation credits to this class of sex offenders would not be in furtherance of the legislative purpose underlying the provision of these credits. Commutation credits are permitted to inmates as of the date of commitment to state correctional institutions in order to enhance the ability of prison officials to maintain discipline.

> The granting of forfeiture of commutation credits . . . requires the exercise of judgment by state prison authorities based upon their observation and evaluation of the prisoner's conduct . . . . [*Torres v. Wagner, supra,* at 460.]

It would not be consistent with this underlying legislative intent to provide for the award of commutation credits for a period of time during which state prison officials were not authorized to credit inmates with time for good behavior.

A further question then arises as to whether sex offenders who have been given new sentences under the Penal Code should be awarded commutation credits, and whether these credits should be computed from the date of original sentence or from the date of a new sentence under the Penal Code. Under the terms of N.J.S.A. 2C:1-1d(2), any person under sentence of imprisonment for an offense committed prior to the effective date of the Penal Code may move to have a sentence reviewed by the court. The court may impose a new sentence consistent with the provisions of the Penal Code. In the case of a sentence of imprisonment for an offense committed prior to the Penal Code there was no specific term of years from which commutation credits could be remitted. Only sex offenders who have been resentenced under the terms of the Penal Code would serve

1. The Penal Code has eliminated minimum-maximum terms and substituted sentences for a specific term of years. N.J.S.A. 30:4-140, which authorizes the award of commutation credits to enhance the ability of state prison officials to maintain discipline in correctional facilities, was not repealed by the Penal Code. It is therefore evident that the legislature intended that these credits be applied to sentences imposed under the Penal Code. *See Formal Opinion No. 26—1979.*

determinate sentences. Since a determinate sentence is the functional equivalent to a minimum-maximum sentence, commutation credits should be awarded from the date of the imposition of a new sentence under the Penal Code.

You have also inquired as to the circumstances under which sex offenders may be awarded work credits. Work credits are granted to state prison inmates pursuant to N.J.S.A. 30:4-92 which provides in pertinent part:

> Compensation for inmates of correction institutions may be in the form of cash or remission of time from sentence or both . . . .

N.J.S.A. 2A:164-10, however, provided that sex offenders should not be compensated by the remission of time from their sentences but that provision be made for monetary compensation. It follows that work credits should not be remitted against the sentences of those sex offenders sentenced pursuant to the provisions of Title 2A. First, those offenders had entitlement to only monetary compensation in lieu of remission of time for any work performed. Secondly, there was no determinate sentence from which a remission of time could be taken.

The legislature as part of its enactment of the Penal Code repealed the preexisting prohibition on the award of work credits in the remission of sentences of sex offenders. Laws of 1979, c. 178, §147. The legislature further specifically provided that sex offenders would now be sentenced to a specific term of years rather than to an indeterminate term. It is, therefore, clear that state prison officials are authorized to give work credits to sex offenders incarcerated in state correction institutions either in the form of compensation for work performed or, in the case of a remission of time, only from those determinate sentences imposed by a court under the Penal Code.

In conclusion, it is our opinion that neither work credits in remission of time nor commutation credits may be awarded to a sex offender against time spent in custody under sentence for an offense committed under Title 2A prior to its repeal by the Penal Code. You are further advised that a sex offender resentenced under the provisions of the Penal Code may be awarded commutation credits and/or work credits in remission of sentence, to be computed only as of the date of his resentence to a determinate term under the Penal Code.[2]

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

2. An award of commutation and work credits to sex offenders sentenced under Title 2A for crimes committed prior to the Penal Code is not required by Section 2C:1-1d(1) which provides in pertinent part:

> *The provisions of the code governing the treatment and the release or*

discharge of prisoners, . . . shall apply to persons under sentence for offenses committed prior to the effective date of the code . . . .

The new criminal Code does not provide for the award of work or commutation credits. The authority to grant these credits is provided by N.J.S.A. 30:4-140 and N.J.S.A. 30:4-92 which have not been amended by the enactment of the criminal code. There, consequently, is no provison of the new criminal code governing the treatment, release or discharge of prisoners to be applied to sex offenders sentenced for offenses committed prior to the effective date of the Code.

June 9, 1980

JERRY FITZGERALD ENGLISH, *Commissioner*
Department of Environmental Protection
P.O. Box 1390
Trenton, New Jersey 08625

FORMAL OPINION NO. 12—1980

Dear Commissioner English:

You have requested an opinion interpreting the Solid Waste Management Act and the Solid Waste Utilities Control Act, to determine whether authorization exists for the establishment of "uniform average rates for solid waste disposal utilities within a Solid Waste Management District."

It is important to recognize from the outset that environmentally sound solid waste disposal, as well as the efficient and economical provision of solid waste collection and disposal services, are matters which directly affect the public health, safety and welfare. *Hackensack Meadowlands v. Mun. Landfill Authority,* 68 N.J. 451 (1975); *Southern Ocean Landfill v. Ocean Tp.,* 64 N.J. 190 (1974). The Legislature has therefore enacted a comprehensive scheme mandating the strict regulations of all solid waste collection and disposal operations. N.J.S.A. 13:1E-1 *et seq.,* N.J.S.A. 48:13A-1 *et seq.* To ensure environmental quality, the Solid Waste Management Act (1970), N.J.S.A. 13:1E-1 *et seq.,* (hereinafter the "Act") prohibits any person from engaging "in the collection or disposal of solid waste" without obtaining approval from the Department of Environmental Protection (hereinafter "DEP") N.J.S.A. 13:1E-5(a). Moreover, in order to assure the economic integrity of the operation, no person may engage "in the business of solid waste collection or solid waste disposal" until a certificate of public convenience and necessity is issued by the B.P.U., N.J.S.A. 48:13A-1, 6 *et seq.* (Solid Waste Utility Control Act of 1970) (hereinafter the "Utility Act"). In combination, these statutes provide for a far-reaching regulatory program designed to remedy the "grave problem" to the public health generated by improper solid waste collection and disposal. N.J.S.A. 13:1E-2.

The Act initiates this overall solid waste management scheme by mandating a regional planning approach as a basis for solid waste collection and disposal throughout the State. N.J.S.A. 13:1E-2, 4, 5, 20 *et seq.*

This planning required by the Act consists of several distinct stages, and commences with the promulgation by the DEP of "general guidelines sufficient to initiate the solid waste management process by solid waste management districts . . . ." N.J.S.A. 13:1E-6(a)(3). These "planning districts" are coincidental with the twenty-one counties and the Hackensack Meadowlands Development Commission. N.J.S.A. 13:1E-20.

The next step in the planning process is actual plan formulation and development by the planning districts, N.J.S.A. 13:1E-20, 21. This entails comprehensive planning studies to obtain regional data, including an inventory and appraisal of all facilities within the district. N.J.S.A. 13:1E-21. The waste disposal needs of the region, as well as a strategy to be applied in meeting same, are also to be developed, N.J.S.A. 13:1E-21, and a site plan depicting the location of "suitable sites to provide solid waste facilities" to meet such regional needs must be prepared. N.J.S.A. 13:1E-21(b)(3). It is also required that during this planning process, the districts analyze the "solid waste collection systems and transportation routes" within the respective districts. N.J.S.A. 13:1E-21(a)(4). The clear objective is thus to commence formulation of a management plan which most effectively and economically controls waste collection and disposal. N.J.S.A. 13:1E-2, 6, 20 *et seq.*

In conjunction with the DEP, the Board of Public Utilities Commissioners is integrally involved in this management process. Under §24 of the Act, N.J.S.A. 13:1E-24, and after receipt by the Commissioner of a solid waste management plan adopted in its entirety, the DEP is required to submit a copy of the plan to the Board of Public Utilities Commissioners for review and recommendations on the "economic aspect of the plan." Similarly, under the Utility Act the B.P.U. is authorized to designate a district as a "franchise area to be served by one or more persons engaged in solid waste collection . . . and disposal." N.J.S.A. 48:13A-4, 5, 7. The B.P.U. is also vested with the fundamental authority to establish the rate structures of solid waste facilities. N.J.S.A. 48:13A-1 *et seq.,* N.J.S.A. 48:2-25.

Through the joint abilities of the B.P.U., the districts, and the DEP, an overall solid waste management program to provide for the efficient and economical collection and disposal of solid wastes throughout the State can thus be effected. Equalized rates to be paid by consumers for solid waste collection and disposal services may be included within this management plan.

In this regard, only the B.P.U. is generally authorized to determine rates for individual solid waste utilities, N.J.S.A. 48:13A-1 *et seq.,* N.J.S.A. 48:2-1 *et seq.,* N.J.S.A. 13:1E-2(b)(5), N.J.S.A. 13:1E-27. In setting such rates, the B.P.U. is to consider the legislative intent to encourage efficient and economic waste disposal N.J.S.A. 13:1E-1 *et seq.,* and the B.P.U. may also exercise its rate-making authority in a manner to best insure environmental quality, N.J.S.A. 13:1E-2(b)(5). Moreover, since solid waste utilities, due to their competitiveness, may be differentiated from other public utilities, which are generally monopolistic, the B.P.U. may account for such differences in determining rates for solid waste utilities N.J.S.A. 48:2-25, *In Re Application of Saddle River,* 71 N.J. 14 (1976). The B.P.U. therefore has substantial flexibility in making rates for solid waste facilities

so as to best effectuate objectives of the Act and the Utility Act, N.J.S.A. 48:13A-1, 7, N.J.S.A. 13:1E-2.*

Equally as important, however, uniform costs to consumers may be effected through district planning even though independent rates are set for each solid waste facility. The broad planning authority vested in the districts includes the ability to develop an economic strategy to direct the flow and manner of solid waste collection, utilization and disposal. N.J.S.A. 13:1E-1 *et seq.* As part of this economic planning, methodologies can be devised to pass on to consumers a uniform cost of service even though each facility operates pursuant to an independent rate schedule. As an example, a "weighted average" may be an acceptable element within a district planning strategy. If proposed by a district, and approved by the DEP, this "weighted average" approach would calculate an equalized charge to be paid by consumers, with all such revenues distributed by an implementing agency to facilities within a district based upon a formula encompassing such variables as wastes received over a specific period of time and the independent rate base of each facility. Similarly, the B.P.U. through its franchising powers may equalize or control costs within a region by directing wastes to specific facilities, each with an approved rate base, N.J.S.A. 48:13A-5, and too, uniform rates may also be set if the solid waste facilities are public authorities pursuant to N.J.S.A. 13:1E-22.

Also, it is important to note as we have spelled out in great detail in *Formal Opinion No. 3—1980,* a solid waste management plan developed by a district may provide for the direction or control of the flow of wastes to a specific facility in order to encourage environmentally and economically sound solid waste planning. This may serve as a practical alternative to encourage equalized rates for consumers. This is illustrated by efforts to offset the prohibitive costs of the Hackensack Meadowlands Development Commission baler through the management of the flow of wastes directed to that facility. Although the particulars of any given economic approach within a district-wide solid waste management strategy must be left to the district plans, the authority to plan in such fashion may be found in the Act. *See* N.J.S.A. 13:1E-2(b)(5), 2(b)6, 21(b)(2), and N.J.S.A. 48:13A-1 *et seq.*

In sum, the Solid Waste Management Act and the Solid Waste Utilities Control Act are broadly fashioned preventative and remedial statutes designed to bring about environmentally sound and economically efficient solid waste management. In conjunction, the Acts provide for the development of district plans which may propose equalized rates to be paid by

* An exception to the exclusive rate-making authority of the B.P.U. appears to exist at N.J.S.A. 13:1E-22, where the Legislature has empowered boards of chosen freeholders and the Hackensack Meadowlands Development Commission to provide for *rates and charges* "necessary in development and formulation of a solid waste management plan . . . ." Such authority is limited to those instances when the respective board(s) of chosen freeholders of the Hackensack Commission has entered into a contract or agreement with a public authority for the furnishing of solid waste collection and disposal services. Moreover, the B.P.U. retains jurisdiction to order an adjustment in such a contract in order to assure that the rates and charges are "just and reasonable". N.J.S.A. 48:13A-7, *In Re Application of Saddle River,* 71 N.J. 14, 25 (1976).

consumers. Upon submission of the plan(s) to the DEP, and after consultation with the B.P.U., the DEP may approve, modify or reject same. The B.P.U. may then set individual rates, or designate a franchise so as to reflect the provisions and economic strategy of the district plans. It is therefore our opinion that solid waste management districts are authorized by these acts in the development of solid waste management plans to direct the waste stream to preferred facilities and, in conjunction with the DEP and B.P.U., to require the establishment of uniform average solid waste disposal rates.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: NATHAN M. EDELSTEIN
Deputy Attorney General

June 13, 1980

New Jersey Board of Optometrists
1100 Raymond Boulevard
Newark, New Jersey 07102

FORMAL OPINION NO. 13—1980

Dear Members of the Board:

You have asked for our advice as to whether the Board of Optometrists may require its prior approval of vision service plans. For the following reasons, it is our opinion that the Board has the authority to establish a requirement for its prior approval of those elements of vision service plans which concern the rendering of optometric care services to members of the plan. You are further advised, however, that it would be beyond the authority of the Board to either restrict its right of prior approval to solely nonprofit vision service plans or to require a vision service plan to operate on an "open panel" basis.

At the outset, it is necessary to refer to the definition of a vision service plan under the Board's regulation, N.J.A.C. 13:38-2.7, which provides in pertinent part:

> a plan offered by a non-profit association or corporation whose objective shall be to foster the conservation of human eyesight whereby [licensed optometrists] can offer their professional services upon a planned payment basis to members of groups desiring said services . . . .

It may be assumed that to the extent a vision service plan is operated on a profit making basis it would not qualify to receive the Board's approval to operate. The initial inquiry, therefore, is focused directly on whether the Board may, consistent with its enabling authority, limit vision service

plans to those solely operated on a nonprofit basis. In responding to this question, it is clear that an administrative agency has only such authority as is expressed by law or may be inferred therefrom by implication. *State v. Traffic Tel. Workers' Federation of New Jersey,* 2 N.J. 335 (1949). Although the Board may have had its reasons for limiting its approval to solely nonprofit plans, there is no evidence of legislative intent to foreclose the operation of vision care plans under the Board's jurisdiction to solely nonprofit plans. For this reason, it is our opinion that the definition contained in N.J.A.C. 13:38-2.7, which limits the right of the Board's prior approval to solely nonprofit plans, is beyond the parameters of the statute. In order for the Board to properly exercise its authority over these plans, this regulation should be amended to include both nonprofit and profit making vision service care plans.

The specific regulation pertaining to the nature of the Board's review is contained in N.J.A.C. 13:38-2.8(a) which provides as follows:

> In approving a vision service plan, the Board shall ascertain whether said vision service plan provides:
> 1. A sufficient number and geographic distribution of participating optometrists so as to provide for a free choice of practitioners.
> 2. A range and type of services which complies with the provisions of N.J.S.A. 45:12-11 and sections 1 (Minimum examination) and 2 (Examination equipment) of this subchapter.
> 3. That the participating optometrists possess the necessary equipment to provide the services set forth in the vision service plan.

A review of the Board's authority in its enabling legislation discloses no express reference to the regulation of vision service plans. However, it is clear that enabling legislation dealing with the practice of optometry in the State is predicated on the exercise of the State's police power to protect the public against incapacity, incompetence, deception and fraud in the rendering of optometric services. *Abelson's Inc. v. New Jersey Board of Optometrists,* 3 N.J. Super. 332 (Ch. Div. 1949), *aff'd* 5 N.J. 412 (1950); *New Jersey Optometric Association v. Hillman Kohan, et al.,* 144 N.J. Super. 411 (Ch. Div. 1976), *aff'd* 160 N.J. Super. 81 (App. Div. 1978); *New Jersey State Board of Optometrists v. Reiss,* 83 N.J. Super. 47 (App. Div. 1964). The Board has the inherent authority to protect the public against abuses in the providing of optometric services. It would follow that it also could take such reasonable measures as would be necessary to review and approve vision service care plans to protect the public against these abuses.

Given the Board's broad rule-making authority over vision service plans, the further issue posed is the nature and scope of the Board's inquiry into those plans. The structure, operation and implementation of a vision service plan would include, for example, fee structures, patient contribution, reimbursement procedures and other general operating and administrative procedures. Although there is a broad and diverse range of elements contained within a vision service plan, it is clear that the Board may only

exercise its jurisdiction with regard to those elements bearing on patient care. A requirement of limited prior approval may permissibly be set forth by Board regulation where such requirement bears a reasonable relationship to those specific areas expressly or implicitly contemplated by the Board's enabling legislation. Clearly, a requirement that a vision service plan provides minimum examination* and equipment standards reasonably relates to providing safe, competent and effective eye care. Similarly, a requirement that an optometrist possesses certain equipment necessary to render particular services contemplated by the plan, reasonably relates to the providing of quality patient care.

The Board's present regulation, in addition to providing for minimum equipment and examination standards pertaining to quality patient care, imposes a requirement that a plan contains a sufficient number and geographical distribution of participating optometrists. N.J.A.C. 13:38-2.8(a)1. This regulation presumably reflects an administrative determination that only open panel plans are permissible, i.e., plans which do not restrict the number of optometirsts to be used by plan members. There again is no direct evidence of legislative intent to authorize the Board to deal with this substantive component of a vision service plan. Moreover, a limited panel plan conceivably could render safe, adequate and proper vision care consistent with the salutary objectives underlying the Optometry Act. Therefore, it is our opinion that N.J.A.C. 13:38-2.8(a)1 is beyond the Board's rule-making authority and is invalid.

In conclusion, you are advised that the Board does not have the authority to limit its right of prior approval of vision service plans to solely those of a nonprofit character. The Board's authority to review and approve vision service plans is confined to those elements which reasonably relate to the provision of quality patient eye care. Finally, a requirement which allows only "open panel" plans to operate is beyond the authority of the Board set forth in its enabling legislation. You are further advised that the exercise of the Board's right of prior approval over vision service plans should be carried out in a reasonable manner, within a reasonable period of time and after full consultation with the Office of the Attorney General.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

* In *In Re Weston,* 36 N.J. 258 (1961), the New Jersey Supreme Court has upheld a regulation prescribing minimum examination standards to be consistent with the Board's statutory authorization.

June 19, 1980

JOSEPH A. LaFANTE, *Commissioner*
Department of Community Affairs
363 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 14—1980

Dear Commissioner LaFante:

An opinion has been requested whether the construction of resource recovery facilities by counties or county authorities pursuant to the Solid Waste Management Act of 1970 is subject to the requirements of the Local Public Contracts Law. For the following reasons, it is our opinion that such construction of resource recovery facilities by counties or county authorities is subject to the terms and provisions of the Local Public Contracts Law.

The Solid Waste Management Act (hereinafter the "Act") sets forth a comprehensive regulatory scheme intended to assure environmentally sound solid waste collection and disposal throughout New Jersey. N.J.S.A. 13:1E-2. The Act not only vests the Department of Environmental Protection with broad administrative authority to register such solid waste operations within the State, but it establishes an extensive solid waste management planning scheme to provide for the efficient, economical and environmentally sound collection and disposal of solid waste. N.J.S.A. 13:1E-2, 6, 20 *et seq.* The Act expressly declares as its policy the encouragement of "resource recovery through the development of systems to collect, separate, recycle and recover metals, glass, paper and other materials of value for reuse or for energy production." N.J.S.A. 13:1E-2(b)(7). *See* N.J.S.A. 13:1E-6(b)(1), 21(b)(2).

To implement this planning program throughout the State, the Act identifies twenty-two planning districts which include each county and the Hackensack Meadowlands District. N.J.S.A. 13:1E-19. Each district is required to develop a comprehensive area-wide solid waste management plan, which is subject to final review and approval by the Department of Environmental Protection. N.J.S.A. 13:1E-20 *et seq.* Each district is authorized in the development and formulation of its district plan "to enter into any contract or agreement with any public authority within any solid waste management district providing for or relating to solid waste collection and solid waste disposal. . . ." N.J.S.A. 13:1E-22. The Act further provides that every action taken by any county pursuant to its terms is a "county purpose" and that in "the performance of any responsibilities or requirements pursuant to [the Act], any county may adopt and come under the 'County Solid Waste Disposal Financing Law.' " N.J.S.A. 13:1E-25(a)(b).

Under the County Solid Waste Disposal Financing Law, N.J.S.A. 40:66A-31.1 *et seq.*, any county or county authority is authorized to "purchase, construct, improve, extend, enlarge or reconstruct solid waste disposal facilities within such county . . ." and may "make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act . . . ." N.J.S.A. 40:66A-31.4(1), (6). In combination, the Solid Waste Management Act and

the County Solid Waste Disposal Finance Law thus appear to vest the counties with authority to contract for the collection and/or disposal of solid waste as part of their solid waste management planning responsibilities.

The question presently raised is whether such a contract is subject to the terms and provisions of the Local Public Contracts Law, N.J.S.A. 40A:11-1 *et seq.* The Legislature has directly addressed this issue in the County Solid Waste Disposal Finance Law where it is provided that any contract entered into by a county pursuant to that act is "subject to P.L. 1971, c. 198 'Local Public Contracts Law' (c. 40A:11-1 *et seq.*)." Similarly, the Solid Waste Management Act requires that any contract between a county and a public authority regarding solid waste collection and disposal must "conform to all the requirements of law for contracts or agreements made by any public authority . . . ." N.J.S.A. 13:1E-22.

Furthermore, the construction of resource recovery facilities under the Local Public Contracts Law is consistent with a legislative policy to guard against favoritism, improvidence, extravagance and corruption. *L. Pucillo & Sons, Inc. v. Mayor & Council of Bor. of New Milford,* 73 N.J. 349 (1977). These objectives are complementary to the legislative concern to effectuate the most efficient and economical solutions to the statewide crisis in solid waste management, as expressed in both the Solid Waste Management Act and the Solid Waste Utility Control Act of 1970, N.J.S.A. 48:13A-1 *et seq.* The Supreme Court has noticed, in fact, that the solid waste industry has historically "tended to inefficiency in the form of wasteful fragmentation and conflicting licensing requirements, [and] was fraught with the potential for abuse in the form of favoritism, rigged bids, official corruption, and the infiltration of organized crime." *In re Application of Saddle River,* 71 N.J. 14, 22 (1976). The court thus proceeded to determine that when read together, these statutes intend to keep solid waste collection and disposal utilities within the ambit of the Local Public Contracts Law: "[I]n view of the strong public policy favoring competitive bidding and the whole tenor of the Solid Waste Utility Control Act, we think it evident that the Legislature intended that municipalities enter into solid waste contracts only after advertising for competitive bids . . . . We hold, therefore, that contracts negotiated with solid waste disposal and collection utilities do not at present fall under the exception of N.J.S.A. 40A:11-5(1)(f) . . . ." *In re Application of Saddle River,* 71 N.J. 14, 24, 32 (1976). It therefore appears clear that in addition to an express legislative requirement for the construction of resource recovery facilities by counties pursuant to the Local Public Contracts Law, a system of competitive bidding is in furtherance of public policy generally in the area of solid waste management.

You are accordingly advised that the construction of resource recovery facilities by counties under their statutory authority regarding solid waste collection and disposal is subject to the terms and provisions of the competitive bidding requirements of the Local Public Contracts Law.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: NATHAN M. EDELSTEIN
Deputy Attorney General

July 7, 1980

G. THOMAS RITI, *Director*
Division of Public Welfare
Department of Human Services
2525 Quakerbridge Road
Trenton, New Jersey

FORMAL OPINION NO. 15—1980

Dear Director Riti:

You have asked for our opinion as to whether a municipality organized under an optional form of government is empowered to abolish its local assistance board.

A resolution of your question requires an analysis of the Optional Municipal Charter Act (Faulkner Act) and the applicable provisions of the "General Public Assistance Law." Municipalities are required to:

> provide public assistance to the persons eligible thereto, residing therein or otherwise when so provided by law, which shall be administered by a local assistance board according to law and in accordance with this Act and with such rules and regulations as may be promulgated by the Commissioner. [N.J.S.A. 44:8-114.]

The local assistance boards are composed of from three to five persons appointed by the chief executive of the municipality upon the approval of the governing body. N.J.S.A. 44:8-115.

These provisions of the General Public Assistance Law were enacted in 1947 (L.1947, c. 156), three years before the enactment of the Faulkner Act. (L.1950 c. 210). The issue to be determined is whether by the enactment of the Faulkner Act, municipalities have been given the power to administratively abolish or reorganize local assistance boards. The Faulkner Act provides for the adoption of certain optional plans of municipal government by the voters. N.J.S.A. 40:69A-1 *et seq., Bucino v. Malone,* 12 N.J. 330 (1953).[1] Optional plans available to municipalities are various versions of Council-Manager plans, N.J.S.A. 40:69A-81 to 69A-114.5 and Mayor-Council plans, N.J.S.A. 40:69A-31 to 69A-80. The Act contains a number of provisions pertinent to the instant question. A starting point is N.J.S.A. 40:69A-30 which provides, in part, that:

> [T]he general grant of municipal power contained in this article is intended to confer the greatest power of local self-government consistent with the Constitution of this State. Any specific enumeration of municipal powers contained in this act or in any other general law shall not be construed in any way to limit the general description of power contained in this article . . . All grants of municipal power to municipalities governed by an optional plan under this act, whether in the form of specific enumeration or general terms, shall be liberally construed, as required by the Constitution of this State, in favor of the municipality.

1. In 1979, 87 of the 567 New Jersey municipalities were governed under the Faulkner Act, *Stop-Pay-Hikes v. Town Council of Irvington,* 166 N.J. Super. 197, 206 (Law Div. 1979), *aff'd* 170 N.J. Super. 393 (App. Div. 1979).

Among the powers granted to the municipal council under a Council-Manager form of government is the authority to:

> continue or create, and determine and define the powers and duties of such executive and administrative departments, boards and offices, in addition to those provided for herein, as it may deem necessary for the proper and efficient conduct of the affairs of the municipality. [N.J.S.A. 40:69A-90.]

Moreover, this same statute further provides that "(a)ny department, board or office so continued or created may at any time be abolished by the municipal council." N.J.S.A. 40:69A-90.

Under a Mayor-Council form of government, the council is empowered to establish "a department of administration and . . . other departments, not exceeding 9 in number." N.J.S.A. 40:69A-43. The statute further provides that "(a)ll of the administrative functions, powers and duties of the municipality, other than those vested in the office of the municipal clerk, shall be allocated and assigned among and within such departments." N.J.S.A. 40:69A-43. The only limitation on municipal authority which appears in the statute is a requirement that municipalities with a Mayor-Council government and having a population over 250,000 must establish a board of alcoholic beverage control. N.J.S.A. 40:69A-43(e). The statute clearly limits this restriction on municipal authority to the creation of an alcoholic beverage control board.

In addition, N.J.S.A. 40:69A-26 provides that, upon adoption of one of the optional forms of government, a "municipality shall thereafter be governed by the plan adopted, by the provisions of this act common to optional plans and by all applicable provisions of *general law.*" A general law is defined, in part, as:

> any law or provision of law, not inconsistent with this act, heretofore or hereafter enacted which is by its terms applicable or available to all municipalities . . . . [N.J.S.A. 40:69A-28.]

The issue in the present situation is whether the organization of a local assistance board set forth by statute is encompassed as a general law binding on all municipalities.

It is a familiar rule in the interpretation of statutes that the determinative factor is legislative intent. *Clifton v. Zweir,* 36 N.J. 309, 322 (1962); *Mentus v. Irvington,* 79 N.J. Super. 465, 472 (Law Div. 1963). "[T]his intent must be our only guide." 79 N.J. Super. at 472. The history of the Faulkner Act provides a persuasive indication of the legislative purpose. In the *Final Report,* of a commission which drafted the legislation it was stated:

> [T]he Commission has sought to provide sufficient flexibility in the several plans so that each municipality could decide for itself how it wished to organize its local administration, within the general principle that each administrative department should be headed by a single executive. *This would not permit the past practice of quasi-independent boards in many fields where they have been common,* but the plans allow the operation of general laws in those fields in which boards or commissions are essential to carry out particular functions or discharge special trusts. These exceptions include, for example boards of education, boards of health and boards of zoning adjustment." [*Final Report of the Commission on Municipal Government,* at p. 13 (1949).] [Emphasis added.]

It is significant that the Commission did not include a local assistance board among those enumerated as essential to carry out a particular function. Moreover, the nature of the boards mentioned in the *Report* is significantly different from that of a local assistance board. Boards of zoning adjustment, for example, have been referred to as "quasi-independent" boards. *Mentus v. Irvington, supra.* Boards of education and boards of health are frequently involved in making policy determinations for the municipality. A local assistance board, in contrast, is involved solely in carrying out administrative decisions. The statute provides that local public assistance "shall be administered by a local assistance board according to law and in accordance with this act and with such rules and regulations as may be promulgated by the Commissioner." N.J.S.A. 44:8-114. Policy is set by the Division of Public Welfare through regulations issued by the Commissioner of Human Services and binding upon the municipalities. *State v. Malone,* 164 N.J. Super. 47 (Ch. Div. 1978). Clearly, the supervision of local public assistance programs by the Division at the State Level obviates the need for an independent policy making body in a municipality.

The legislative purpose behind the enactment of the Faulkner Act was to allow municipalities to abolish independent boards. In *Myers v. Cedar Grove Tp.,* 36 N.J. 51, 59 (1961) the Court stated:

> [T]he idea of diminishing the power of the new governing body by extending the number of separate and independent bodies is incompatible with the statutory scheme for the centralization of sweeping legislative and administrative authority in the Council and Manager. [36 N.J. at 50.]

Also, *Am. Fed. State, Cty. Mun. Emp. v. Hudson Welf. Bd.,* 141 N.J. Super. 25 (Ch. Div. 1976) provides compelling support for the proposition that Faulkner Act municipalities are empowered to abolish their local assistance boards. The court held that a county, organized under the Optional County Charter Act, was authorized to abolish an independent county welfare board mandated by statute and incorporate the board and its functions within one of the county's administrative departments. *Id.* at 35. The court reached this conclusion after finding that "the clear expressed intent of the Legislature and the meaning of the act is to give

the new county governments created under the law the sweeping power to restructure their form as they see fit consistent with the Constitution of New Jersey and general law." *Id.* at 32. Since "(i)t is obvious that the Faulkner Act was used as the model for the Optional County Charter Law," *Citizens for Charter Change, Essex Cty. v. Caputo,* 136 N.J. Super. 424, 439 (App. Div. 1975), *certif. den.* 74 N.J. 268 (1975), it is reasonable to conclude that the Legislature intended the Faulkner Act to permit a municipality to abolish and reorganize its local welfare agency.[2]

It is therefore our opinion that municipalities governed by an optional form of government may reorganize or abolish their local assistance board.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: BARBARA A. HARNED
Deputy Attorney General

2. Although Faulkner Act municipalities are empowered to abolish or reorganize local assistance boards, municipalities are required to provide general assistance in conformity with applicable provisions of general law found in Title 44 and in the regulations of the Division of Welfare. As noted in *Am. Fed. State, Cty. Mun. Emp. v. Hudson Welf. Bd.,* "(m)andated services must continue [even though] how they are to be administered is to be a decision of the elected . . . officials." 141 N.J. Super. at 32-33. *See also, State v. Malone, supra.*

July 11, 1980

JOHN R. JAMIESON, *Deputy Commissioner*
Department of Transportation
1035 Parkway Avenue
Trenton, New Jersey 08625

FORMAL OPINION NO. 16—1980

Dear Mr. Jamieson:

You have inquired whether the Department of Transportation may accept interest free federal loans and in turn lend the borrowed federal funds to public and private employers for the acquisition of vanpool vehicles consistent with the Constitution and the Commissioner's statutory powers. Your inquiry presents the following three issues which will be discussed separately:

I. Does the Department's borrowing of federal funds violate the Debt Limitation Clause of the New Jersey Constitution?
II. Does the Department's lending of the borrowed federal funds violate the constitutional provisions banning a loan of the credit of the State or appropriation of money for a private purpose?

III. In connection with a program to defray the acquisition cost of vanpool vehicles, does the Commissioner of Transportation have the statutory power to accept federal loans and to lend the funds to public and private employers?

Section 126 of the Federal-Aid Highway Act of 1978, 23 U.S.C. §146, authorizes the U.S. Secretary of Transportation, using Federal-aid funds, to make grants and loans to States and other governmental bodies in order to financially assist eligible ridesharing projects, including defraying the acquisition costs of vanpool vehicles. The federal act, however, limits federal assistance for the cost of acquiring vanpool vehicles to loans, and not grants. The federal loans amount to 75 percent of the acquisition costs. Current federal regulations, as amended by the 1978 Act, provide that federal loans may be made "as long as appropriate provision is made for repayment of this cost within a period of less than four years." 23 C.F.R. §656.7(3) (1976).

As part of its vanpool assistance program, the New Jersey Department of Transportation would accept the interest free federal loans and obligate itself to repay the federal loans within four years. The Department would then lend the borrowed funds to counties, municipalities, governmental or quasi-governmental agencies, and private corporations or individuals in the amount of 75 percent of the acquisition cost of the vanpool vehicle.

By executed agreement, the vanpooler would agree to repay the loan within four years. The Department would retain the vehicle's certificate of title in its possession until the loan has been fully repaid. The certificate of title would indicate that the Department is the secured party with regard to that vehicle. The agreement with the recipient of the loan would state that the primary purpose of the vanpool project is to utilize vanpool vehicles to transport specific employees, between their homes or appointed pick up areas and their place of employment, and for employment related trips during the work day in order to reduce fuel consumption, traffic congestion, parking difficulties, and pollution. Other use would be permitted only upon written determination by the Department that such use is not inconsistent with the general objectives of the vanpool project. Utilization of the vanpool vehicle for illegal purposes, or on a regular basis for other than passenger transportation, would be cause for termination of the agreement and all balances of the loan would become immediately due. The recipient would also agree to comply with all applicable state and federal statutes and obligations relating to vanpool project operations during the term of the contract. Finally, the agreement would provide that the Department is not obligated to use any funds other than those provided by the federal government for the vanpool program in fulfilling any of the terms or conditions of the contract.

I

The first question presented by your inquiry is whether the Department's receipt of the federal funds in the form of loans violates the Debt Limitation Clause of the State Constitution. The Debt Limitation Clause of our Constitution provides as follows:

> The Legislature shall not, in any manner, create in any fiscal year a debt or debts, liability or liabilities of the State, which together with any previous debts or liabilities shall exceed at any time one per centum of the total amount appropriated by the general appropriation law for that fiscal year, unless the same shall be authorized by a law for some single object or work distinctly specified therein. Regardless of any limitation relating to taxation in this Constitution, 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 the law shall not be repealed until such debt or liability and the interest thereon are fully paid and discharged. 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 legally qualified voters of the State voting thereon. All money to be raised by the authority of such law shall be applied only to the specific object stated therein, and to the payment of the debt thereby created. *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.* Nor shall anything in this paragraph contained apply to the creation of any debts or liabilities for purposes of war, or to repel invasion, or to suppress insurrection or to meet an emergency caused by disaster or act of God. [*N.J. Const.* Art. 8, §2, ¶3.] [Emphasis added.]

Formal Opinion No. 23—1975 considered the applicability of the Debt Limitation Clause to loans from the federal government. The Commissioner of Transportation had inquired whether the Commuter Operating Agency could accept federal loans for purposes generally authorized by the Agency's enabling legislation. After reviewing the history of the sentence which exempts federal funds from the Debt Limitation Clause, the opinion concluded that the receipt of federal loans by the Agency was consistent with the constitutional mandate. The opinion stated:

> [T]he monies made available in the present legislation would be loans and not grants and would not be treated the same as general funds of the State. It is clear that all such funds would continue to be an obligation of the State to the Federal Government until repaid, and the basic agreement is thus between the two governments rather than between the State and a third party. [F.O. No. 23-1975.]

Any federal money deposited with this State, whether as grants or loans, is therefore unaffected by the Debt Limitation Clause. In the matter at hand, the Department would be accepting interest free federal loans and would be obligated to repay the principal within four years. Please be advised that the Department's receipt of the federal loans falls within the federal funds exemption of the Debt Limitation Clause and is therefore constitutionally permissible.

II

The second question presented by your inquiry is whether the State's subsequent lending of the borrowed federal funds to public and private employers for the acquisition of vanpool vehicles violates the constitutional provisions banning a loan of the credit of the State or an appropriation of money for private purpose. The pertinent constitutional provisions are as follows:

> The credit of the State shall not be directly or indirectly loaned in any case. . . . [*N.J. Const.* Art. 8, §3, ¶1.]
>
> 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. . . . [*N.J. Const.* Art. 8, §3 ¶3.]

In *Roe v. Kervick,* 42 N.J. 191 (1964), the New Jersey Supreme Court discussed the factors which determine whether a statutory program of public financial assistance violates the constitutional ban on loan or appropriation of public money. The court stated that, in order for a program to be constitutional, the financial assistance must be primarily for a public purpose; the contractual consideration must be primarily for a public purpose; the contractual consideration must be intimately associated with executing the public purpose and must not be merely the obligation to repay the loan; the paramount factor in the contract between the State and the recipient must be the accomplishment of the public purpose; and any private advantage is merely incidental and subordinate. *Id.,* at 218. The Court also stated that there must be a reasonable measure of control by the public agency by means of contract, statute and regulation such that the recipient represents "the controlled means by which the government accomplished a proper objective" *Id.,* at 219, 222. *See also Bayonne v. Palmer,* 41 N.J. 520 (1966).

In construing the meaning of "public purpose," the Court, in *Roe v. Kervick, supra,* stated that:

> Generally speaking, it connotes an activity which serves as a benefit to the community as a whole, and which, at the same time is directly related to the functions of government . . . . To be serviceable it must expand when necessary to encompass changing public needs of a modern dynamic society. [*Id.,* at 207.]

The Court also recognized that "the modern trend of judicial thought is to expand and construe liberally the meaning of public purpose." *Id.,* at 226.

In the matter at hand, the Department would accept interest free federal loans, and then lend the funds to public and private employers in amounts of 75 percent of the acquisition cost of the vanpool vehicles. To pass constitutional muster, such assistance must be primarily for a public purpose. Congress has declared it "to be national policy that special effort should be made to promote commuter modes of transportation which conserve energy, reduce pollution and reduce traffic congestion" and

has directed the U.S. Secretary of Transportation to assist in the establishment of vanpool programs. 23 U.S.C. §146 (notes). The Department initiated its vanpool loan program in response to the federal legislation.

Based upon the dynamic concept of public purpose and upon the legislative findings, the lending of the borrowed federal funds herein to assist in the acquisition of vanpool vehicles by public and private employers primarily serves a public purpose. In addition, there is the required measure of control to ensure that the public purpose is accomplished. The loan agreement provides that the primary purpose of the vanpool vehicle is to transport specified employees to and from work and for employment related trips during the work day. Use of the vehicle which is inconsistent with the general objectives of the vanpool project is cause for termination of the agreement.

Please be advised that the Department's lending of borrowed federal funds does not violate the constitutional prohibition against loaning the state's credit or appropriating money for a private purpose.

III

Although the Department's program is consistent with the Constitution, the final question presented by your inquiry is whether the Commissioner of Transportation has the statutory authority to accept interest free federal loans in connection with a departmental program to lend the borrowed federal funds to employers to defray the acquisition costs of the employers' vanpool vehicles.

In the "Transportation Act of 1966," N.J.S.A. 27:1A-1, *et seq.,* the Legislature established the Department of Transportation as a principal department in the executive branch of the State government. The Legislature intended the act:

> to establish the means whereby the full resources of the State can be used and applied in a coordinated and integrated matter [sic] to solve and assist in the solution of the problems of all modes of transportation; to promote an efficient, fully integrated and balanced transportation system for the State; to prepare and *implement* comprehensive plans and *programs for all modes of transportation development in the State;* and to coordinate the transportation activities of State agencies, State-created public authorities, and other public agencies with transportation responsibility within the State. [N.J.S.A. 27:1A-1.] [Emphasis added.]

As head of the Department of Transportation, the Commissioner has been delegated extensive powers and functions in the area of all transportation modes. N.J.S.A. 27:1A-5. The Commissioner has also been given a broad legislative mandate to "(d)o whatever may be necessary or desirable to effectuate the purposes of this Title (Title 27 Highways)." N.J.S.A. 27:7-21(i). In addition, N.J.S.A. 27:8-2 authorizes the Commissioner" . . . to receive and apply any money received from the federal government for road work to any work he shall have authority to do." N.J.S.A. 27:7-1 defines road "work" to include "all other things and

services necessary or convenient for the performance of the duties imposed by this title (Title 27 Highways)." Moreover, it is well settled that the statutory powers of the Commissioner are to be liberally construed. *Township of Hopewell, et al v. Goldberg, et al,* 100 N.J. Super. 589 (App. Div. 1968), *certif. denied,* 52 N.J. 500 (1968); *State v. Maas & Waldstein Co.,* 83 N.J. Super. 211 (App. Div. 1964). In *Township of Hopewell, et al v. Goldberg, et al, supra,* the court stated:

> Our Legislature has clearly indicated its intent that New Jersey participate in the Federal aid highway program. It has empowered the Highway Commissioner to perform whatever acts are required by Federal Statute to qualify the State for Federal highway aid . . . The powers granted the Commissioner under the various State statutes must be construed liberally so as to carry out the basic purpose of providing adequate highway facilities throughout the State. Participation in the Federal highway aid program is clearly within the scope of the statutes. [101 N.J. Super. 589, 595 (App. Div. 1968).]

The Department initiated its program to assist employers interested in acquiring vanpool vehicles as a result of federal highway legislation. Section 126 of the Federal-Aid Highway Act of 1978 provides:

> *In order to conserve fuel, decrease traffic congestion during rush hours, improve air quality, and enhance the use of existing highways and parking facilities,* the Secretary may approve for Federal financial assistance from funds apportioned under sections 104(b)(1), 104(b)(2), and 104(b)(6) of this title, projects designed to encourage the use of carpools and vanpools. (As used hereinafter in this section, *the term "carpool" includes a vanpool.)* Such a project may include, but is not limited to, such measures as providing carpool opportunities to the elderly and handicapped, systems for locating potential riders and informing them of convenient carpool opportunities, *acquiring vehicles appropriate for carpool use,* designating existing facilities for use as preferential parking for carpools. [23 U.S.C. §146(a).] [Emphasis added.]

In the interest of conserving energy and reducing pollution and traffic congestion, the federal legislation directs the Secretary of Transportation to assist both public and private employers who are interested in establishing carpooling and vanpooling programs. *See* §126(d)-(h) of Pub. L. 95-599, 23 U.S.C. §146 (notes). The Secretary is authorized to make grants and loans in amounts not exceeding 75 percent of the cost of eligible projects. The Act provides, however, that federal financial assistance in connection with the acquisition costs of vanpool vehicles is limited to loans. These funds are available to New Jersey only through the Department of Transportation, which is the State agency designated to receive federal-aid highway funds. *See* 23 U.S.C. §117.

Initiated as a result of the federal legislation, the Department's vanpool loan program is in furtherance of one of the broad purposes of the

Department—the implementation of programs for all modes of transportation development in the State. The program is intended to reduce traffic congestion on highways and to enhance the use of highways. Utilizing federal funds in the form of loans, the program assists employers in defraying the acquisition costs of vanpool vehicles. Although not regularly available to the public, the primary purpose of the vehicle is to transport eight to fifteen participating employees between their homes or appointed pick up areas and their place of employment. In light of the purposes of the program and the liberal construction to be given to the powers of the Commissioner, the Department's vanpool loan program is in furtherance of the purposes of the Department and falls within the statutory powers of the Commissioner.

In responding to your inquiry, the impact, if any, of the New Jersey Public Transportation Act of 1979, L. 1979, c. 150, on the power of the Commissioner of Transportation to engage in the vanpool loan program must also be considered. In addition to amending the powers of the Commissioner, N.J.S.A. 27:1A-5, the recent legislation created the New Jersey Transit Corporation to provide public transportation services. N.J.S.A. 27:25-1 *et seq.,* The Act, however, defines "public transportation services" to include "paratransit services," N.J.S.A. 27:25-3(e), which are in turn defined to include:

> any service, other than motorbus regular route service and charter services, including, but not limited to, dial-a-ride, nonregular route, jitney or community minibus, and shared-ride services such as *vanpools,* limousines or taxicabs *which are regularly available to the public. Paratransit services shall not include limousine or taxicab service reserved for the private and exclusive use of individual passengers.* [N.J.S.A. 27:25-3(d).] [Emphasis added.]

Since the Department's vanpool loan program herein is essentially a program to assist employers to establish non-profit vanpools exclusively for employees and does not contemplate vanpooling which is regularly available to the public, the power of the Commissioner to engage in this program is unaffected by the New Jersey Public Transportation Act of 1979.

In conclusion, please be advised that the Department has the statutory authority to accept the interest free federal loans and in turn to lend the funds to public and private employers to defray the acquisition costs of vanpool vehicles.

Very truly yours,
JOHN J. DEGNAN
Attorney General
By: JOHN J. REILLY
Deputy Attorney General

July 15, 1980

New Jersey Department of Optometrists
1100 Raymond Boulevard
Newark, New Jersey 07102

FORMAL OPINION NO. 17—1980

Dear Members of the Board:

You have asked for our opinion as to the validity of N.J.A.C. 13:38-1.4 and 13:38-1.7 which deal with solicitation by optometrists for the purpose of selling optometric services or materials. For the following reasons, you are advised that those regulations of the Board are invalid.

In order to deal with the validity of these regulations it is necessary at the outset to consider the section of the Optometry Act dealing with solicitation by optometrists. N.J.S.A. 45:12-11(p) provides that the Board shall have the power to revoke or suspend any license to practice optometry where an optometrist has been found to be:

> Soliciting in person or through an agent or agents for the purpose of selling ophthalmologic materials or optometric services or employing what are known as 'chasers,' 'steerers,' or 'solicitors,' to obtain business.

It may be assumed that such solicitation of business by optometrists or their agents was viewed by the Legislature to be inconsistent with appropriate professional standards governing the relationship between an optometrist and his patient. Also, a ban on in person solicitation of patients was presumably designed to prohibit those business practices which tend to exert pressure on prospective patients in order to make speedy, uninformed or ill-conceived decisions with regard to the purchase of optometric services and related goods.

The regulations adopted by the Board dealing with solicitation provide as follows:

> a. Any statement, printed, written or oral, published, posted or circulated, directly or indirectly, by any person, firm, corporation, group or association, which quotes or specifies the name of any individual optometrist, firm or partnership of optometrists or any person, firm or corporation employing or having associated with him or it one or more optometrists, by way of especially recommending the professional services of said optometrist, firm or corporation in conjunction with the announcement of the consummation of any contract, agreement or arrangement for professional services with said optometrist, firm or corporation, in which announcement of the said contract, agreement or arrangement offer optometric services at a stipulated fee, or any variation of such a fee, or as being free, or at a fee which is represented to be smaller than ordinary fees or which purports to offer discounts or any other inducement or advantages to prospective recipients of such services, unless in conjunction with a vision service plan approved by the Board, shall be *prima facie* evidence of soliciting through agents; within the meaning of N.J.S.A. 45:12-11(p) on the part of the optometrist or optometrists so named, specified or involved.
>
> b. This shall be conclusive if the optometrists are shown to be accessories to the contract, agreement or arrangement by satisfactory evidence of their providing or rendering optometric services in accordance with the contract, agreement or arrangement. [N.J.A.C. 13:38-1.4.]
>
> Within the meaning of N.J.S.A. 45:12-11(p), any optometrist who offers or provides optometric services and/or contact lenses and/or eyeglasses at a fee less than his usual fee, in consideration of the patient being associated with any person, association, organization or corporation, shall be considered as soliciting for the purpose of selling ophthalmic materials or optometric services, unless such optometric services and/or contact lenses and/or eyeglasses are offered in conjunction with a vision service plan approved by the Board. [N.J.A.C. 13:38-1.7.]

It is clear at once from a reading of these regulations that they are designed to achieve objectives beyond those contemplated by the statute. N.J.A.C. 13:38-1.4 prohibits any communication of information of the identity of any optometrists or firm employing or having one or more optometrists where such communication is in conjunction with any agreement offering optometric services at a stipulated fee or smaller than ordinary fees or which purports to offer discounts, inducements, or advertising or recipients of those services. Since the statutory section was enacted to only prohibit what the Legislature regarded as unprofessional practices inherent in the in person solicitation of business for the purpose of selling ophthalmologic materials or optometric services, it is evident that a regulatory prohibition against the communication of information pertaining to either the services of an optometrist or a stipulated fee would exceed the regulatory scope contemplated by the statute. Similarly, the offering of optometric services at a fee less than the usual fee in consideration of a patient being associated with a third party plan is not encompassed within the legislative objective concerning the prohibition against in person solicitation.

This conclusion is supported by the rule of statutory construction that a legislative enactment should not be interpreted in a manner to raise substantial questions as to its constitutionality. *Woodhouse v. Woodhouse,* 17 N.J. 409 (1955); 2A *Sutherland, Statutory Construction,* (3d ed. 1973), §45.11 at 33-34. To interpret N.J.S.A. 45:12-11(p) as statutory authority to prohibit the communication of information to the public concerning the services and fees charged by optometrists, would raise a substantial question under the First Amendment to the United States Constitution. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 248, 48 L.Ed.2d 346 (1976); *Bates v. State Bar of Arizona,* 433 U.S. 350, 53 L.Ed.2d 810 (1977). In *Ohralik v. Ohio State Bar Association,* 436 U.S. 477, 56 L.Ed.2d 444 (1978), the Supreme Court of the United States held that a state's valid concern with regard to the regulation of

in person solicitation in the legal profession is limited to those aspects of solicitation that involve fraud, undue influence, intimidation, over reaching and other forms of vexatious conduct. The valid objectives of the Legislature in the case of the profession of optometry under N.J.S.A. 45:12-11(p) would essentially be the same. The statute, therefore, cannot be interpreted to allow for a regulatory prohibition on the truthful advertising or communication of routine information concerning the provision of ophthalmologic materials and optometric services. For these reasons, it is our opinion that N.J.A.C. 13:38-1.4 and 13:38-1.7 are not consistent with N.J.S.A. 45:12-11(p) and are, therefore, invalid.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: DOUGLAS J. HARPER
Deputy Attorney General

October 6, 1980

DR. FRED PRICE, *Secretary*
Board of Examiners
Department of Education
225 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 18—1980

Dear Dr. Price:

On September 23, 1974 this office advised the Commissioner of Education in *Formal Opinion No. 10—1974* that statutory citizenship requirements on the employment or tenure of teachers who are aliens were constitutionally invalid. On June 13, 1979 in *Formal Opinion No. 12—1979,* we advised the Commissioner that as a result of a decision of the United States Supreme Court in *Ambach v. Norwick,* 441 U.S. 68 (1979), New Jersey statutes, which require a teaching staff member to either demonstrate that he is a citizen of the United States or has declared his intent of becoming a citizen, are supported by a legitimate governmental purpose and are valid. It is clear, therefore, that at the present time a noncitizen may not be certified by the Board of Examiners in the Department of Education to teach in the public schools unless he or she has satisfied the requirements of the governing statute dealing with United States citizenship.[1]

A question has now arisen as to the status of those noncitizens who have been certified by the Board of Examiners at some point in time between the issuance of *Formal Opinion No. 10—1974* and our most recent advice to the Commissioner on June 13, 1979 in *Formal Opinion No. 12—1979* that those statutes requiring citizenship are constitutional and fully operative. From a cursory examination of those statutes, it is apparent

to have been the underlying legislative policy to require all persons teaching in the public schools and certified by the Board to be citizens of the United States. It would be inconsistent with this overall legislative purpose to allow noncitizens to continue to teach and be certified in the public schools of this State. It is therefore our opinion that those noncitizens who are the subject of this inquiry are required to become United States citizens as a condition to continuing to teach in the public schools and to hold their certificates. In order to implement the statutory mandate, the Board should require those persons to either produce valid proof of citizenship or to declare a present intent to become a United States citizen.

An additional issue posed concerns the responsibility of the Board towards those noncitizens who fail to acquire United States citizenship within five years of the filing of a declaration of intent. N.J.S.A. 18A:6-39 in pertinent part provides that a teacher's certificate issued to a noncitizen *shall be cancelled* by the Board if the holder has not become a citizen within five years of its date of issuance. N.J.S.A. 18A:26-8.1 provides that any such certificate *may be* revoked by the Board in its discretion if the holder shall not have become a United States citizen within five years. These two statutory sections therefore are inconsistent on their face with regard to the Board's discretion to revoke certification (N.J.S.A. 18A:26-8.1) on the one hand, and its obligation to cancel a certificate (N.J.S.A. 18A:6-39) on the other hand, where the holder thereof shall not have become a United States citizen within five years.

In order to resolve this inconsistency, it is necessary to briefly review the pertinent legislative history. Both of these statutory sections were adopted by the legislature in a single piece of omnibus legislation which

1. There are two statutory sections which deal with United States citizenship requirements for teachers in the public schools. N.J.S.A. 18A:6-39 provides as follows:

> The board may, with the approval of the commissioner, issue a teacher's certificate to any citizen of any other country, who has declared his intention of becoming a United States citizen and who is otherwise qualified but any such certificate shall be void, and shall be canceled by the board, if the holder thereof shall not become a United States citizen within five years of the date of its issuance, and it may be revoked within said period by the board, if the board is satisfied that the holder thereof has abandoned his efforts to become a United States citizen or has become disqualified for such citizenship but no teacher certified, pursuant to this section, shall acquire tenure unless and until United States citizenship shall have been granted to him.

N.J.S.A. 18A:26-8.1 provides as follows:

> The state board of examiners may, with the approval of the commissioner, issue a teacher's certificate to teach in the public schools to any citizen of any other country who has declared his intention of becoming a United States citizen and who is otherwise qualified, but any such certificate may be revoked by the state board of examiners if the board is satisfied that the holder thereof has abandoned his effforts to become a United States citizen, or has become disqualified for citizenship, or shall not have become a United States citizen, within five years of the date of its issuance.

See *infra* for a discussion of the controlling statutory section.

recodified Title 18 into Title 18A. Laws of 1967, c. 271. N.J.S.A. 18A:6-39 is substantially the same as an earlier statutory section in N.J.S.A. 18:13-4.2 enacted as Laws of 1956, c. 158. N.J.S.A. 18A:26-8.1, however, in pertinent part, appears for the first time in the recodification of Title 18 by Laws of 1967, c. 271. In the absence of a legislative indication as to which of these two conflicting statutory sections should govern the revocation of a certificate of a noncitizen, it is necessary to resort to the rule of statutory construction that the legislature should not be deemed to have enacted repetitious or surplus legislation. *Peper v. Princeton University Board of Trustees,* 77 N.J. 55, 68 (1978). Rather, it is reasonable to assume that the legislature intended its latest and newest expression of legislative policy on the subject to govern. For these reasons, the provisions of N.J.S.A. 18A:26-8.1 are applicable. A certificate may be revoked in the discretion of the Board of Examiners on a case by case basis if the holder shall not have become a citizen of the United States within five years.[2]

In summary, you are advised that those noncitizens who have been certified by the Board of Examiners at some point in time between the issuance of *Formal Opinion No. 10—1974* on September 23, 1974 and the issuance of *Formal Opinion No. 12—1979* on June 13, 1979 are now required to conform with the provisions of N.J.S.A. 18A:26-8.1. They should either produce proof of citizenship or declare a present intent to become a United States citizen. You are further advised that the Board of Examiners has the discretion whether or not to revoke the certificate issued to a noncitizen under the facts of an individual case where the holder either has abandoned his efforts to become a citizen or has become disqualified or shall not have become a citizen within five years of a declaration of intent to do so.

Very truly yours,
JOHN J. DEGNAN
Attorney General
By: THEODORE A. WINARD
Assistant Attorney General

2. It should be noted, however, that notwithstanding a decision by the Board of Examiners not to revoke the certificate of a noncitizen in an individual case, no person shall be deemed to have acquired tenure in the public schools unless he shall become a United States citizen. N.J.S.A. 18A:38-3.

October 21, 1980

JOHN J. REILLY, *Executive Director*
New Jersey Racing Commission
404 Abington Drive
East Windsor, New Jersey 08520

FORMAL OPINION NO. 19—1980

Dear Mr. Reilly:

The Racing Commission has asked for our opinion concerning a form of pari-mutuel wagering known as "pick six." In particular, the question is whether an ingredient of "pick six" which provides for a carry-over of an undistributed percentage of a pari-mutuel pool to the next racing day is permissible. For the following reasons, it is our opinion that the use of "pick six" pari-mutuel wagering at New Jersey racetracks would be inconsistent with the racing laws.

At the outset, it is necessary to describe in specific terms the nature of the form of pari-mutuel wagering known as the "pick six." Each bettor selects the first horse in each of six consecutive races designated as the pick six races. The pick six pool is held entirely separate from all other pools and is not part of a daily double, exacta, trifecta or other wagering pool. The net amount in the pari-mutuel pool is distributed among the holders of pari-mutuel tickets which correctly designate the official winner in each of the six consecutive races comprising the pick six. In the event there is no ticket which correctly designates the winner of all six races, 50% of that racing date's net amount available for distribution to winners would be distributed among the holders of tickets correctly designating the most consecutive winning selections. The remaining undistributed 50% of the pari-mutuel pool would be carried over and included as part of the pick six pool for the next racing date. In the event a holder correctly designates all six race winners on any date for which there has been a carry-over, all monies carried over, as well as 50% of the amount for that individual racing date, shall be distributed among such ticket holders. On any racing date where there is a carry-over and no distribution of prize money can be made to a holder correctly designating all six race winners, the undistributed pool shall be carried over and included in the pick six pool for the next racing date.

The governing statutory section of the racing laws which bears on whether or not this form of pari-mutuel wagering is permissible is N.J.S.A. 5:5-64 which provides in pertinent part:

> In every pool where the patron is required to select three or more horses, *every holder of a permit shall distribute all sums deposited in each pool to the winners thereof,* less an amount which shall not exceed 25% of the total deposits, plus the breaks. [Emphasis added.]

The above quoted language clearly provides that every permit holder distribute all sums deposited in each pool to the winner thereof, less a specified percentage of the total deposits. At issue, therefore, is whether

in an instance where there is no pari-mutuel ticket held which correctly designates the winner of all six consecutive races, an undistributed 50% of said pool may be carried over and included as part of the pick six pool of the next racing date. The question presented therefore, stated in other words, is whether the statute mandates the distribution of the total net amount wagered among the winning contributors to a pool or, on the other hand, whether a portion of the net total amount may be retained and added to the total amount wagered by a separate group of contributors on a horse race conducted on a subsequent racing date. Since the statutory language requires the permit holder to distribute all sums in each pool to the winners thereof, it is necessary to ascertain the meaning of a "pool."

The racing laws do not provide any definition of the word "pool" nor is there any available legislative history to assist in its interpretation. It is therefore a well established rule of statutory construction that in the interpretation of the words of a statute resort should be made to the common sense or commonly understood meaning of the term. *Service Armament Co. v. Hyland,* 70 N.J. 550, 556 (1976). In horse racing a "pool" has been defined to mean the combination of a number of persons, each staking a sum of money on the success of a horse in a race, the money to be divided among the successful bettors according to the amount put in by each. *United States v. Berent,* 523 F. 2d 1360, 1361 (C.A. 9th Cir. 1975); *Lacey v. Palmer,* 24 S.E. 930, 931 (Va. 1896). The term "pool" has also been defined by the courts to mean a system of betting which provides for the distribution of the total amount wagered among the successful contributors in proportion to their respective contributions thereto. *Delaware Steeplechase and Racing Association v. Wise,* 27 A. 2d 357, 362 (Del. 1942); *Feeney v. Eastern Racing Association,* 22 N.E. 2d 259, 260 (Mass. 1939); 38 C.J.S. *Gaming* §1 (1943). In *Pompano Horse Club v. State,* 111 So. 801, 812 (Fla. 1927), the Florida Supreme Court referred to the commonly understood means for the distribution of monies by result of a horse race as an instance when:

> . . . a group of persons, each of whom has contributed money to a common fund and received a ticket or certificate representing such contribution, adopt a horse race, the result of which is uncertain, as a means of determining, by chance, which members of the group have won and which have lost upon a redivision of that fund, each contributor having selected a stated horse to win such race. . . .

This citation of judicial authority establishes that a "pool" is created by the combination of the total wagers made on a specific horse race or races which total wagers are contemplated to be distributed under a formula to successful bettors on those races. In the case of pick six, it is provided that where there is no bettor successfully selecting winners in six consecutive races, 50% of the undistributed pool shall be carried over and added to a combination of wagers contributed by a separate class of patrons with regard to races held on the next succeeding racing day. The remaining 50% of that racing date's net amount available for distribution would be distributed among the holders of tickets correctly designating

the next most consecutive winning selections. It is clear, therefore, that pick six wagering is inconsistent with the responsibility of the holder of a permit under the statute to provide for the distribution of all net sums deposited in each pool to the winners thereof. Rather, in the case of pick six, only a portion of the total net accumulated fund would be distributed to the winning patrons who have successfully selected winning horses in a race or races for which the common fund of wagers has been created. For this reason, it is our opinion that a form of pari-mutuel wagering on horse races known as pick six, which contains a provision for a carry-over of an undistributed percentage of a pari-mutuel pool to horse races conducted on the next racing day, is inconsistent with N.J.S.A. 5:5-64. Therefore, it would be necessary for enabling legislation to be enacted to authorize this form of pari-mutuel wagering.

Very truly yours
JOHN J. DEGNAN
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

October 24, 1980

JOHN J. HORN, *Commissioner*
Department of Labor and Industry
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPINION NO. 20—1980

Dear Commissioner Horn:

You have asked whether sick leave payments to employees constitute "wages" within the meaning of the Unemployment Compensation Law and the Temporary Disability Benefits Law. If they do, the worker may include them as part of his base year earnings when he files a claim for benefits.[1] The total amount of a worker's base year earnings is a crucial part of his claim, because they are used to determine both his eligibility for benefits and the amount of benefits he will receive.[2] The remuneration earned by employees is also crucial in one other respect. It is used in computing the unemployment and disability insurance taxes paid each year by the worker and his employer. For the following reasons, it is our

1. Your inquiry does not encompass sick payments made to employees in accordance with an employer's state-approved private plan under the Temporary Disability Benefits Law. It is clear that those sick payments in which an employer is paying the equivalent of statutory disability benefits are compensation for wage loss during illness or disability and would not be deemed wages or remuneration. *Bartholf v. Board of Review,* 36 N.J. Super. 349 (App. Div. 1955).

opinion that sick leave payments are wages within the meaning of those laws.

Unemployment benefits are payable to otherwise eligible claimants who, during the base year preceding the filing of their claim, have earned in covered employment a total of at least $2,200, or, alternatively, have earned a minimum of $30 for each of 20 weeks. N.J.S.A. 43:21-4(e) and 19(t). The term "wages" is defined in the act as "remuneration paid by employers for employment . . . ." N.J.S.A. 43:21-19(o). "Remuneration" is defined as "all compensation for personal services, including commissions and bonuses and the cash value of all compensation in any medium other than cash." N.J.S.A. 43:21-19(p). And "employment" means "service . . . performed for remuneration or under any contract of hire, written or oral, express or implied." N.J.S.A. 43:21-19(i)(1)(A).

These definitions, liberal on their face, have been construed expansively by our courts. In particular, the decisions make clear that payments to employees may constitute "remuneration" under the act even where made for weeks in which the employee performed no services. Thus, the term has been held to include holiday pay, *DiMisele v. General Motors Corp.* 29 N.J. 427 (1959); vacation pay, *Butler v. Bakelite Co.*, 32 N.J. 154, 164-165 (1960); severance pay, *Owens v. Press Publishing Co.*, 20 N.J. 537 (1956) and *Dingleberry v. Bd. of Review,* 154 N.J. Super. 415 (App. Div. 1977), and compensation drawn by corporate officers on an irregular basis, *Paramus Bathing Beach v. Div. of Employment Sec.*, 31 N.J. Super. 128 (App. Div. 1954).

In *Paramus Bathing Beach* the court enunciated the principle in these words:

> The presence of the relationship of employer and employee is not necessarily conditional upon the concurrent and coexistent performance of some actual exertion by the employee. An employer may hire a man to do something who does nothing, or a man may be hired 'to stand by' during intervening periods of the year. And then there are holidays, *intervals of illness or disability,* lack of work, and the like, during which the employment with pay continues. [*Id.* at 133.] [Emphasis added.]

While no New Jersey decision directly addresses the subject of sick leave payments, the underscored words of the above quotation suggest in dictum that such benefits likewise constitute remuneration under the act. This conclusion is supported by the Appellate Division's comments on *Paramus*

2. The definitions of wages and other pertinent terms in the Temporary Disability Benefits Law, N.J.S.A. 43:21-27, are virtually identical to those in the Unemployment Compensation Law, N.J.S.A. 43:21-19. The two laws, moreover, are construed *in pari materia* since they "are 'mutually complementary and . . . illuminat[e] each other.' " *Continental Gas, Co. v. Knuckles,* 142 N.J. Super. 162, 166 (App. Div. 1976); *see* N.J.S.A. 43:21-42(a). In the interest of simplicity, therefore, there will be no further reference to the Disability Benefits Law in this opinion; references to the Unemployment Compensation Law should be understood to apply to the other act as well.

Bathing Beach in *Bartholf v. Bd. of Review,* 36 N.J. Super. 349 (App. Div. 1955), decided a year later. The court there specifically quoted the reference to "Intervals of illness or disability . . . during which the employment with pay continues." While declaring it unnecessary to definitively resolve the matter, the court explicitly agreed that "periods of occasional or incidental illness for which the employer nevertheless pays the employee the usual wages as a matter of custom or policy may be regarded as qualifying base weeks . . . ." *Id.* at 356.

Finally, in the only reported decision elsewhere squarely addressing the issue, the Commonwealth Court of Pennsylvania held that paid sick leave constitutes remuneration under that state's unemployment compensation law. In *Unemployment Comp. Board of Review v. Buss,* 362 A. 2d 1113 (Pa. Commw. Ct. 1976), the functions being performed by the claimant for the Postal Service were transferred to another city. He was then offered the right to go on paid annual leave or sick leave, but chose instead to go on unpaid leave status in order to qualify for a pension. In holding him ineligible for unemployment benefits for this period, the court stated:

> Claimant was entitled to annual and/or sick leave pay for services performed. This leave pay, which he chose not to accept, accrued to him as a result of services performed. Since he is owed remuneration for the claim weeks, the Board did not err when it denied claimant unemployment compensation benefits. [*Id.* at 1115.]

Similarly, sick leave payments would, for the same reason, constitute remuneration properly includable in a worker's base year earnings for purposes of determining his benefit eligibility and amount.

The Pennsylvania court's holding, in *Buss,* and the dicta to the same effect expressed by our Appellate Division in *Paramus Bathing Beach* and *Bartholf,* are consistent with the nature of paid sick leave. Such leave as generally understood in public and private employment represents a remunerative benefit granted an ill or injured worker in consideration for services performed for a specific period of time or as a general incident of the employment relationship. In the public sector the Civil Service Act, for example, defines sick leave as "absence from post of duty of an employee because of illness, accident, exposure to contagious disease, attendance upon a member of the employee's immediate family seriously ill requiring the care or attendance of such employee, or absence caused by death in the immediate family of said employee." N.J.S.A. 11:4-2. The act allows classified public employees one day of paid sick leave for each month of service in the first calendar year following permanent appointment, and 15 days in each succeeding year. *Ibid.* This allowance is similar to sick leave benefits typically granted in private employment, whether under a collective bargaining agreement or as a matter of customary practice.[3]

In sum, as the Pennsylvania Supreme Court has put the matter, "sick leave like vacation pay is an incident or benefit provided under the work agreement and is an entitlement like wages for services performed." *Temple*

v. Pennsylvania Dept. of Highways, 285 A. 2d 137, 139 (1971). *Cf. Bd. of Ed. Piscataway Tp. v. Piscataway Main.* 152 N.J. Super. 235, 243-244 (App. Div. 1977) ("Unquestionably, sick leave or other leaves of absence are matters that directly and intimately affect the terms and conditions of employment.") No less than vacation, holiday and severance pay, therefore, paid sick leave constitutes remuneration for purposes of the Unemployment Compensation and Temporary Disability Benefits Law.

For these reasons, it is our opinion that sick leave payments to public or private employees are "wages" within the meaning of the Unemployment Compensation Law and the Temporary Disability Benefits Law. They must therefore be included in a worker's earnings in determining his eligibility for benefits and in computing the payroll taxes paid by the worker and his employer under these programs.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: MICHAEL S. BOKAR
Deputy Attorney General

3. The same is not true, on the other hand, of sick leave injury (SLI) benefits paid to public employees under the Civil Service Act. In addition to the 15 days of paid sick leave to which classified employees are entitled under N.J.S.A. 11:4-2, that provision directs the Civil Service Commission to adopt regulations allowing payments "for longer periods" at or below the worker's regular salary where he sustains a work-related injury or illness. The Commission's regulations governing SLI, as amended in January 1980 (*see* 12 N.J.R. 383(b)), state that where benefits are recommended by the appointing authority and approved by the Department of Civil Service, an employee who is unable to perform his job shall receive benefits at full pay for a period not exceeding one year. N.J.A.C. 4:1-17.9(a). Significantly, the regulations provide that SLI benefits must be reduced by the amount of any worker's compensation benefits awarded the employee for the same disability. *Ibid.* It is implicit from these regulations that SLI constitutes, like worker's compensation itself, wage-loss replacement benefits rather than remuneration for services rendered. Hence, SLI benefits are not "wages" or "remuneration" within the meaning of the unemployment and temporary disability benefits law.

October 28, 1980

MR. BARRY SKOKOWSKI
Acting Director
Div. of Local Government Services
Department of Community Affairs
363 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 21—1980

Dear Mr. Skokowski:

A question has arisen as to whether moneys received by municipalities in the form of Urban Aid are to be appropriated within the spending caps of such municipalities under the Local Government Cap Law or whether, alternatively, such moneys are to be treated as a modification to be excluded from the statute's limitation. For the reasons set forth below, you are advised that appropriations of Urban Aid moneys are to be treated as a modification under the statute. You are further advised that, in calculating a municipality's permissible spending increase under the Local Government Cap Law, appropriations of Urban Aid in a municipality's budget for a preceding year are to be deducted from the municipality's final appropriations for that year to derive the base upon which the increase is calculated for the current year.

The Local Government Cap Law was enacted for the express purpose of limiting the spiraling cost of local government. N.J.S.A. 40A:4-45.1; *N.J. State P.B.A., Local 29 v. Town of Irvington,* 80 N.J. 271, 281 (1979). To accomplish this purpose, the statute limits municipalities having a municipal purposes tax levy in excess of $0.10 per $100. from increasing the final appropriations of their municipal budgets by more than five percent over the previous year's appropriations. N.J.S.A. 40A:4-45.2; *N.J. State P.B.A., Local 29 v. Town of Irvington, supra* at 281. However, the statute also provides for a number of exceptions from, or modifications to, this limitation. N.J.S.A. 40A:4-45.3. These modifications are intended to provide certain flexibility to municipalities in complying with the statute's limitation, see, for example, N.J.S.A. 40A:4-45.3(i), to avoid imposing constraints upon municipalities to the point where it would be impossible to provide necessary services to their residents, *see* N.J.S.A. 40A:4-45.1, *N.J. State P.B.A., Local 29 v. Town of Irvington, supra* at 283, and N.J.S.A. 40A:4-45.3(g), and to prevent certain other public interests, such as the ability to market bonds, from being jeopardized. *See* N.J.S.A. 40A:4-45.3(d) and N.J.S.A. 40A:4-45.3(j).

One of the exceptions set forth in the statute provides for the exclusion from the statute's spending limitation of

> programs funded wholly or in part by Federal or State funds in which the financial share of the municipality is not required to increase the final appropriations by more than 5%. . . . [N.J.S.A. 40A:4-45.3(b).]

The purpose of this exception was reviewed in *Formal Opinion No. 3-1977* as being to exclude from the statute's spending limitation all expenditures

of federal or state aid money as well as all local matching expenditures necessary to secure federal or state aid for municipal governments. *See also* Attorney General's *F.O. 5—1977.* Accordingly, the appropriation and expenditure of state aid moneys by a municipality subject to the statute's spending limitation would be excluded from the spending limits pursuant to N.J.S.A. 40A:4-45.3(b).

In 1978, legislation was enacted for the purpose of providing state aid to certain municipalities to enable such municipalities to maintain and upgrade municipal services and to offset local property taxes. L. 1978, c. 14. N.J.S.A. 52:27D-178 *et seq.* Under the statute, a sum is annually appropriated by the Legislature for apportionment among qualifying municipalities. N.J.S.A. 52:27D-179. Such moneys, which are commonly referred to as "Urban Aid," may then be expended by these municipalities pursuant to the Local Budget Law, N.J.S.A. 40A:4-1 *et seq.* N.J.S.A. 52:27D-181.

There can be no doubt that, consistent with the intent of N.J.S.A. 40A:4-45.3(b), moneys received by municipalities as Urban Aid are clearly "state aid" moneys. Consequently, the appropriation and expenditure of such moneys are to be excluded from the statute's spending limitation and should be treated as a modification for the purposes of the implementation of that law.

It should be noted that the treatment of Urban Aid moneys as a modification to a municipal spending limit requires that such moneys be deducted from a municipality's final appropriations for the preceding year in the calculation of the municipality's permissible cap increase for a current fiscal year. As stated in *Attorney General's Formal Opinion No. 3—1977*, a municipality should use a specific formula in the calculation of its permissible cap increase. A municipality should subtract from its final appropriations for a previous year those appropriations which qualified as modifications during that year. This will yield the base upon which a municipality calculates its permissible spending increase for the current fiscal year. Modifications must be considered as exclusions both in the computation of the base from the previous year's appropriations and in the determination of the amount of appropriations which must be included within the spending limitation for the forthcoming fiscal year. To do otherwise would mean that there would be no point of comparison between the two years. In sum, appropriations of moneys received as Urban Aid under Laws of 1978, c. 14, should be treated as a modification in the computation of the base figure upon which a municipality's spending increase is calculated and in the determination of those appropriations which must be made within its permissible spending limitation for the current fiscal year.

That this is the proper manner in which to treat Urban Aid moneys under the Local Government Cap Law is further evident upon consideration of the consequences of treating such moneys as being included within the Statute's spending limitation. In a case where the amount of Urban Aid is included within this limitation, it would inflate a municipality's cap base. In turn, the amount by which the municipality may increase its overall expenditures for the coming fiscal year would be proportionately inflated. The residents of the municipality would consequently, through

the payment of municipal taxes, be required, contrary to the clear intent of the statute, to support spending increases in excess of the 5% limit established by the statute. These consequences further demonstrate that the appropriation of Urban Aid moneys must be treated as a modification under the Local Government Cap Law.

In conclusion, you are advised that appropriations of Urban Aid moneys received pursuant to L. 1978, c. 14 should be treated as a modification under the Local Government Cap Law. You are further advised that, in the calculation of a municipality's permissible spending increase, the appropriation of Urban Aid in a municpal budget for a preceding year should be deducted from the final appropriations in that year to derive a base amount from which a permissible spending increase for a current year is determined.*

Very truly yours,
JOHN J. DEGNAN
Attorney General
By: DANIEL P. REYNOLDS
Deputy Attorney General

* It is provided in the 1981 State Appropriations Act that in 1980 municipal budgets appropriations of municipal aid moneys by qualifying municipalities, or line item moneys contained in the Act for municipalities that no longer qualify, may be treated as an exception to the spending limitation. It is also provided that the treatment of such moneys as an exception to this spending limitation shall not alter the amount upon which the five percent annual increase is calculated in 1980 budgets for such municipalities. In the preparation of 1981 municipal budgets, however, municipalities should be governed in their determination of appropriate spending limits by the conclusions set forth in this opinion.

October 31, 1980

T. EDWARD HOLLANDER
Chancellor
Department of Higher Education
225 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 22—1980

Dear Chancellor Hollander:

For the past several years, this office has expressed its concern over the increasing use of corporate entities formed and utilized by some of the state colleges to carry out various functions of the institutions. We have been informed that state colleges have formed corporations which operate student centers and campus pubs, manage dormitories and engage in other functions normally controlled by the college administration. As a general rule, these corporations have been set up by college personnel,

are managed by a board of directors, dominated and controlled by college employees, utilize both college facilities and office space and are funded to varying degrees with state money. Nonetheless, these corporations do not comply with any of the rules and regulations which state colleges are subjected to by statute, such as bidding laws, civil service requirements and treasury regulations concerning state funds. For the following reasons, you are hereby advised that such activities are improper and may not continue absent statutory authorization.

It is clear that the college corporations are instrumentalities of the state. The corporations are controlled by college officials, have the use of state facilities, expend state funds and effectuate state functions. Courts in various jurisdictions have uniformly held under similar circumstances that such entities are in fact instrumentalities and components of the colleges which created them. For example, in *Brown v. Wichita State University,* 540 P. 2d 66 (Kan. 1975), *mod.* 547 P. 2d 1015, (1976), the court held that a corporation created by the college and controlled by it must be "considered a mere instrumentality of the University," *Id.* at 76. In *DeBonis v. Hudson Valley Community College,* 389 N.Y.S. 2nd 647 (1977), the court utilized the same analysis in concluding that a purportedly "independent" corporation controlled by the college was in actuality an arm of the state which accordingly must comply with New York's public bidding law. *See also Shriver v. Athletic Council of Kansas State University,* 564 P. 2d 451 (Kan. 1977); *Good v. Associated Students of the University of Washington,* 542 P. 2d 762 (Wash. 1975). Accordingly, the college corporations at issue are clearly state entities which are subject to all general statutory and regulatory requirements imposed upon the colleges which created them, including the fiscal, contractual and budgetary requirements mandated by N.J.S.A. 18A:64-6(e), 18A:64-6(k), and 18:A:64-18.

Moreover, even if the corporations were structured so as to be truly independent of the colleges, their present operation at the colleges would remain improper. It is a settled principle of law that a statutory body may not delegate its essential managerial prerogatives to a private body. *Group Health Insurance Co. v. Howell,* 40 N.J. 436 (1963), *aff'd after remand,* 43 N.J. 104 (1964). Pursuant to N.J.S.A. 18A:64-2 and N.J.S.A. 18A:64-6, it is the college Board of Trustees which is statutorily required to exercise supervision and control over the institution. Clearly the Legislature intended that the trustees would manage and administer the colleges themselves or through their respective presidents and other officers and employees. The Legislature has given no indication that the boards or their officers and employees may authorize purportedly private, independent, non-profit corporations to assume any significant responsibilities traditionally associated with the colleges. *See N.J. Dept. of Transportation v. Brzoska,* 139 N.J. Super. 510 (App. Div. 1976); *Ridgefield Park Education Ass'n v. Ridgefield Park Board of Education* 78 N.J. 144 (1978).

Finally, it should be noted that even if a corporation could be deemed truly independent of its parent college, and was engaged in a function which may be legitimately contracted out to a private concern, college transactions with that entity would necessarily entail compliance with statutory requirements concerning contracts with private entities. For example, if the college determined that it did not desire to operate a campus cafeteria service itself, there would not be any authority for the college to award the contract unilaterally to the purportedly independent college corporation. Rather, the college would be required to enter into such a contract only after compliance with applicable competitive bidding statutes. *See* N.J.S.A. 52:34-6, *et seq.*

In conclusion, you are hereby advised that state colleges may not use independent corporate entities to carry out college functions unless all statutory and administrative requirements imposed on state agencies are satisfied. Therefore, the following interim steps must immediately be taken:

1. All corporate employees must be advised that the corporations are in actuality components of the colleges and that the functions and duties of the corporations will be brought within the control of the college adminstration;
2. The Department of Civil Service must be provided a list of names and job functions of corporation employees so that appropriate college job titles can be created;
3. Corporate purchases must utilize the procedures set forth in the applicable state bidding laws;
4. Certified audits of corporate accounts must be forwarded to the Chancellor and the State Treasurer; and
5. The Legislature must be advised of the status of college corporate accounts prior to submission of budget requests.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: ROBERT A. FAGELLA
Deputy Attorney General

November 17, 1980

BARRY SKOKOWSKI, *Acting Director*
Division of Local Government Services
Department of Community Affairs
363 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 23—1980

Dear Mr. Skokowski:

You have raised a question with us concerning the manner in which the proceeds of the sale of municipal assets are to be treated under the Local Government Cap Law. Your question is whether such proceeds are to be treated in the same manner as all other modifications under the statute, that is, as a modification to the statute's spending limitation both in the year in which such proceeds are appropriated and in the year subsequent to such appropriation. For the reasons which are set forth in

Formal Opinion No. 3—1977, you are advised that the amount of such proceeds are to be treated in the same manner as are other modifications under the statute, that is, as a modification both in the year in which such proceeds are appropriated in a municipality's budget and in the following year in calculating the municipality's CAP base.

The manner in which appropriations which qualify as modifications should be treated under the law was exhaustively reviewed in Attorney General's *Formal Opinion No. 3—1977.* The answer to your question is readily apparent to a reader of that opinion and we need not repeat it extensively here. Suffice it to say that it was stated in that opinion that a municipality in calculating its permissible spending increase should use a specific formula. A municipality should subtract from its final appropriations for the previous year those appropriations which qualified as modifications during that year under one or more of the provisions of N.J.S.A. 40A:4-45.3. In this manner a municipality derives a base upon which it calculates its permissible spending increase for the coming fiscal year. This spending increase is computed by multiplying the CAP base by 5%. The CAP base and the allowable increase are added together to yield the amount a municipality may expend within its spending limit.

It has therefore always been clear under *Formal Opinion No. 3— 1977* that appropriations which fall within one of the modifications set forth in N.J.S.A. 40A:4-45.3 should be treated as a modification both in the year in which such appropriations are made and in the calculation of a municipality's CAP base in the following year. Since in the present situation the proceeds of the sale of a municipality's assets have been provided as an exception to the statute's spending limitation, N.J.S.A. 40A:4-45.3(h), the proceeds of a sale should be treated as a modification to the statute's spending limit in the manner set forth in the formal opinion. To do otherwise, i.e., to allow the amount of such proceeds to become part of a municipality's CAP base in a subsequent year, would permanently expand the base and allow for a permanent increase in municipal expenditures in excess of an amount contemplated by the Legislature.

In conclusion, you are advised that consistent with the reasoning set forth in *Formal Opinion No. 3—1977* the proceeds of the sale of a municipality's assets should be treated as a modification both in the year in which the proceeds are appropriated in a municipality's budget and in the calculation of the municipality's CAP base for the subsequent year.*

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: DANIEL P. REYNOLDS
Deputy Attorney General

* We understand that the Division may not have treated such sales in accordance with *Formal Opinion No 3—1977* over the past three years and that to alter that position now may cause substantial disruption in such municipalities which have relied upon the Division's tolerance of their erroneous treatment of such sales. That is regrettable and we would expect that they may look to the Legislature for redress.

November 24, 1980

EDWIN H. ALBANO, M.D.
President
N.J. State Board of Medical Examiners
28 West State Street
Trenton, New Jersey 08608

FORMAL OPINION NO. 24—1980

Dear Dr. Albano:

You have requested our opinion regarding the constitutionality of that portion of the act regulating podiatry, which authorizes licensure of podiatrists through endorsement of licenses issued in other jurisdictions, but only if the podiatrist then establishes legal residence in New Jersey and practices only in this State. You are advised that that provision is unconstitutional.

The podiatry statute contains two sections bearing upon the licensing of podiatrists. Under N.J.S.A. 45:5-3 an applicant may obtain a license through examination after first having submitted to the Board various documentation concerning his background; not mentioned are any requirements that the applicant, either before or after being licensed, must reside or work in New Jersey. The alternate route for licensure is N.J.S.A. 45:5-7, which authorizes the Board to issue a license through endorsement of a license to practice podiatry previously issued in another jurisdiction. Under this alternative, by contrast, the applicant does face residency and practice requirements, for the applicant "shall, within six months after the issuance of his license hereunder, remove to this State, establish his permanent and only legal residence and cease to operate his practice in the State from which he applies and not use such license for part-time practice in this State."* The statute thus differentiates between two types of podiatry licensees—those licensed by examination and those licensed through endorsement of a sister state license—and imposes upon the latter class regulatory requirements not imposed upon the former.

As a general matter, a legislatively-chosen system of regulation will stand "[i]f the need [for governmental control] is not wholly illusory and the regulation imposed is reasonably calculated to satisfy the need . . .," for "[i]f the subject is within the police power of the State, even debatable questions as to reasonableness of the means employed are not for the courts but for the Legislature." *N.J. Chapter, American Institute of Planners v. N.J. State Bd. of Professional Planners,* 48 N.J. 581, 600 (1967). Nevertheless, a genuine public need upon which the regulatory constraints are to operate must exist, for a statute "may not transcend public need and must bear a real and substantial relationship to the objectives of the [legislation]." *Hudson Circle Servicecenter, Inc. v. Kearny,* 70 N.J. 289, 301 (1976).

Moreover, "[w]hile the due process and equal protection guarantees are not coterminous in their spheres of protection, equality of right is fundamental in both." *Washington National Ins. Co. v. Bd. of Review,* 1 N.J. 545, 553 (1949). As the Supreme Court of New Jersey has said:

> Each forbids class legislation arbitrarily discriminatory against some and favoring others in like circumstances. It is essential that the classification itself be reasonable and not arbitrary, and be based upon material and substantial distinctions and differences reasonably related to the subject matter of the legislation or considerations of policy and that there be uniformity within the class. [*Id.*]

Equal protection "requires more of a state law than nondiscriminatory application within the class it establishes. . . . It also imposes a requirement of some rationality in the nature of the class singled out." *Rinaldi v. Yeager,* 384 U.S. 305, 308-309, 86 S. Ct. 1497, 16 L. Ed. 2d 577 (1966). Stated another way, "[a]lthough the Legislature has broad discretion in selecting those who shall be affected by its enactments, such selection must be reasonable and include all those who naturally fall within the class." *DeMonaco v. Renton,* 18 N.J. 352, 358 (1955).

Upon reviewing the podiatry statute, there does not appear to be any rational basis for imposing upon podiatrists licensed through endorsement obligations of residency and practice not imposed upon podiatrists licensed through examination. To be sure, the State does have an interest in assuring that a professional licensee maintain adequate contacts with it as the

* The pertinent portion of the provision reads:

"Any applicant for a license to practice podiatry upon proving that he has been examined and licensed by the examining and licensing board of another State, territory of the United States, or the District of Columbia, may in the discretion of the board be granted a license to practice podiatry without further examination upon payment to the board of a licensee fee of $100.00; provided, such applicant shall furnish proof that he can fulfill the requirements demanded in the other sections of this chapter relating to applicants for admission by examinations; provided further, that the laws of such State, territory or the District of Columbia accords equal reciprocal rights to a licensed podiatrist of this State, who desires to practice his profession in such State, territory or the District of Columbia; provided further, that said applicant has been in lawful and ethical practice of podiatry in the State, territory or District of Columbia from which he applies for 5 full consecutive years next prior to filling his application; *and provided further, that said applicant shall, within 6 months after the issuance of his license hereunder, remove to this State, establish his permanent and only legal residence and cease to operate his practice in the State from which he applies and not use such license for part-time practice in this State. An affidavit setting forth his intention to comply with the requirements of this proviso must be filed with the application for license.* In any such application for a license without examination, all reciprocalquestions of academic requirements of other states, territories or the District of Columbia shall be determined by the board. The board shall consider each application for such license on its individual merits and may, in its discretion and without establishing a precedent, waive the requirements for internship in lieu of 10 or more years of active and continuous ethical practice outside of this State.

"The board may issue to any licensed podiatrist of this State, known to it to be of good moral character and who has conducted an ethical practice in this State, and who desires to remove his residence and practice to another state, a certificate or certification authenticated with its seal, which shall attest such information as may be necessary for competent boards of other states to determine reciprocity qualifications, upon payment of a fee of $10.00."

licensing jurisdiction. *See e.g.* R. 1:21-1(a), requiring a New Jersey-licensed attorney either to be domiciled and maintain a bona fide office for the practice of law in New Jersey or, if not domiciled in New Jersey, maintain within the State his principal office for the practice of law; *Wilson v. Wilson,* 416 F. Supp. 984, 986-988 (D. Ore. 1976) (3 judge court), *aff'd mem.* 430 U.S. 925, 97 S. Ct. 1540, 51 L. Ed. 2d 768 (1977), holding that an applicant to the bar may be required to state his intent to be a resident at the time of admission; *Lipman v. Van Zant,* 329 F. Supp. 391, 401-404 (N.D. Miss. 1971) (3 judge court), holding that a state may require residency at the time of the bar examination for character investigation. Consequently, were the sort of residency and practice requirements set forth in N.J.S.A. 45:5-7 imposed upon *all* podiatry licensees, whether licensed by endorsement or examination, there would be no constitutional infirmity. As the matter stands, however, one category of licensees—those licensed through endorsement of sister state licenses—has been singled out, and therefore some characteristic which is unique to podiatry licensees by endorsement and which engenders a particular kind of regulatory difficulty must be identified in order to justify the classification. Having been unable to identify any reasonable basis for this classification, we conclude that the statutory scheme denies endorsement licensees due process and equal protection of the law, *U.S. Const.,* Amend. XIV.

You are advised therefore that that portion of N.J.S.A. 45:5-7 which conditions the licensure of podiatrists through endorsement of licenses issued in other jurisdictions upon the podiatrist's establishing legal residence in New Jersey and practicing only in the State is unconstitutional and should not be enforced.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: BERTRAM P. GOLTZ, JR.
Deputy Attorney General

December 5, 1980

T. EDWARD HOLLANDER, *Chancellor*
Department of Higher Education
225 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 25—1980

Dear Chancellor Hollander:

You have asked whether the Board of Higher Education has the statutory authority to regulate foreign medical schools operating in New Jersey. The reason for your inquiry is that a number of foreign medical schools have contracted with New Jersey hospitals to permit their matriculating students to observe and conduct clinical procedures in those hospi-

tals. This educational experience is credited by the medical school as satisfactory completion of the students' requisite seventh and eight semesters of clinical instruction. For the following reasons, you are hereby advised that the Board of Higher Education does not have the authority to license foreign medical schools nor regulate their course of instruction in the state.

The Board of Higher Education has been vested with the general authority to supervise the system of higher education and to regulate institutions of higher education operating in the state. N.J.S.A. 18A:3-13. The Board is also required to license institutions of higher education operating in the state. N.J.S.A. 18A:68-6. N.J.S.A. 18A:68-3 prohibits the offering of instruction leading toward the attainment of a degree without a license obtained by the Board of Higher Education. That statute provides:

> No corporation shall furnish instruction or learning in the arts, sciences, *or professions* for the purposes of admitting any person to the grade of a degree, or shall confer or participate in conferring a degree, giving to any person a diploma of graduation or of proficiency in a course of study, in learning, or in scientific arts or methods, within this state, until it shall have filed a certified copy of its certificate of incorporation with the board of higher education and obtained from such board a license to carry on the business under rules as the board of higher education may prescribe. [Emphasis supplied.]

Similarly, N.J.S.A. 18A:68-6 prohibits the award of collegiate degrees without approval by the Board. This licensing scheme concerning collegiate institutions has been upheld as an appropriate area of regulation by the Board of Higher Education. *Shelton College v. State Board of Education,* 48 N.J. 501 (1967).

However, despite the general authority conferred on the Board of Higher Education to regulate institutions of higher education, there is a separate regulatory enactment dealing with medical schools. N.J.S.A. 18A:68-12 provides:

> No school or college shall be conducted within this state for the purpose of training or qualifying its students to practice medicine or surgery or any branch thereof or any method for the treatment of disease or any abnormal physical conditions without first securing from the state board of medical examiners a license authorizing it so to do.

The relevant statutory framework also contains a detailed legislative directive concerning the method by which such licensure shall occur. The statutes concern the information which the medical school must supply to the medical examiners in support of a licensing request, N.J.S.A. 18A:68-13, the nature of the branch of medicine which is to be taught, N.J.S.A. 18A:68-15, the term of any such license, N.J.S.A. 18A:68-16, and the penalty for violation of these statutory provisions, N.J.S.A. 18A:68-18.

It is a familiar principle of statutory construction that when two enactments deal with the same subject, one in a more general manner and the other in specific and concrete terms, the latter will supersede the former and be controlling in a given situation. *State v. Hotel Bar Foods,* 18 N.J. 115 (1955); *In Re Salaries for Probation Officers of Hudson County,* 158 N.J. Super. 363 (App. Div. 1978). The Board of Higher Education has been authorized in general terms to regulate the offering of higher education in the professions. On the other hand, the legislature in specific and comprehensive terms has placed the responsibility for the regulation and licensure of medical training upon the Board of Medical Examiners.[1] Therefore, it may reasonably be assumed the legislature intended that exclusive jurisdiction inheres in the Board of Medical Examiners as it pertains to the licensure of medical schools. This is further supported by another related rule of statutory construction that a specific later enacted statute would generally govern over an earlier more general one. *Cirangle v. Maywood Board of Education,* 164 N.J. Super. 595 (Law Div. 1979). In this case, the specific statutory scheme with respect to the regulation of medical education was enacted more than eight years after the Board of Education (now Board of Higher Education) was given general authority over institutions of higher education.

For these reasons, it is clear that while the Board of Higher Education has been given supervisory authority over instruction in higher education generally, the Board of Medical Examiners is the exclusive state agency to exercise regulatory control over medical schools. You are therefore advised that the Board of Higher Education does not have the authority to license and regulate medical schools conducted within the state.[2]

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: ROBERT A. FAGELLA
Deputy Attorney General

1. L. 1924, c. 184, was entitled "an act for the licensing of schools and colleges for the purpose of training or qualifying students to practice medicine . . ."

2. We note that the Board of Higher Education has been given express supervisory authority over the determination of the educational curriculum and program of the College of Medicine and Dentistry. N.J.S.A. 18A:65G-6. The regulatory authority which the Board exercises over the College of Medicine and Dentistry is in no way affected by this opinion. Moreover, we understand that the Department of Higher Education in exercising this authority has developed significant expertise for the review of academic degree programs in the area of medical education. It would, therefore, be appropriate for the Board of Medical Examiners to obtain the assistance of the Department of Higher Education in carrying out its regulatory functions in the area of medical education.

December 8, 1980

BARRY SKOKOWSKI, *Director*
Division of Local Government Services
Department of Community Affairs
363 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 26—1980

Dear Mr. Skokowski:

You have requested us to provide futher advice with regard to those circumstances which are necessary to warrant the adoption of an emergency appropriation by a local governmental unit. The pertinent statute is N.J.S.A. 40A:4-46 which provides as follows:

> A local unit may make emergency appropriations, after the adoption of a budget, for a purpose which is not foreseen at the time of the adoption thereof, or for which adequate provision was not made therein. Such an appropriation shall be made to meet a pressing need for public expenditure to protect or promote the public health, safety, morals or welfare or to provide temporary housing or public assistance prior to the next succeeding fiscal year.

In *Formal Opinion No. 10—1980* (hereinafter *Formal Opinion No. 10*), you were advised that an emergency appropriation made pursuant to N.J.S.A. 40A:4-46 could only be made to meet expenditures which were necessitated by sudden, unanticipated and unforeseen circumstances for which adequate provision was not made in a municipality's budget. This conclusion was reached after an analysis of the basic intent and policies underlying the Local Budget Law, N.J.S.A. 40A:4-1 *et seq.*, of the language of N.J.S.A. 40A:4-46 itself and of the manner in which the language set forth therein has been construed by the courts. In *Formal Opinion No. 10* it was further concluded that the word "or" in the first sentence of N.J.S.A. 40A:4-46 should properly be read as meaning "and" in order to be consistent with the legislative intent.

Questions have now arisen as to the conclusions reached in that Opinion and specifically as to the conclusion with regard to the proper construction of the term "or." After consideration of the questions raised, it is our opinion that the term "or" need not be read to mean "and" in order to effectuate the legislative intent of N.J.S.A. 40A:4-46. Rather, the word "or" can properly be accorded its commonly understood and generally accepted meaning as a disjunctive, and not a conjunctive, term. However, reading the term in this manner does not alter the overall conclusion of *Formal Opinion No. 10* that N.J.S.A. 40A:4-46 requires that an emergency appropriation may only be made to meet an immediate need for expenditure which results from emergent, that is, from sudden, unexpected or unanticipated, circumstances.

It was noted in *Formal Opinion No. 10* that the Local Budget Law, N.J.S.A. 40A:4-1 *et seq.*, of which N.J.S.A. 40A:4-46 is an integral part,

requires that municipal and county budgets be prepared on a "cash basis." A "cash basis" budget is defined in the statute as a budget which ensures that there will be sufficient cash collected to meet all debt service requirements, to pay all necessary operations of the local unit and to cover all mandatory payments required by law during the local governing body's fiscal year. N.J.S.A. 40A:4-2. Since tax bills are prepared on the basis of the amount of such appropriations, N.J.S.A. 40A:4-17, it is essential that the appropriations be sufficient to cover an entire year. Further, to ensure public participation in the process of preparing such a budget and permit public comment upon the amounts to be expended for public services during the course of the year, the law requires advertisement of the budget and a public hearing with regard to same prior to its final adoption. N.J.S.A. 40A:4-6, 7 and 8. These requirements are intended to ensure that a local governing body will not make expenditures which will exceed the amounts appropriated in the budget for that year. *State v. Boncelet,* 107 N.J. Super. 444, 450 (App. Div. 1969).

It was accordingly reasoned that the emergency appropriation process provided for by N.J.S.A. 40A:4-46 was not intended merely to provide a means for the making of supplemental or additional appropriations which a local governing body chose not to make in its annual budget. Such a construction would undermine the very purpose of requiring the adoption of a cash basis budget as well as subverting the public participation for which the Local Budget Law provides. Rather, the intent and policies of that statute clearly require that appropriations made pursuant to N.J.S.A. 40A:4-46 be made to meet expenditures necessitated by emergencies, that is, by sudden and unanticipated circumstances requiring immediate responsive action.

It was further noted in *Formal Opinion No. 10* that such a conclusion was supported upon consideration of the specific language in N.J.S.A. 40A:4-46. As noted, the commonly understood meaning of the term "emergency" is a "sudden, generally unexpected occurrence or set of circumstances demanding immediate action." *Webster's New Dictionary of the American Language, Second College Edition,* 1972. It was noted that the courts of this State have construed the term "emergency" in this manner. *Scatuorchio v. Jersey City Incinerator Authority,* 14 N.J. 72, 87-93 (1953); *Bd. of Ed. of Elizabeth v. Elizabeth,* 13 N.J. 589, 593-594 (1953); *Mount Laurel Township v. Local Finance Board,* 166 N.J. Super. 254, 256-257 (App. Div. 1978), *aff'd* 79 N.J. 397 (1979); *Newark Teachers Assoc. v. Bd. of Education,* 108 N.J. Super. 34, 47 (Law Div. 1969); *Lyons v. Bayonne,* 101 N.J.L. 455-457 (S. Ct. 1925). Thus, the very language of N.J.S.A. 40A:4-46, i.e., the use of the term "emergency" to define and describe the type of appropriation permitted to be made under that provision, indicates that the provision was intended to authorize appropriations to meet expenditures necessitated by sudden and unanticipated circumstances requiring immediate action. Therefore, *Formal Opinion No. 10* concluded that the term "or" in the first sentence of N.J.S.A. 40A:4-46 should be read as meaning "and", since to do so would be consistent with the overall intent of the provision.

However, it is clear upon further consideration that reading the word "or" as meaning "and" is neither required nor necessary in order to

preserve the basic intent of the provision. Construing "or" in the first sentence of the statutory section as meaning the disjunctive "or" would mean either that an emergency appropriation could be made for a purpose which was not foreseen at the time of the adoption of a local governing body's budget or that an emergency appropriation could be made for a purpose for which adequate provision was not made in such a budget. In either case, the types of appropriations which could properly be made would nevertheless be limited to appropriations made to deal with "emergencies," that is, with sudden and unanticipated occurrences or circumstances requiring immediate action.

An emergency appropriation could thus be made for a purpose which was not foreseen at the time of the adoption of a local budget, such as the reconstruction of a municipal road or bridge which had collapsed, provided that circumstances of an emergent nature created the need to make such an appropriation. Alternatively, an emergency appropriation could be made for a purpose which was foreseen at the time of the adoption of a local budget but for which adequate provision was not made. An example would be an instance where a municipality made appropriations for fire protection in its budget but experienced an unexpectedly large number of fires or a fire of an unexpectedly great magnitude during the course of the year which in turn caused the municipality's fire protection appropriation to be expended at a more rapid rate than the municipality had anticipated. In these situations, however, the circumstances creating the need for the emergency appropriation would have to be emergent, that is, sudden and unanticipated.

For these reasons, you are hereby advised that *Formal Opinion No. 10—1980* is modified to the extent it is now our opinion that a local government unit may make an emergency appropriation either for a purpose which was not foreseen at the time of the adoption of its budget or, in the alternative, for a purpose for which adequate provision was not made therein. You are further advised, however, that, consistent with the advice given in that Opinion, an emergency appropriation made pursuant to N.J.S.A. 40A:4-46 may only be adopted to meet expenditures necessitated by sudden, unanticipated and unexpected circumstances which require immediate action.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: DANIEL P. REYNOLDS
Deputy Attorney General

January 14, 1981

HON. FRED G. BURKE
Commissioner of Education
Department of Education
225 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 1—1981

Dear Commissioner Burke:

The Department of Education has submitted for our review a contract between the Essex County Educational Services Commission and the Education and Training Consultants, Inc., concerning the provision of educational services to non-public school pupils. The Department indicates that this contract was not submitted by the Commission to either the State Board of Education or to you for review prior to its execution. The question specifically posed, therefore, is whether the Commission, pursuant to the terms of the contract, may appropriately relinquish its responsibilities for the provision of these educational services to a private, profit-making organization.

In accordance with this contract, executed on July 8, 1980, the private corporation, Education and Training Consultants, Inc., is to provide fifty hours of actual instructional time to all pupils enrolled in the "Direct Services to Non-Public Schools Project."[1] The private corporation further agreed to provide the educational services in accordance with a Program Plan approved by the Commission or its Executive Director. The Plan was to provide:

> school and instructional calendars, class size, teacher performance evaluation, teacher professional development, student assessment and evaluations, group in-put, both public and non-public instructional materials to be used, the educational strategies to be employed and such other matters as may be deemed necessary by the Commission and/or its Executive Director.

The contract stated that instruction was to be provided in mobile classrooms leased by the Commission and that the private corporation was to assume responsibility for lease payments on these vehicles.

In exchange for the performance of these services, the private contractor was to receive "in ten (10) equal monthly installments for each enrolled

1. At the time the contract was entered into, it was estimated that the number of non-public school pupils, enrolled in various aspects of the "Project," would be:

1. Compensatory Education	9,000
2. English as a Second Language	1,800
3. Corrective Speech Services	4,500
4. Supplementary Instruction without VI-B	450
5. Supplementary Instruction with VI-B	450
6. Home Instruction	180
7. Examination and Classification of Potentially Handicapped	1,800

student . . . an amount equal to the pupil costs as set forth in the . . . bid proposal . . ." The total cost of pupil services, as set forth in the bid proposal, was $3,900,114. These monthly payments were to be made by the Commission as it received the moneys due it from local school districts on whose behalf the educational services were to be provided. From these monthly installments would be deducted the lease payments for the mobile classrooms and a charge representing the "administrative services provided by the Commission to carry out the purpose and effect" of the contract.

The contract term is from July 1, 1980 to June 30, 1981 and the agreement contains the following provision:

> In the event this entire contract shall be found to be void, illegal, or against public policy, then this contract shall be deemed to be null and void *ab initio* and all rights, obligations and duties hereunder shall be considered terminated and at an end.

In order to determine the propriety of this contractual arrangement, it is necessary to consider two provisions of the school law: the first governing educational services commissions and the second structuring the provision of certain remedial and auxiliary educational services to pupils in both public and nonpublic schools.

In 1968, the Legislature enacted c. 243, P.L. 1968, N.J.S.A. 18A:6-51 *et seq.*, which authorized the establishment of educational services commissions. This Act defined a commission as:

> an agency established or to be established in one or more counties for the purpose of carrying on programs of educational research and development and providing to public school districts such educational and administrative services as may be authorized pursuant to rules of the State Board of Education. [N.J.S.A. 18A:6-51(a).]

In order to establish an educational services commission, the interested boards of education must file a petition with the State Board of Education together with a report setting forth the needed educational services to be provided by the Commission, the cost of same and "a method of financing the operation . . . until such can be financed under its first regularly adopted budget. . ." If the State Board determines that the need for the proposed educational services commission exists and that the operation of the commission is feasible, "it shall approve the petition and so notify the petitioning boards of education." N.J.S.A. 18A:6-52.

Once a commission is established, its board of directors:

> shall from time to time determine what services are to be provided by the commission, subject to the approval of and pursuant to rules of the State Board of Education. It shall determine the cost of providing such services, and may enter into contracts with member school districts to provide such services. [N.J.S.A. 18A:6-63.]

Similarly, N.J.S.A. 18A:6-69 provides that the purpose for which an educational services commission was approved may be enlarged, "upon application to and approval by the State Board of Education." Furthermore, an educational services commission is specifically authorized to employ teachers, principals and other employees necessary to provide the educational services so approved by the State Board of Education. N.J.S.A. 18A:6-65.

In accordance with this detailed statutory scheme, on November 29, 1978, the Essex County Superintendent of Schools, on behalf of the petitioning boards of education, requested approval for the establishment of an Educational Services Commission in Essex County. The Program Plan submitted for the proposed commission included, *inter alia,* the provision of educational services to 105 non-public schools. With regard to these services, the Plan specified:

> It is anticipated that both diagnostic and instructional services will be provided and that compensatory education will also be included for those non-handicapped students attending non-public facilities.
>
> These services can be divided into six specific areas. These are:
> 1. Examination and classification of students potentially handicapped.
> 2. Speech correction services for students defined to have minor articulation disorders.
> 3. English as a second language.
> 4. Supplementary instruction.
> 5. Home instruction services.
> 6. Compensatory education.

The Plan also provided that resident students requiring services outside the County would be contracted for by the Commission and further that the Commission would "accept tuition students for districts outside Essex County whose students attend any of the (non-public) schools being serviced."

The State Board of Education at its meeting of December 6, 1978, approved establishment of the Educational Services Commission for Essex County for the provision of the educational services included in its Program Plan.[2] The Commission was, therefore, authorized to provide certain remedial and auxiliary educational services to non-public school pupils.

These educational services were authorized by c. 192, P.L. 1977 and c. 193, P.L. 1977. The intent of this legislation was to insure that the State "provide remedial services for handicapped children" and "furnish on an equal basis auxiliary services" to all pupils in the State in both public and non-public schools. N.J.S.A. 18A:46-19.1 and 18A:46A-1. "Auxiliary ser-

2. On January 2, 1980, the Essex County Educational Services Commission sought an enlargement of its original purpose pursuant to N.J.S.A. 18A:6-69. The State Board, at its January 9, 1980 meeting approved expansion of services provided to local districts to include direct computer services. This change of purpose does not implicate the subject matter of the present opinion.

vices," authorized by c. 192, were defined as "compensatory education services; supportive services for acquiring communication proficiency in the English language for children of limited English-speaking ability; supplementary instruction services; and, home instruction services." N.J.S.A. 18A:46A-2(c). These services were only to be provided those "children who would be eligible for such services and for the appropriate categorical program support if they were enrolled in the public schools of the State." N.J.S.A. 18A:46A-4. Furthermore, the law specifically precludes the provision of these services in a church or sectarian school. However, a local board of education "may contract with an *educational improvement center, an educational service commission or other public or private agency* other than a church or sectarian school, *approved by the commissioner* for the provision of auxiliary services." N.J.S.A. 18A:46A-7. (Emphasis added.) In addition to these services, c. 193, P.L. 1977, authorizes the provision of diagnostic and therapeutic services to handicapped pupils attending non-public schools. N.J.S.A. 18A:46-19.1, *et seq.* Local boards of education may also contract with educational services commissions or other public or private agencies for the provision of these services. N.J.S.A. 18A:46-19.7. However, both legislative enactments, and the regulations adopted by the State Board of Education to implement them, require that the Commissioner of Education approve such contractual arrangements. N.J.S.A. 18A:46A-7; 18A:46-19.7; N.J.A.C. 6:28-5.3, 6:28-6.3.

Although the above described statutory provisions require local boards of education to provide auxiliary, diagnostic and therapeutic services to non-public pupils resident within their borders, the costs for such services are met entirely with State aid. Pursuant to the statutory scheme, on November 1 of each year, local boards of education are informed of the amount of State aid they may anticipate in their budget for the next school year for the provision of these services. The entitlement of State aid is based on the Statewide average cost of providing these services to public school pupils multiplied by the number of non-public school pupils expected to receive such services. N.J.S.A. 18A:46A-11, 12; 18A:46-19.8; N.J.A.C. 6:28-5.5; 6:28-6.5. Local school districts are paid State aid for these services "in equal amounts beginning on the first day of September and on the first day of each month during the remainder of the school year." Should the amount of State aid received by a district exceed the costs incurred by the district for the provision of educational services to non-public school pupils, the district's State aid for the following year would be reduced to the extent of such surplus. Moreover, a district is not required to make expenditures for those services in "excess to the amount of State aid received." N.J.S.A. 18A:46A-14, 15; 18A:46-19.8.

Pursuant to this statutory scheme, local boards of education contracted with the Essex County Educational Services Commission, during the 1979-80 school year, for the provision of auxiliary, diagnostic and therapeutic services for those non-public school pupils within their districts entitled to these services. Consistent with the provisions of N.J.S.A. 18A:46A-13 and 18A:46-19.8, the monthly State aid payments necessary to meet these educational costs were made to the local school districts. Upon receipt, the districts forwarded the State aid moneys to the Essex County Commission in accordance with their contractual agreement. This

arrangement was in harmony with the statutory scheme governing the provision of educational services to non-public school pupils and fully comported with the purposes for which the Commission had been authorized by the State Board of Education. Prior to the commencement of the 1980-81 school year, however, the Commission entered into a contract with Education and Training Consultants, Inc., a private, profit-making corporation, which is the subject of the present inquiry. The question projected is whether this further contractual arrangement is consistent with the requirements of N.J.S.A. 18A:6-51 *et seq.*, 18A:46-19.1 *et seq.*, and 18A:46A-1 *et seq.*

It is a fundamental tenet of statutory construction that the overall intention of the Legislature is the controlling factor in interpreting a statute. *Presberg v. Chelten Realty, Inc.*, 136 N.J. Super. 78 (Cty. Ct. 1975); Sands, *Sutherland Statutory Construction*, §45.05. Legislative intent must be gathered from the plain language of the statute under review. *Ritt v. Ritt*, 98 N.J. Super. 590, 595 (Chan. Div. 1967). In construing the laws of this State, words and phrases are to be read and construed with their context and shall "be given their generally accepted meaning according to the approved usage of the language." N.J.S.A. 1:1-1.

Furthermore, when seeking legislative intent the nature of the subject matter, the contextual setting and statutes *in pari materia* must all be viewed together and the import of particular words and phrases is controlled accordingly. *State Bd. of Medical Examiners v. Warren Hospital*, 102 N.J. Super. 407 (Cty. Ct. 1968), *aff'd* 104 N.J. Super. 409 (App. Div. 1969). Indeed, statutes relating to the same subject matter, both special and general, must be construed together as a unitary and harmonious whole so that each will be fully effective. *Bergen County Bd. of Taxation v. Borough of Bogota*, 104 N.J. Super. 499 (Law Div. 1969); Sands, *Sutherland Statutory Construction* §51.03.

The subject matter of the statutory provisions under consideration is the provision of educational services. As such, they find their ultimate source in Art. VIII, §4, ¶1 of the New Jersey Constitution which provides:

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.

A consistent theme throughout the decisions of the Supreme Court of New Jersey in the landmark *Robinson* litigation was the preeminence of education among the various constitutional rights. *Robinson v. Cahill*, 62 N.J. 473 (1973), *cert. den.* 414 U.S. 976, 94 S. Ct. 292, 38 L. Ed. 2d 219 (1973). However, the Education Clause has been consistently construed to allow the Legislature to provide a "thorough and efficient" system of public schools by any means which achieves the ultimate constitutional objective. Historically, the Legislature has discharged its obligation by the creation of local school districts which have the primary responsibility of providing a thorough and efficient education for the children within their districts. *West Morris Reg. Bd. of Ed., et al., v. Sills, et al.*, 58 N.J. 464 (1971); *Board of Education of Elizabeth v. City Council*, 55 N.J. 501 (1970); *Board*

of Ed., E. Brunswick Tp. v. Tp. Council, 48 N.J. 94 (1966).

It is equally well established that local boards of education, as local governmental units, are but creations of the State. As such, they are capable of only exercising those powers granted them, either expressly or by fair implication, by the Legislature. *Fair Lawn Ed. Assn. v. Fair Lawn Bd. of Ed.,* 79 N.J. 574, 579 (1979); *Board of Ed. of Belvidere V. Bosco,* 138 N.J. Super. 368 (Law Div. 1975). The powers of educational services commissions are similarly circumscribed by the legislative act authorizing their establishment.

The act governing educational services commissions specifically states that such agencies are to be established to "carry on" programs of educational research and "to provide" educational and administrative services to public school districts as authorized by the State Board of Education. Indeed, the State Board is only to approve the establishment of an educational services commission when it has ascertained the need for the services which the commission proposes to provide to local boards of education. Once approved by the State Board, the Commission may enter into contracts with school districts "to provide for such services." Furthermore, the Commission is specifically empowered to employ "teachers, principals and other employees" needed to furnish the approved services to local school districts.

From the language utilized in the statute, it is clear that the Legislature intended to create, under certain circumstances, a public agency which would provide educational services on a consolidated or regional basis, to local boards of education. Clearly, the purpose of such undertaking was to upgrade the quality of services which an individual local district might be able to provide or to assure the provision of these services on a cost efficient basis.

Reading this provision within the context of the education laws, it is clear that the Legislature, which has already created local districts to discharge its responsibility under the Education Clause, has further authorized the creation of regional public agencies to assist districts in the performance of their educational functions. There is nothing in the statute authorizing the creation of these entities which indicates that such commissions may contract with private agencies for the performance of instructional services.[3] Indeed, the language selected by the legislature supports the conclusion that the Commission, upon authorization and approval by the State Board, is to furnish instructional services directly to local districts and may employ teachers and principals necessary to the performance of these educational services. To construe this statute otherwise would permit local school districts to enter into arrangements whereby their essential function, the provision of instructional services, would be performed by non-public agencies. To so remove "public education" from the public sphere would effectively frustrate the ongoing monitoring of these services by the Commissioner and State Board of Education, as was mandated by the Public School Education Act of 1975, N.J.S.A. 18A:7A-10, and

3. This opinion is strictly limited to the propriety of a contractual arrangement between an educational services commission and local school districts for the provision of instructional services.

enthusiastically approved by the Supreme Court of New Jersey in *Robinson v. Cahill,* 69 N.J. 449, 459-461 (1976). A departure so radical from the legislative scheme generally governing public education is not to be inferred from the mere silence of N.J.S.A. 18A:6-51 *et seq.* on the subject of contracts with private entities for instructional services. Indeed, where the Legislature has determined it necessary to permit local districts the flexibility of discharging their educational functions by means of a private agency, it has specifically authorized those limited arrangements by statute. Pursuant to N.J.S.A. 18A:46-14(g), local boards may provide special education to handicapped children by sending these children to privately operated day classes. However, such arrangements are only to be made if all other public options are "impractical" and only with the "consent of the commissioner." More recently, local boards have been authorized to enter into contracts with private vocational schools for vocational education courses if such course "cannot be provided by" public entities or where the private schools can "provide substantially equivalent training at a lesser cost." N.J.S.A. 18A:54-10.1. However, such arrangements are subject to detailed regulations adopted by the State Board of Education, N.J.S.A. 18A:54-10.2 and 4, N.J.A.C. 6:46-9.1 *et seq.,* and each contract for these services must be approved by the Commissioner "in writing" before its execution. N.J.S.A. 18A:54-10.4. Additionally, each private school entering into these contractual arrangements is to "make its records available for inspection by the Commissioner or his designated representative." N.J.S.A. 18A:54-10.3.[4]

The final issue to be considered is whether N.J.S.A. 18A:46A-1 *et seq.* and 46:19.1 *et seq.* provide an independent statutory basis for the contract between the Commission and the private agency. Pursuant to those statutory provisions, a local board of education is primarily responsible for the provision of auxiliary, diagnostic and therapeutic educational services to the non-public school pupils resident within its district and receives State aid to meet the costs of providing such services. Local boards, however, may "contract with an educational improvement center, educational services commission or other public or *private agency approved by the commissioner"* for the provision of these services. From the stautory scheme, it is manifest that the local board has the primary responsibility for providing these services and the option of providing them either directly or by contract with certain public or private agencies. However, it may

4. It is clear that in the limited instances where the Legislature has permitted local boards to enter into contracts with private entities for the provision of instructional programs, it has only been under circumstances where the State officials responsible for assuring the quality of public education have had explicit control over those arrangements. Even assuming that the authority to enter into the present contractual arrangement may be inferred from the language of N.J.S.A. 18A:6-5.1 *et seq.,* the Commission failed to comply with the requirement that this highly significant change in its program plan be submitted to the State Board for approval. Had such application been made, the State Board would have had the opportunity to review its propriety and educational soundness, and to impose any conditions on its approval deemed necessary to assure accountability on the part of the private agency. However, in the present situation, the approval process established by N.J.S.A. 18A:6-51 *et seq.* was simply not followed.

only contract with a private agency if it is approved by the Commissioner. Construing this statute in harmony with N.J.S.A. 18A:6-51, *et seq.*, it is clear that appropriate services to be provided by an educational services commission are those mandated by N.J.S.A. 18A:46A-1, *et seq.* and 46-19.1, *et seq.* Therefore, the State Board of Education appropriately approved that function as part of the proposed services to be provided by the Essex County Educational Services Commission. The local districts, consistent with the statutory scheme, chose to fulfill their responsibilities to non-public school pupils by contracting with a public agency, the Essex County Educational Services Commission. The statutory language makes it abundantly clear that the option of contracting with a private agency was only available to local boards of education and the boards in question rejected that option. The commission has no similar grant of discretion and cannot unilaterally negate the board's choice by entering into a contract with a private agency. Moreover, arrangements between local boards of education and private agencies for the provision of these educational services would only be consistent with the statutory scheme if the private agency were approved by the Commissioner. This statutorily required approval was not sought by the commission in the present matter.

Construing N.J.S.A. 18A:6-51, *et seq.*, within the context of the education laws as a whole and with special reference to the statutes governing educational services to non-public school pupils, it is concluded that only local boards of education have the authority to enter into contracts with private agencies for the provision of auxiliary, diagnostic and therapeutic educational services to non-public school pupils. Furthermore, such contracts may only be entered into if the private agency is approved by the Commissioner of Education. Finally, an educational services commission may only provide those services authorized by the State Board of Education and any change in the services to be provided by the Commission must be reviewed and approved by that body. For these reasons, you are advised that the Essex County Educational Services Commission acted beyond the legitimate scope of its authority when it entered into the present contract with Education and Training Consultants, Inc. Not only did the Commission act without express statutory authorization, but it also entered into this agreement without seeking the review and approval of the State Board or the approval of the Commissioner of Education. Indeed, under the latter circumstances, even local boards of education could not have validly entered into this arrangement.

Very truly yours,
JOHN J. DEGNAN
Attorney General

BY: MARY ANN BURGESS
Deputy Attorney General

February 5, 1981

DR. T. EDWARD HOLLANDER
Chancellor
Department of Higher Education
225 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 2—1981

Dear Chancellor Hollander:

A question has arisen concerning the applicability of state statutory requirements such as bidding laws, civil service, and treasury and budget laws to non-profit corporations known as alumni associations and development funds. We have been advised that these are independent organizations which are incorporated and controlled by private individuals for the primary purpose of engaging in fund-raising activities for various state colleges.

In *Formal Opinion No. 22—1980,* it was concluded that state colleges may not use independent corporate entities to carry out college functions unless statutory and administrative requirements imposed on state agencies were satisfied. In many instances those corporations are virtually indistinguishable from the state colleges with which they are associated. Such organizations are incorporated and controlled by college officials and are often utilized to carry out activities more appropriately supervised by the college administration. In contrast, however, development and alumni associations are controlled by boards of directors which are independent of both the boards of trustees and administrators of their affiliated colleges. These corporations do not utilize office space or employees of the college to any significant extent, provide for their own liability insurance and do not supervise or effectuate activities traditionally associated with a college administration. Most importantly, both the allocation and disbursement of the funds donated to, or raised by these corporations are made available to the colleges in the sole discretion of the corporate board of directors. The state colleges do not control, either directly or indirectly, the activities of these corporations, nor do these entities purport to carry out state mandated functions. For these reasons, you are advised that alumni associations and development funds which are in their organization and operation totally independent of state colleges and whose sole purpose is fund-raising activities, are not subject to statutory and other requirements imposed on state agencies.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: ROBERT A. FAGELLA
Deputy Attorney General

March 10, 1981

DANIEL O'HERN, *Counsel to the Governor*
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 3—1981

Dear Counsel O'Hern:

You have asked for an opinion as to the constitutionality of Laws of 1981, c. 27, which authorizes the legislature through the adoption of concurrent resolutions to disapprove rules and regulations proposed by state administrative agencies and to suspend adopted agency rules. For the following reasons, it is our opinion that Laws of 1981, c. 27, is unconstitutional.

Laws of 1981, c. 27, was enacted as an amendment and supplement to the Administrative Procedure Act. It requires all state agencies to submit all proposed rules prior to their adoption to the Senate and General Assembly. The Senate and General Assembly may then within a period of 60 days through the adoption of concurrent resolutions disapprove rules in whole or in part or delay their effective date for an additional period of 60 days. Also, the act provides authority for a joint legislative committee to review any rules proposed or adopted after the effective date of the act, and upon receiving the committee's report, the Senate and General Assembly may adopt a concurrent resolution suspending the rule for a period of 60 days.

The question directly posed by this legislation is whether its provisions provide a constitutionally appropriate means for the legislature to participate in the review and oversight of the rule-making activities of state agencies. The legislature normally is authorized to exercise its substantive law-making powers through the passage of bills in a manner consistent with the State Constitution. For example, a bill must be read three times in each house; one full calendar day must intervene between the second and third reading, and the bill must be adopted by a majority of all the members of each house. Art. 4, §4, ¶6. More importantly, the State Constitution includes a "presentment" clause which requires "every bill which shall have passed both houses shall be presented to the Governor for his approval or veto." Art. 5, §1, ¶ 14(a).

It is a well established proposition that concurrent resolutions passed without executive review have no effect as general legislation. *Moran v. LaGuardia,* 1 N.E. 2d 961, 962 (N.Y. Ct. of App. 1936); Gibson, *Congressional Concurrent Resolutions: An aid to statutory interpretation?,* 37 A.B.A.J. 421 (1951); 1A *Sutherland Statutory Construction* (4th ed. 1972) §29.03. Their effect is limited to the internal administration of parliamentary business or to the expression of legislative sentiment or opinion. Myers, *Joint Resolutions are Laws,* 28 A.B.A.J. 33 (1942). *See also, State v. Atterbury,* 300 S.W. 2d 806, 817, 818 (Mo. S.Ct. 1957). This proposition was discussed by the Supreme Court of New Jersey in *In the Matter of the Application of New York, Susquehanna and Western Railroad Company,* 25 N.J. 343 (1957). The railroad applied to the Board of Public Utilities commissioners for permission to curtail service. Following protracted hearings, the Senate adopted a concurrent resolution declaring the policy of the legislature against further curtailment of passenger rail service pending the final report of a Rapid Transit Commission. The Board of Public Utilities commissioners thereupon suspended all further proceedings until the submission of the report of the Commission. The Supreme Court in assessing the impact of the Senate concurrent resolution on the Board of Public Utilities declared:

> It is perfectly clear that the concurrent resolution is not an act of legislation. Art. 4, §4, ¶ 6, of the Constitution of 1947 prescribes the procedure for the passage of 'bills and joint resolutions.' The Constitution is silent with respect to concurrent resolutions. . . . The Executive Article refers only to bills in fixing the procedure for final executive action. . . . The resolution here involved is a concurrent one and of course was never submitted to the governor for his action. Except within the precincts of the legislature or perhaps where it acquires force by virtue of some specific statute, a concurrent resolution is ordinarily an expression of sentiment or opinion, without legislative quality or any coercive or operative effect. . . . [*In re Susquehanna* at 348.]

The court therefore held that the decision of the Board of Public Utilities to suspend proceedings should be reversed because the legislature may not by concurrent resolution control the functions of an administrative agency.

It is clear that under the terms of this statute the exercise of the power of disapproval over rule-making activities of state administrative agencies through the passage of concurrent resolutions is not a procedural act concerned with the internal business of the legislature or an expression of legislative opinion. It is rather a form of law-making having a direct substantive and operative effect on the rights and duties of the citizens of New Jersey without the constitutionally required opportunity for gubernatorial review and approval.

This same conclusion was reached by the court in *State v. A.L.I.V.E. Voluntary,* 606 P. 2d 769 (Alas. 1980), in reviewing legislation similar to c. 27. The court held that a statute which would permit the legislature by concurrent resolution to disapprove a regulation of a state agency was in violation of the state's constitutional means prescribed for the enactment of legislation. The court noted that when the legislature wishes to act in an advisory capacity, it may do so by resolution; but when it means to take action having a binding effect on those outside the legislature, it may do so only by following the enactment procedures in the state constitution.

Also, a recent comprehensive opinion of the United States Attorney General is directly supportive of this conclusion. In an opinion to Secretary of Education Hofstedler, dated June 6, 1980, Attorney General Civiletti concluded that §432 of the General Education Provisions Act was unconstitutional. That provision authorized Congress by concurrent resolutions that are not submitted to the President for his approval or veto to disapprove regulations promulgated by the Secretary of Education for programs administered by the Department of Education. The Attorney General pointed out that the legislative veto device found in the federal

statute was equivalent to legislation insofar as its practical effect was to allow Congress to bring a halt to substantive programs carried out at the administrative level. For that reason, the legislative veto device was found by the United States Attorney General to be inconsistent with the Presentment Clause of the United States Constitution which required all legislation to be submitted to the President for his approval or veto.

In summary, therefore, the exercise of the legislative veto as set forth in this legislation is equivalent to the enactment of legislation because it permits the legislature through the passage of concurrent resolutions to, in effect, block the execution of substantive programs by the Executive Branch. In fact, the necessary effect of a legislative veto by the passage of concurrent resolutions is to interfere with the implementation of a statutory program until the administrative agency promulgates further regulations in compliance with the policies of the legislature. For these reasons, you are advised that those provisions of Laws of 1981, c. 27, which provide for the disapproval of agency rules and regulations through the passage of concurrent resolutions by the Senate and General Assembly is inconsistent with the state constitutional means for the passage of legislation and for the presentment of the same to the governor for his review and approval.* Administrative agencies of state government should be directed that those provisions have no force and effect and state agencies should not conform their rule-making activities to the provisions of that act on its effective date.

Very truly yours,
JUDITH A. YASKIN
Acting Attorney General

* Also, there are serious constitutional questions as to whether this legislation is consistent with Art. 3 of the State Constitution providing for the separation of powers. The provisions of this legislation allow the legislature to interfere with substantive programs administered by state agencies through its rules and regulations. This is a function traditionally assigned and committed to the Executive Branch of state government.

May 13, 1981

JOAN H. WISKOWSKI, *Director*
Division of Motor Vehicles
25 South Montgomery Street
Trenton, New Jersey

FORMAL OPINION NO. 4—1981

Dear Director Wiskowski:

The Division of Motor Vehicles has asked for an opinion with regard to its authority to impose a one year revocation of driving privileges for the refusal of a motorist to submit to a breath chemical test. Specifically, the issue posed is whether a one year revocation should be imposed where a motorist who has previously been convicted of the substantive offense of driving while under the influence of intoxicating liquor is subsequently arrested on probable cause for driving while under the influence and refuses to take the breath chemical test. For the following reasons, you are advised that the Division of Motor Vehicles should impose a one year revocation of driving privileges in an instance where a motorist has been arrested for a subsequent drinking-driving violation and refuses to take a breath chemical test. You are further advised that there need not be a conviction on the subsequent substantive offense to warrant the imposition of the one year revocation for a refusal to take a breath chemical test.

The pertinent provision in this case is N.J.S.A. 39:4-50.4(b) which provides:

> Any revocation of the right to operate a motor vehicle over the highways of this State for refusing to submit to a chemical test shall be for 90 days *unless the refusal was in connection with a subsequent offense of this section,* in which case, the revocation period shall be 1 year. . . . [Emphasis supplied].

In *Formal Opinion No. 13—1977,* dated June 8, 1977, the Attorney General advised the Director of Motor Vehicles that a one year revocation of driving privileges should be imposed in an instance where a motorist refuses to take a breath chemical test in connection with a subsequent substantive offense of driving while intoxicated with or without regard to whether there has been a prior breath refusal connected with a previous offense. In *In the Matter of Bergwall,* 85 N.J. 382 (1981), the Supreme Court of New Jersey substantially for the reasons stated in the dissent in the Appellate Division reported at 173 N.J. Super. 431 (App. Div. 1980) held in effect that N.J.S.A. 39:4-50.4(b) should be implemented by the Division of Motor Vehicles in a manner consistent with the advice given by the Attorney General, i.e., a one year revocation of driving privileges should be imposed in an instance where a breath refusal is in connection with a subsequent substantive offense of drunk driving with or without regard to a prior breath refusal.

The question remains, which is the focus of your inquiry, whether a second or subsequent offense needed to warrant the imposition of the enhanced one year revocation was intended to require that a motorist be

convicted of a subsequent offense or rather whether an arrest on probable cause for having committed such an offense is sufficient. The legislative history underlying the enactment of this provision provides guidance. In the "Statement to the Senate Bill, No. 1423," page 2, item 8 (May 24, 1976) prepared by the Senate Law, Public Safety and Defense Committee, it is indicated that the Motor Vehicle Study Commission recommendation regarding amendment of penalty provision of the refusal statute was:

> 1st-6 mos.+
> Alcohol Education or
> Rehabilitation Subsq.
> to Prior DWI Conv.
> in 15 yrs.—2 yr.

From this language, it is apparent that the one-year suspension was intended to apply in all cases where the refusal followed a prior driving while intoxicated conviction. No other prerequisite is indicated. More specifically, no requirement is indicated that the refusal must be followed by conviction on the related drinking-driving charge before the one-year penalty shall apply.

Similarly, in the "Statement to Senate Bill, No. 1423," p. 2 (September 27, 1976) prepared by the Assembly Judiciary, Law, Public Safety and Defense Committee, it is stated that the bill, as amended, would provide, among other things, that the:

> Penalties for refusing the breath test would be a 90-day license suspension if no prior offense or 1 year suspension *if a prior* conviction within 15 years. [Emphasis added].

Again, there is no indication that anything more than the existence of a prior drinking-driving conviction followed by a refusal to take the breath test is needed before the one-year suspension will apply. It appears that probable cause to believe that the offense has been committed when coupled with the existence of the prior driving while intoxicated conviction was apparently thought sufficient by the Legislature to trigger the enhanced penalty provision for a breath refusal.

This was also the understanding of the Governor when he signed the bill into law. In his Statement upon signing of Senate Bills Nos. 1416-1423, p. 4, released February 24, 1977, it was stated that:

> Refusal to take the breath test after arrest for suspected drunken driving will result in a 90 day license suspension if no prior conviction exists and one year if there has been prior conviction within 15 years.

Again, the import is clear—conviction on the driving while intoxicated charge which accompanied the breath test request and refusal is *not* a prerequisite to imposition of the one-year suspension.

This conclusion, drawn from the available legislative history, is fully consistent with an apparent legislative purpose to encourage motorists who

have previously been convicted of driving while intoxicated and who are again arrested for that same offense to take the breathalyzer test. This presumed legislative purpose is reflected in the Motor Vehicle Study Commission's 1975 report, which report was substantially relied upon by the legislature in drafting its extensive amendments in 1977 to the Motor Vehicle Act. The Commission noted that:

> If an individual is a second offender under the impaired statute, it is advantageous for him to refuse the test, since the penalty he must receive, if convicted, is two years loss of license. If he is charged with driving while under the influence, he faces either a two or ten year revocation, depending on his prior record. By refusing the test, he deprives the state of objective evidence of intoxication or impairment (and perhaps evidence of his own innocence) and risks a six-month suspension. . . .
>
> . . . .
>
> It is presently advantageous for an individual to refuse the breath test since the refusal suspension penalty is so much shorter than any penalty imposed under N.J.S.A. 39:4-50 except for a first 'impaired' offense. That advantage should be removed from the law so that more individuals will be induced to take the test. [Report of the Motor Vehicle Study Commission, September 1975, at pp. 147-48, 150-51.]

Therefore, it should be noted that if a conviction on a subsequent driving while under the influence charge is required as a precondition to the imposition of a one year revocation for refusal to take a breath test, the incentive to take a breath test will be lost, i.e., in the event a motorist believes he can win acquittal on the subsequent offense by refusing to take the breath test, he would have every reason to do so for he would also thereby avoid the one year suspension for the breath refusal. On the other hand, under an interpretation of the statutory language which would allow the imposition of the one year revocation whether or not a conviction is obtained on the drinking-driving violation, the incentive to take the breath test clearly exists.

For these reasons, you are advised that the Director should impose a one year revocation of driving privileges in an instance where a motorist who has previously been convicted of the substantive offense of driving while under the influence of intoxicating liquor has again been arrested on probable cause for the offense and refuses to take a breath chemical test. There need not be a conviction obtained on the substantive offense to warrant the imposition of the one year revocation for a breath refusal.

Very truly yours,
JAMES R. ZAZZALI
Attorney General
By: ROBERT M. JAWORSKI
Deputy Attorney General

July 13, 1981

CHRISTOPHER DIETZ, *Chairman*
State Parole Board
Whittlesey Road
Trenton, New Jersey 08625

FORMAL OPINION NO. 5—1981

Dear Chairman Dietz:

You have requested advice on several questions with regard to that provision of the Penal Code which governs the disposition, treatment and parole of sex offender inmates sentenced to the Adult Diagnostic and Treatment Center (hereinafter referred to as ADTC or Center). Your questions are concerned with whether various categories of inmates should be deemed eligible for parole consideration by the Parole Board only after recomendation by a special classification review board or, on the other hand, whether categories of inmates should be regarded eligible for parole consideration subject to the provisions of Title 30 governing parole.

Prior to providing an analysis of each of the specific inquires made by you, it is necessary to review both the applicable provisions of the pre-Code legislation and those now made a part of the Penal Code which govern the treatment and parole of sex offenders. Under N.J.S.A. 2A:164-8, sex offenders were eligible for release under parole supervision at any time after their confinement upon a recommendation of the special classification review board that they were "capable of making an acceptable social adjustment in the community."[1] The same administrative procedure and standard for release of sex offenders are in effect with the adoption of the Penal Code in N.J.S.A. 2C:47-5.

In N.J.S.A. 2C:47-4, however, the legislature has made provision for the release of those sex offenders transferred out of the ADTC. The precise statutory language is essential to a disposition of your inquiries and it is therefore set forth at length as follows:

> a. The Commissioner of the Department of Corrections, upon commitment of such person, shall provide for his treatment in the Adult Diagnostic and Treatment Center.
>
> b. The Commissioner may, in his discretion, order the transfer of a person sentenced under this chapter out of the Adult Diagnostic and Treatment Center. In the event of such a transfer the conditions of confinement and release of such person transferred shall no longer be governed by this chapter.

1. The statute, repealed by Laws of 1978, c. 95, effective September 1, 1979, provided in pertinent part:

> Any person committed to confinement, as provided for in section 2A:164-6 of this title, may be released under parole supervision when it shall appear to the satisfaction of the state parole board, after recommendation by a special classification review board appointed by the state board of control of institutions and agencies, that such person is capable of making an acceptable social adjustment in the community.

> c. If, in the opinion of the commissioner, upon the written recommendation of the Special Classification Review Board continued confinement is not necessary, he shall move before the sentencing court for modification of the sentence originally imposed.

It is clear from a straightforward reading of subsection b that in any instance where the Commissioner of Corrections in the exercise of his discretion orders the transfer of a person sentenced under the Penal Code out of the ADTC, the conditions of confinement and parole release of such an inmate should no longer be governed by those provisions governing the parole of sex offenders, but rather those enactments in Title 30 generally governing the parole of inmates incarcerated in state correctional institutions.

The question, then, arises as to whether the provisions for parole release set forth in N.J.S.A. 2C:47-4(b) apply both to those sex offenders sentenced under the repealed Sex Offenders Act and not resentenced under the Penal Code and to those sex offenders resentenced under the Penal Code. In this regard, it is necessary to again refer to the statutory language in subsection b which provides in pertinent part that "the Commissioner may, in his discretion, order the transfer of a person *sentenced under this chapter* out of the Adult Diagnostic and Treatment Center." It is apparent that the legislature intended that this provision apply only to that class of sex offender "sentenced under the Penal Code." Although provisions of the Code for the release of prisoners are generally applicable to those under sentence for offenses committed prior to its effective date, N.J.S.A. 2C:1-1d(1),[2] in this instance the legislature has made specific reference to only those sex offenders sentenced under the Penal Code. Consistent with the rule of statutory construction that a specific statutory section governs over the terms of a more general one, it is fair to conclude that the legislature did not intend to extend the provisions of N.J.S.A. 2C:47-4(b) to those sex offenders who have not been resentenced under the Penal Code.

This conclusion is supported by the fact that the enactment of the Penal Code did not in itself reduce or otherwise affect pre-Code sentences. The reduction of pre-Code sentences may only be accomplished upon motion with a showing of disparity in sentences with equivalent offenses and for good cause shown for resentencing. N.J.S.A. 2C:1-1d(2). Therefore, those sex offenders, whether or not transferred out of the ADTC, who have not been resentenced under the Code, continue to serve sentences under the Sex Offender Act prior to its repeal, integral to which eligibility for parole release upon the recommendation of a special classification review board.

2. The statute provides as follows:

> The provisions of the code governing the treatment and the release or discharge of prisoners, probationers and parolees shall apply to persons under sentence for offenses committed prior to the effective date of the code, except that the minimum or maximum period of their detention or supervision shall in no case be increased.

The legislative policy underlying the Sex Offender Act prior to its repeal was recently reviewed by the Appellate Division in *Savad v. Corrections,* 178 N.J. Super. 386, 390 (App. Div. 1981). The court stated that:

> Progress through treatment and therapy to an acceptable social adjustment was the legislative goal of the repealed Sex Offender Act. Upon satisfactory rehabilitation from their aberrations pre-Code sex offenders . . . were immediately eligible for parole. At the other extreme, their maximums were those fixed by law for the crimes for which they were committed.
>
> Their terms of confinement were thus bounded: release at any time upon satisfactory rehabilitation and social adjustment up to the statutory maximum term of imprisonment. . . .

The major change effected by the enactment of the Penal Code is that sex offenders are sentenced to a specific term of years rather than to an indeterminate term. N.J.S.A. 2C:47-3(b). A sex offender, consequently, is now sentenced to a determinate term in the same manner as are other inmates incarcerated in state correctional institutions.

The legislative policy underlying the sentencing procedures provided for sex offenders under the Penal Code must be considered together with significant changes made in laws concerning eligibility for parole consideration in the 1979 Parole Act. Related statutes must be interpreted together to discern a consistent legislative pattern. *Loboda v. Clark Tp.,* 40 N.J. 424, 435 (1963). In the parole legislation, it is provided that eligibility should be determined for each adult inmate sentenced to a specific term of years. N.J.S.A. 30:4-123.51a. It is apparent that the legislature intended to refer to a specific term of years mandated by a court under the Penal Code and not to an indeterminate term. Consequently, only those sex offenders sentenced or resentenced under the Penal Code would be eligible for parole under non-ADTC guidelines established by the 1979 Parole Act. Those sex offenders transferred out of the ADTC who have not been resentenced under the Code, continue to be eligible for parole release only upon the recommendation of the special classification review board.

There can be no doubt but that this proposition applies not only to inmates transferred by the Commissioner subsequent to their being resentenced under the Code, but also to those sex offenders in the general prison population transferred out of the ADTC prior to resentencing under the Penal Code. The provisions of the Code for the release or discharge of prisoners are clearly applicable to those under sentence for offenses committed prior to its effective date. N.J.S.A. 2C:1-1d(1). The statutory procedure for the release and parole of sex offenders who are transferred out of the ADTC consequently, by operation of the statute, applies to both sex offenders originally transferred under the repealed Sex Offender Act as well as those transferred for the first time under the Code.

In light of this background, your first inquiry concerns the treatment of an inmate sentenced to a term in the Center prior to the effective date of the Penal Code and who is transferred out of the Center to a state prison facility prior to the effective date of the Code and who is not resentenced under the Code. It is our opinion that since in that case an inmate has

not been resentenced under the Code, the provisions of N.J.S.A. 2C:47-4(b) are not applicable and the inmate should be considered eligible for release under parole supervision consistent with the terms of N.J.S.A. 2A:164-8

The second category posed by you is an inmate sentenced to a term in the Center prior to the effective date of the Code and who is transferred out of the Center to a state prison facility prior to the Code and who is resentenced under the Code. It is clear that under those circumstances, since a sex offender has been resentenced under the Code, the provisions of N.J.S.A. 2C:47-4(b) are applicable and the conditions of confinement and release of such a person should be governed by those provisions of Title 30 governing parole release. This conclusion, furthermore, is supported by the decision of the United States District Court in *McCray v. Dietz,* 517 F. Supp. 787 (D. N.J. 1980), where the court held that an inmate resentenced under the Code who had been transferred out of the Center prior to the enactment of the Code, was entitled to an immediate parole release hearing under non-ADTC parole guidelines.

In the third category, a sex offender is sentenced to a term in the Center prior to the enactment of the Code and is transferred out of the Center to a state prison facility after the enactment of the Code and is not resentenced under the Code. Again, in this case, a sex offender has not been resentenced under the provisions of the Code and, as in the first example, the provisions of N.J.S.A. 2A:164-8 should govern eligibility for release under parole supervision.

Finally, the last category of sex offender is sentenced to a term in the Center prior to the enactment of the Code and is transferred out of the Center to a state prison facility after the enactment of the Code and is resentenced under the Code. There can be no question but that the provisions of N.J.S.A. 2C:47-4(b) directly apply in that situation and the conditions of confinement and release of such a sex offender should be governed by the non-ADTC guidelines governing parole set forth in Title 30.

Very truly yours,
JAMES R. ZAZZALI
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

August 14, 1981

GEORGE MINISH, *Chairman*
New Jersey Racing Commission
404 Abbington Drive
Twin Rivers Town Center
East Windsor, New Jersey 08520

FORMAL OPINION NO. 6—1981

Dear Chairman Minish:

You have asked for an opinion as to the administrative authority of the New Jersey Racing Commission under existing statutory law to approve a system of "telephone wagering" (more commonly known as dial-a-bet) at licensed racetracks. It is our opinion for the following reasons that the Commission does not have the authority to permit telephone wagering under existing racing laws and that specific amendatory legislation must be enacted to provide necessary enabling authority.[1]

"Telephone wagering" is an arrangement wherein an individual may place on deposit with a given racetrack a certain sum of money so that he may place a bet by telephone on the outcome of a race being conducted at the track. The amount of the bet would be limited by the money on deposit in the account. The racetrack employee receiving the message would enter the wager into the pari-mutuel system and any winnings would be credited to the individual account. All wagers received in this manner would be maintained under the control and supervision of the racetrack permittee.

At the outset, it is clear that a proposal wherein a permittee maintains an account on behalf of an individual bettor in which monies are deposited and winnings are credited and withdrawn from time to time at the option of a bettor may not be implemented by the Racing Commission absent amendatory legislation. The existing statutes make explicit a requirement that each holder of a permit distribute *all* sums deposited in a pari-mutuel pool less specifically enumerated exceptions. N.J.S.A. 5:5-64 and 66. For example, there is an express provision to withhold a specific percentage of the total deposit, plus the breaks, and in other instances to hold and set aside in special trust accounts to be used to increase purses and grant awards, to establish a sire stakes program and for other related purposes.

1. In 1939 the 1844 Constitution was amended to authorize conduct of pari-mutuel wagering on horse races in this state. Art. 4, §7, ¶2 of the 1947 New Jersey Constitution specifically approves those forms of gambling which had heretofore been submitted and popularly approved. The text of the amendment approved in 1939 provides in pertinent part that it shall be lawful to hold, carry on and operate race meetings in duly legalized racetracks at which the pari-mutuel system of betting shall be permitted. The use of the words "at which" indicates a purpose to confine the pari-mutuel system of betting to the confines of the legalized racetrack. We have been informed that in the case of telephone wagering, the pari-mutuel system of betting will continue to be maintained and operated by the permittee and within the racetrack enclosure. Consequently, it is our opinion that "telephone wagering" would not be inconsistent with the Constitution and there would be no need for a constitutional amendment or popular referendum to approve of its use.

N.J.S.A. 5:5-66. In addition, "all sums held by any permit holder for payment of outstanding pari-mutuel tickets not claimed by the person or persons entitled thereto within six months from the time such tickets are issued shall be paid to the Commission upon the expiration of such six month holding period." N.J.S.A. 5:5-64. There is consequently a specific exception created by the legislature to the general rule requiring distribution of all sums deposited in any pool, for the holding by a permittee of outstanding unclaimed pari-mutuel winnings for a period of not more than six months. On the other hand, there is not even implicit authorization for the creation of a special individual "telephone wagering" account wherein monies may be deposited and claimed and accumulated winnings withdrawn or maintained under the supervision and control of a permittee on an ongoing and indefinite basis. If the legislature intended to authorize the setting up of these special accounts as part of the overall system of pari-mutuel wagering, it should state its intent to do so in unmistakably clear terms.

The proposal for "telephone wagering" also implicates the provisions of N.J.S.A. 5:5-62 of the racing laws. That statutory subsection provides as follows:

> Any permit holder conducting a horse race meeting under the act may provide a place or places in the race meeting grounds or enclosure at which such holder of a permit may conduct and supervise the pari-mutuel system of wagering by patrons on the result of the horse races conducted by such permit holder at such meeting, and such pari-mutuel system of wagering upon the result of such horse races held at such horse race meeting and within such race track and at such horse race meeting shall not under any circumstances, if conducted under the provisions of this act and in conformity thereto, be held or construed to be unlawful, other statutes of the State of New Jersey to the contrary notwithstanding.

There is no available legislative history or case law to help in the interpretation of this section. It is therefore necessary to interpret the plain meaning of the language of the statute consistent with its presumed overall legislative objective. In this vein, it is important to note that the legislature as an exception to the general prohibition against gaming in this state has authorized a permit holder to provide a place in the race meeting grounds or enclosure at which the permittee may conduct the pari-mutuel system of wagering by patrons on the result of horse races conducted by the permit holder. The language used by the legislature is not without purpose. It would seem apparent that it was the intent to exempt pari-mutuel betting from the general statewide prohibition on gaming only when such betting is carried out by patrons who are physically present at the racetrack. It follows that one who is not personally present at the racetrack to place a bet is not a patron thereof and would not come within the pari-mutuel exemption. In the present situation, it is apparent that in the case of telephone wagering a pari-mutuel system of wagering by patrons is not in fact being conducted at the racetrack consistent with the statutory

language. The wager is not being made or entered into the pari-mutuel system "at the race meeting grounds or enclosure" by the patron but rather made or entered into the system by an employee of the permittee at the specific direction of another. Further, the giving of authorization to an employee of a permittee to place a bet on behalf of an individual bettor is inseparable from the act of "placing" a bet itself while outside of the racetrack enclosure. To sanction such a procedure would sanction a system of wagering clearly beyond the legislative contemplation in its enactment of N.J.S.A. 5:5-62.

Moreover, until 1939 a pari-mutuel system of betting at racetracks in New Jersey was outlawed. Such gaming was prohibited by the State Constitution at that time. In 1939 at a popular referendum the public gave its approval to a system of pari-mutuel betting at New Jersey racetracks. Pursuant to this authorization, the Racing Commission was created by the legislature in 1940 to establish the regulatory framework for the racing industry. The statutory and administrative controls and the regulatory scheme is both comprehensive and minutely elaborate. In fact, horse racing with attendant legalized gambling is "strongly affected by a public interest" and has been held to be a "highly appropriate" subject for close regulatory supervision. *Jersey Down, Inc. v. Division of New Jersey Racing Commission,* 102 N.J. Super. 451, 457 (App. Div. 1968). Consequently, it is our opinion that in this area of sensitive governmental regulation a new proposal of this character should receive careful and explicit legislative approval prior to its being administratively implemented.

For all of these reasons, you are advised that specific amendatory legislation is necessary to clarify the responsibilities of a permittee in the establishment and maintenance of special accounts to carry out telephone wagering and to specifically authorize this innovative form of wagering by bettors on the result of horse races conducted by permit holders under the racing laws.

Very truly yours,
JAMES R. ZAZZALI
Attorney General

October 7, 1981

HONORABLE CLIFFORD GOLDMAN
State Treasurer
Department of Treasury
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 7—1981

Dear Treasurer Goldman:

You have asked for an opinion as to the tax consequences of checks received by a casino licensee to obtain an extension of credit to gamble, which are not deposited in accordance with the check cashing provisions

of the Casino Control Act and are later dishonored. You are advised that uncollected checks (commonly referred to in the industry as markers or counterchecks) received by a casino licensee and not deposited in accordance with the provisions of the act do not constitute taxable gross revenue.

The act imposes upon casino licensees a tax calculated at 8% of the gross revenue. Gross revenue is defined as:

> The total of all sums, including checks received by a casino licensee pursuant to section 101 of this act, whether collected or not, actually received by a casino licensee from gaming operations, less only the total of all sums paid out as winnings to patrons and a deduction for uncollectible gaming receivables not to exceed the lesser of a reasonable provision for uncollectible patron checks received from gaming operations or 4% of the total of all sums including checks, whether collected or not, less the amount paid out as winnings to patrons. [N.J.S.A. 5:12-24.]

At the outset it is clear from a straightforward reading of the statutory language that all sums actually received by a licensee from gaming operations should be included within gross revenue. Thus, a check collected by a licensee is money actually received and would constitute gross revenue whether or not the check has been received in accordance with section 101 of the Act. Also, the Legislature has clearly mandated that those checks received by a casino licensee pursuant to the requirements of section 101 of the act, whether collected or not, are includable in gross revenue. The issue posed in the present situation is whether checks not received pursuant to section 101 and not actually collected constitute gross revenue.

In order to fully address this question, it is necessary to briefly touch on the statutory conditions to be satisfied by a licensee when accepting checks, from gambling patrons. N.J.S.A. 5:12-101(b) and (c) provide for specific conditions concerning the receipt and deposit of checks by a casino licensee.[1] It is further provided in subsection (f) that "any check cashed, transferred, conveyed or given in violation of this act shall be invalid and unenforceable."

In *Resorts International Hotel v. Salomone,* 178 N.J. Super. 598 (App. Div. 1981), a casino licensee brought an action to recover credit extended to the defendant on the issuance of checks which were not deposited in accordance with the specific requirements of the statute. The court noted, in response to an argument that the underlying obligation survived the invalidation of the negotiable instrument, that "the legislature sufficiently

1. Subsection (b) requires that all checks must be dated but not postdated, made payable to the licensee, presented to a cashier in exchange only for credit slips equal to the amount of the check, and deposited by the licensee in accordance with the check cashing provisions of N.J.S.A. 5:12-101(c). The check cashing provisions require that checks in an amount less than $100 are to be deposited within seven banking days of the transaction; checks in an amount between $1000 but less than $2500 are to be deposited within fourteen banking days of the transaction, and checks in an amount of $2500 or more are to be deposited within ninety banking days of the transaction.

signified its intention to void the gambling obligation represented by these checks when it provided that only 'checks cashed in conformity with the requirements of this act' shall be valid and enforceable." *Resorts International, supra* at 605, 606. It is apparent therefore to have been the underlying legislative intent that there be no obligation created on a check unless the requirements of the act are satisfied and, correspondingly, no accrued right in the licensee to receive payment on such a check.

Therefore, a sensible reading of the definition of gross revenue found in N.J.S.A. 5:12-24 in light of the legislative policy underlying the act leads to the following conclusions. A check processed by a casino licensee in conformity with the act's provisions regarding the receipt of checks and later dishonored by a patron is a valid and enforceable obligation and should be included within gross revenue.[2] On the other hand, a check received by a licensee which has not been processed in conformity with the requirements of the act and is later dishonored, creates no valid accrued right to payment and would not logically be included within a casino's taxable gross revenues. These conclusions not only carry out the policy underlying the act but are specifically mandated by the language of the statute which encompasses within gross revenue only those "checks received by a casino licensee *pursuant to section 101 of this act* whether collected or not . . . ."

For these reasons, you are advised that checks received by a casino licensee which are not deposited in accordance with the provisions of the act and are later dishonored do not constitute taxable gross revenue.

Very truly yours,
JAMES R. ZAZZALI
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

2. It should be noted that with regard to those checks deposited in conformity with section 101 of the act and deemed by a licensee to be uncollectible, the statute provides for a deduction from gross revenue for uncollectible gaming receivables not to exceed the lesser of a reasonable provision for uncollectible patron checks received from gaming operations or 4% of the total of all sums including checks. A check which is not deposited in conformity with section 101 and is uncollectible cannot be considered a bad debt.

November 6, 1981

WILLIAM J. JOSEPH, *Director*
Division of Pensions
20 West Front Street
Trenton, New Jersey

FORMAL OPINION NO. 8—1981

Dear Director Joseph:

You have asked for our advice as to whether the State Health Benefits Commission is required to extend an increased level of reimbursement under the Blue Shield benefits formula to all local participating employers and to their employees. This increased level of reimbursement is commonly known as the 1420 Series which the State has determined to provide to its employees. The occasion for your inquiry is the recently negotiated agreement between the State and its unions. It is provided therein, among other things, that the State shall provide the 1420 Series Blue Shield benefits for its employees. We are informed that the Health Benefits Commission has determined, or will soon determine, to implement the terms of the collective negotiations agreement and to provide those benefits to all state employees effective January 1, 1982. For the following reasons, it is our opinion that under the governing statutory framework, the Health Benefits Commission is required to extend this level of reimbursement under Blue Shield to all participating local employers and their employees.

At the outset, in order to understand the State Health Benefits Act as it applies to both the State and to participating employers, it is necessary to outline the basic statutory framework. In 1961, the legislature enacted the State Health Benefits Act and defined an eligible employee to mean a full time employee of the State of New Jersey. N.J.S.A. 52:14-17.25, 26. A State Health Benefits Commission was created consisting of the Treasurer, Commissioner of Banking and Insurance and the President of the Civil Service Commission, to administer the terms of the Act and to negotiate and arrange for the purchase of contracts from licensed carriers providing hospital and medical expense benefits covering employees of the State and their dependents. The Commission's discretion to purchase contracts was qualified by the proviso that the health benefits provided equal or exceed certain minimum standards specified in the Act, and more importantly that such "coverage is available to all eligible employees and their dependents. . . ." N.J.S.A. 52:14-17.28. In 1964 the legislature extended the State Health Benefits Act to include participation by counties, municipalities, public agencies and school districts. N.J.S.A. 52:14-17.34. Acting thereunder, participating public employers may, and a substantial number have, purchased coverage for their employees through the State Health Benefits Commission.

In light of this statutory backdrop, it is appropriate to deal with the specific issue posed, i.e., whether the Commission is obligated to extend the increased level of reimbursement provided to state employees to all of those participating employers and their employees. Critical to this issue are the following provisions. N.J.S.A. 52:14-17.28 enacted as part of the 1961 statute first made applicable to state employees provides that:

> The Commission shall not enter into a contract under this act unless the benefits provided thereunder equal or exceed the minimum standards specified in section 5 [52:14-17.29] for the particular coverage which such contract provides; and unless coverage is *available to all eligible employees* and their dependents on the basis specified by section 7. [Emphasis supplied.]

Also pertinent to this issue is N.J.S.A. 52:14-17.36 enacted as part of the 1964 supplement to the act which provides:

> All provisions of that act will, except as expressly stated herein, be construed as to participating employers and to their employees and to dependents of such employees the same as for the state, employees of the state and dependents of such employees.

These two statutory provisions evidence a legislative interest in assuring equality of treatment for all public employees. The Commission may not enter into a contract unless coverage is available to all eligible employees and their dependents. Further, that statutory mandate on the exercise of the Commission's discretion must be construed by the terms of the 1964 supplement to now extend to participating local employers and to their employees in the same manner as for the employees of the state. It follows, therefore, that in the event the State determines to provide for an increased level of reimbursement for state employees, it is required in the exercise of this discretion to make that level of reimbursement available to all local participating employers in the same manner as it has for the State and its employees.

This view is supported by the legislative history. Senate Bill No. 46 (1963) was introduced to provide for the extension of the Health Benefits Act to local political subdivisions.* The statement on the bill provided that municipalities, counties and school districts could join the Health Benefits Program and obtain the same benefits as were then provided to state employees. Moreover, we have been informed that it has been the administrative practice of the State Health Benefits Commission during the past 17 years to extend to local employers and their employees the same hospital, medical and surgical benefits as have been provided to state employees. A long-standing administrative practice for a period of several years without any legislative interference is entitled to great weight as to the probable legislative intent. *Radiological Society of New Jersey v. Sheeran,* 175 N.J. Super. 367, 379 (App. Div. 1980).

This conclusion is also reinforced by a separate statutory section designed to encourage equality of treatment and health benefits for all public employees both at the State and local levels. N.J.S.A. 40A:10-25 provides that it shall be the duty of any public employer who enters into

* Senate Bill No. 46 was conditionally vetoed by Governor Hughes for its failure to separate the claims experience for the State and local groups. Senate Bill No. 314 was introduced as a replacement for Senate Bill No. 46 and after providing for separation of claims experience for State and local employers was enacted substantially as originally proposed in Senate Bill No. 46.

a group insurance health contract on behalf of its employees to file a copy with the State Health Benefits Commission. It also directs that the Commission report not less than every two years to the Governor and the legislature as to these contracts:

> and shall make such recommendations concerning the contracts and the coverage thereunder as it deems appropriate *to achieve uniformity of coverage and benefits for employees throughout the state.* [Emphasis supplied.]

For these reasons, it is our judgment that the overall statutory framework evinces both an express and implicit legislative intent to insure equality of benefits between both state and local employees under the program administered by State Health Benefits Commission. Consequently, in the event the Commission determines to provide for an increased level of reimbursement under Blue Shield (Series 1420) to state employees it is required to extend that same level of reimbursement in those contracts purchased by it on behalf of all local participating employers.

Very truly yours,
JUDITH A. YASKIN
Acting Attorney General
By: THEODORE A. WINARD
Assistant Attorney General

December 24, 1981

MARTIN B. DANZIGER, *Acting Chairman*
Casino Control Commission
3131 Princeton Pike
Trenton, New Jersey 08625

FORMAL OPINION NO. 9—1981

Dear Chairman Danziger:

You have requested our opinion as to the legality of a proposed craps tournament to be held at Resorts International Casino. For the following reasons, it is our opinion that a proposed craps tournament would be in violation of the Penal Code's prohibition against gambling when an entry fee is charged as a condition of participation in the tournament.

We have been informed that upon payment of an entry fee of approximately $250 any person may participate in the tournament. Participants are required to buy into the tournament by purchasing approximately $750 in special tournament chips which can only be used in the tournament. Participants draw for numbered positions at the craps tables and at the end of the first round of tournament play, two players at each table with the highest amount of money advance to the second round. At the end of the second round, the one player with the highest amount of money

advances to the third and final round. We are further informed that the final round will be played at one table with a maximum of 14 players. At the end of the final round, the three players with the highest amounts of money will be declared the first, second and third place winners and will receive cash and merchandise prizes in addition to the monies won at the individual craps games. The overall purpose of the tournament is to encourage additional persons to visit and spend time in Atlantic City and to take advantage of its hotel, tourist and entertainment facilities during a slow tourist period for the resort.

At the outset, it is clear that the gaming tournament described above is not a gaming activity specifically enumerated in the Casino Control Act. An authorized game under the Act is defined to mean roulette, baccarat, black jack, craps, Big 6 wheel, slot machines and any variations or composites of such games. N.J.S.A. 5:12-5. There is no express or implicit mention of a gaming tournament. Further, the proposed gaming tournament is not a variation or alteration of the existing craps game conducted by a licensee, but rather it is in essence an innovative and independent kind of gaming using an authorized game as its central component. This conclusion is supported not only by the provision for the award of a separate prize to the tournament winner but also by the requirement for an entry fee not normally charged to participate in an authorized game.

The question therefore posed is, assuming the proposed craps tournament is not in and by itself an authorized game or variation thereof under the Act, whether the tournament is consistent with the criminal law prohibition against illegal gambling. The promoting of gambling is a criminal offense punishable by sanctions which range from a third degree crime to a disorderly persons offense.* N.J.S.A. 2C:37-2. Gambling is defined by the Penal Code to mean the:

> staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the actor's control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome. [N.J.S.A. 2C:37-1b.]

* The strong public policy against gambling in this jurisdiction is spelled out in Art. 4, §7, ¶2 of the 1947 New Jersey Constitution as follows:

> 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, except that, without any such submission or authorization; . . .

Constitutional amendments have been approved to exempt casino gambling, state lotteries to aid education and raffles and bingo games sponsored by charitable organizations from the broad prohibition on gambling. Art. 4, §7, ¶¶2(A), (B), (C) and (D). Pari-mutuel wagering on horse races was approved in a popular referendum held in 1939. This public policy is also expressed in the several enactments in the criminal laws dealing with illegal gambling, lotteries and other unauthorized gaming activities.

"Something of value" is defined to mean

> any money or propety, any token, object or article exchangeable for money or property, or any form of credit or promise, directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge. [N.J.S.A. 2C:37-1d.]

The definitional section on gambling requires a participant to risk something of value upon the outcome of a contest of chance. In the proposed craps tournament, the players pay an entry fee as a condition to participation. Something of value is then risked on the chance of success in the tournament. It is contemplated that all monies including the entry fee would be recouped out of the prize awarded to the winner.

This interpretation of the statutory prohibition against gambling is consistent with the common law definition. In *State v. Berger,* 126 N.J.L. 39 (S. Ct. 1941), the defendant, movie operator, charged a $.30 admission fee to the theater which included the right to play a game called "payme." The game was played with cards on which numbered squares were printed. Patrons would draw by lot small rubber balls from a basket. Each ball contained a letter and a number and if the number appeared on the card, a player would punch out that square. When any player succeeded in punching out five squares, he would be declared the winner of the game and receive a credit voucher redeemable in merchandise. It was argued that because the players did not contribute or make up the fund out of which the vouchers were paid in order to participate, there was no element of risk and no violation of the act. The court held that the defendant had conducted an illegal game under the Gaming Act because the admission fee was something of value paid to the movie operator for the privilege of participating in the game and "[e]ach player took the chance of getting something of value in addition to that of seeing the picture." *State v. Berger, supra,* at 43. Accordingly, it is our judgment that as was the case in *Berger,* the payment of an entry fee is the risking of something of value on the chance of success in the outcome of the tournament. It would constitute an essential element of an unauthorized gambling scheme.

This issue was also considered by the Attorney General in *Formal Opinion No. 1—1980,* dated January 10, 1980. In that case, the essential component of a proposed tournament at a casino licensee was the conduct of a game called backgammon. The Attorney General concluded that the payment of an entry fee directly or indirectly as a condition to participation in the tournament made the tournament a form of illegal gambling. Although in the present situation the central component of the tournament may be a game authorized under the act, there is no meaningful difference from the tournament reviewed in *Formal Opinion No. 1, supra.* The payment of an entry fee (in addition to the wager made to participate in a craps game) similarly brings this tournament within the purview of the criminal law definition of illegal gambling.

In sum, therefore, it is our opinion that a proposed craps tournament to be held at Resorts International is a form of gambling prohibited by the provisions of the Penal Code.

Very truly yours,
JAMES R. ZAZZALI
Attorney General
By: THEODORE A. WINARD
Assistant Attorney General

April 14, 1982

JAMES BARRY, *Director*
Division of Consumer Affairs
1100 Raymond Boulevard
Newark, New Jersey 07102

FORMAL OPINION NO. 1—1982

Dear Director Barry:

You have asked for an opinion as to the effective date of the Plain Language Act with respect to those consumer contracts subject to the federal Truth in Lending Act. For the following reasons, you are advised that the effective date of the Plain Language Act with respect to that category of consumer contracts is November 30, 1982.

Amendments to the Plain Language Act were signed into law on January 11, 1982, Laws of 1981, c. 464. Section 11 of the Act is pertinent to your inquiry and provide in part:

> This act shall take effect April 15, 1982 but with respect to consumer contracts which are subject to the federal Truth in Lending Act (P.L. 90-321, 15 U.S.C. §1601 et seq.), this act shall take effect 60 days after the next revision of regulations made pursuant to that act or April 15, 1982, which ever is later. . . .

Since the amendment is structured to "take effect 60 days after the next revision of regulations made pursuant to that act . . .", it is necessary to discern the probable legislative intent behind the meaning of that phrase. There is no legislative history which provides any clarification. Therefore, the Act should be construed sensibly and in light of developments at the federal level with regard to the promulgation of regulations under the federal Truth in Lending Act.

The Truth in Lending Act (15 U.S.C. §1601 et seq.) was amended by Congress on April 1, 1980. The Federal Reserve System published revised regulations in the Federal Register on April 7, 1981 (12 C.F.R. Part 226). The proposed mandatory effective date of the revised regulations was determined to be April 1, 1982. On December 26, 1981, however, President Reagan signed into law an amendment to the Act which delayed the

effective date of the federal law until October 1, 1982 (P.L. 97-110). The Federal Reserve System then deferred the anticipated mandatory effective date for the revised regulations from April 1, 1982 until October 1, 1982 (47 F.R. 755 January 7, 1982). No other revised federal regulations have been proposed since April 7, 1981 and there are no other anticipated revisions to be made to those regulations in the foreseeable future.

It is instructive to note that amendments to the federal Truth in Lending Act were under consideration in Congress at the same time an amendment to the Plain Language Act was being considered by the legislature. The Plain Language Act does not provide that the Act become effective 60 days after April 1, 1982 which was the initial effective date for the federal regulations. Rather, it must be assumed that the legislature was concerned that changes in federal regulations were a possibility when it referred to "the next revision of regulations." Since there have been no other "revision of regulations" or anticipated "revision of regulations" other than a delay in the mandatory effective date of the revised regulations, it is fair to conclude that the Plain Language Act becomes operative with regard to those consumer transactions 60 days after the new mandatory effective date for those revised regulations.

Moreover, the Plain Language Act must be construed sensibly and in a manner to avoid anomalous or absurd results. *Planned Parenthood v. State,* 75 N.J. 49 (1977), *Monmouth County v. Wissel,* 68 N.J. 35 (1975), *Roman v. Sharper,* 53 N.J. 338 (1979), *State v. Gill,* 47 N.J. 44 (1966). It cannot be seriously contended that the 60 day period commences when the Federal Reserve System again prepares new revised regulations. The Act would in that case be rendered a nullity because its implementation would with respect to that category of consumer transaction would be indefinitely delayed.

An interpretation that the effective date is November 30, 1982 is supported by the overall purpose of the Plain Language Act. The delay in implementation for that category of consumer contracts was undoubtedly enacted to avoid conflicts and confusion between the requirements of state and federal law. The presumed legislative purpose was to avoid confusion and promote better understanding by deferring the effective date of the Plain Language Act until 60 days after the effective date of revisions to federal regulations. Since those regulations become effective on a mandatory basis on October 1, 1982, requirements of the Plain Language Act should take effect on November 30, 1982.

In conclusion, you are advised that the Plain Language Act should take effect on November 30, 1982 with respect to consumer contracts subject to the federal Truth in Lending Act.

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General
By: THOMAS W. GREELISH
First Assistant Attorney General

May 28, 1982

SIDNEY GLASER, *Director*
Division of Taxation
West State and Willow Streets
Trenton, New Jersey 08625

FORMAL OPINION NO. 2—1982

Dear Director Glaser:

You have asked for an opinion as to whether there is any impediment under the Motor Fuel Act to a motor fuel retail dealer establishing one price for gasoline for credit card customers and another lesser price for gasoline for cash customers. For the following reasons it is our opinion that there is no impediment to a motor fuel retail dealer establishing two separate prices for the sale of gasoline, provided any discount to cash sale customers approximates the measurable value of economic benefit accruing to the retailer from the sale being conducted by cash rather than on credit.

Your inquiry has been occasioned by recent decisions made by certain producer-distributors of motor fuels to allocate the cost of credit sales to credit card customers only, rather than allocating such costs among all customers as had been the practice in the past. Most major fuel oil distributors maintain an extensive credit card program whereby card holders may utilize credit cards to purchase motor fuels and other products. In the past, a motor fuel retailer was not charged a fee for participating in the credit card program. Retailers have sold motor fuel to consumers at a single price. In effect, cash consumers have subsidized the cost of extending credit to those consumers who qualify for credit card purchases. Costs of administration of the credit card program have risen in the past decade. As a consequence, it is proposed that a motor fuel retail dealer will be charged a credit card processing fee on each credit card transaction. This would presumably reflect the cost of extending credit and administering the credit card program. Each motor fuel retailer will pass its additional cost on to its credit card customers and, at the same time, offer a cash discount to those consumers who elect to pay cash for a motor fuel or other products. We are further informed that the typical cash discount provided to a cash customer would approximate the retail dealer's saving of the credit card costs imposed by the distributor if the customer had purchased by credit card.

The New Jersey statute regulating the retail pricing of motor fuel is the Motor Fuel Act, N.J.S.A. 56:6-1 *et seq.* To achieve the legislative purpose to prevent fraudulent and unfair practices in the retailing of motor fuel, the Act requires the conspicuous posting on pumps of the selling price of motor fuel, including taxes; requires that the posted prices remain in effect for 24 hours; and "a retail dealer shall not sell at any other price than the price, including tax, so posted." N.J.S.A. 56:6-2(a). Section (e), most pertinent to your inquiry, then provides that

> No rebates, allowances, concessions or benefits shall be given, directly or indirectly, so as to permit any person to obtain motor fuels from a retail dealer below the posted price or a net price lower than the posted price applicable at the time of the sale.

Clearly, if the difference in price charged to a credit card and to a cash customer constitutes either a rebate, allowance or concession, the proposal would be interdicted by the statute.

This provision of the Motor Fuel Act forbidding a retail gasoline dealer from giving a rebate or a concession to his customers has been subject to judicial interpretation. *Sperry and Hutchinson Co. v. Margetts,* 15 N.J. 203 (1954); *Glaser v. Downs,* 126 N.J. Super. 10 (App. Div. 1973) *cert. den.* 64 N.J. 513 (1974). In *Sperry and Hutchinson,* trading stamps were given by retailers to cash customers at the rate of one stamp for each 10¢ of purchased motor fuel. The court held that the offering of a cash discount "is not within the letter of the statutory interdiction; nor would be inimical to the reason and spirt of the act." The court specifically held that the statutory prohibition of "rebates, allowances, concessions or benefits" did not prohibit the true cash discount. The court stated:

> The avowed purpose of this statutory regulation is the prevention, in the public interest, of fraudulent and unfair practices in the retailing of motor fuel. But there is no suggestion in the enactment itself of a design to outlaw the true cash discount as a means to this end. Indeed, its omission from the category of forbidden acts and conduct contained in subdivision (e) makes reasonably clear an intention *contra.* Compare R.S. 56:4-7(a), where the Legislature expressly distinguished between 'trade discounts' and 'cash discounts.' Certain it is that, quite apart from power, we cannot assume from the nature of the expressed policy that the Legislature had in view the interdiction of this well established and commonly known general trade practice of a discount for cash, available to all alike. [*Sperry, Id.* at 208, 209.]

It is important to note, that the crucial ingredient of the court's decision was its conclusion that a true cash discount is a discount equated to the value to the dealer of an immediate cash payment:

> [T]he discount is measured by the economic worth to the merchant of the prompt use of the money and the corresponding reduction in working capital requirements, and the avoidance of the expense of maintaining credit facilities and the inevitable laws from bad debts. [*Id.* at 207.]

The Supreme Court reasoned that a discount based on the value of an immediate cash payment "is a term of payment merely, not a price adjustment; it is a mode of financing, not a reduction in the price . . . it does not in any real sense work an inequality of price within the intendment of subdivision (e)." *Id.* at 207, 208*

It is our judgment that the instant proposal does not differ in any material way from the "cash discount" approved by the Supreme Court in *Sperry.* A dealer may sell motor fuel to his cash customers at a lower

price either through a direct reduction in the price at the time of sale or by providing customers with redeemable trading stamps. In both instances, the discount is consistent with the act provided that the customer's payment in cash has a definite and measurable economic value to the retail dealer. In this case, we are informed that the retail dealer would save a credit card fee which he would pay to the distributor if the customer purchased by credit card. On the other hand, if the difference in price amounts to more than a genuine cash discount, the proposal would clearly be in contravention of the statutory prohibition against rebates and allowances.

The Director of Taxation has been authorized to promulgate rules and regulations as he may deem necessary to properly implement the Motor Fuel Act. N.J.S.A. 56:6-6. The director may suspend or revoke the license held by any retail dealer for a violation of any of the provisions of the act. N.J.S.A. 56:6-14. Also, the grant of express power to the Director is attended by such incidental authority as is fairly and reasonably necessary to make it effective. *See Cammarata v. Essex County Park Comm'n.*, 26 N.J. 404, 411 (1958). In light of the need to establish a genuine cash discount to approximate the economic benefit to the retail dealer of providing a discount to cash customers, the Director may adopt rules and regulations to define the parameters of an appropriate cash discount in the motor fuel industry. The Director should consider all of the relevant data from major producers or distributors of motor fuels in this state, including the existing trade customs in the industry. Also, the Director may adopt regulations relating to the manner of providing discounts and their conspicuous disclosure, including the posting of price signs. *See* N.J.S.A. 56:6-2.1 to 2.5. For example, the Director should determine whether the retail dealer should reduce the price at the time of payment to reflect the cash discount or, alternatively, whether the retail dealer should compute the discount into the "metered" price and sell the gasoline at cash-only pumps.

In conclusion, it is our opinion that there is no statutory impediment under the Motor Fuel Act to a motor fuel retail dealer establishing one price for the sale of gasoline to its credit customers and a separate lower price to its cash customers, provided a discount would approximate the economic value to the retailer of providing a discount to his cash customers.

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General

* In *Glaser v. Downs, supra,* the Appellate Division of the Superior Court held that the giving of three trading stamps for each purchase of 10¢ of motor fuel did fall within the statutory prohibition. Therefore, while acknowledging the general propriety of the providing of cash discounts, the court concluded a triple stamp program exceeded the permissible cash discount in the trade.

June 8, 1982

HONORABLE MICHAEL M. HORN
Commissioner of Banking
36 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 3—1982

Dear Commissioner Horn:

You have asked for an opinion as to whether a secondary mortgage loan licensee may provide for an increase in the rate of interest charged during the first three years of the loan. For the following reasons, you are advised that a rate increase on a secondary mortgage loan may not take effect during the first three years of the term of the loan.

Your inquiry is occasioned by the enactment of Laws of 1981, c. 103, Sec. 8 which provides in part:

> No rate increase shall take effect during the first 3 years of the term of the loan, or thereafter, (a) unless at least 90 days prior to the effective date of the first such increase, or 30 days prior to the effective date of any subsequent increase, a written notice has been mailed or delivered to the borrower that clearly and conspicuously describes such increase, and (b) unless at least 365 days have elapsed without any increase in the rate.

The issue posed, from a cursory reading of the language of the statute, is whether or not the qualifying conditions under which an increase may be made, set forth in (a) and (b), modify only the clause "or thereafter" or whether those qualifying conditions also modify the phrase "during the first three years of the term of the loan." It is clear that a rate increase would be permissible during the first three years if those qualifying conditions were deemed to apply.

In order to determine the probable legislative intent, it is appropriate to refer to the rule of statutory construction that full effect should be given to every word of a statute. The Legislature should not be assumed to have used meaningless language or surplusage. *Gabin v. Skyline Cabana Club,* 54 N.J. 550, 555 (1969); *Central Constr. Co. v. Horn,* 179 N.J. Super. 95, 102 (App. Div. 1981); *Newark Bd. of Ed. v. Newark Teachers Union,* 152 N.J. Super. 51, 60 (App. Div. 1977). It is at once apparent that to interpret the qualifying conditions for an increase in the rate of interest to apply to both the clause "or thereafter" and to "during the first three years of the term of the loan" would render that latter phrase meaningless and superfluous. It seems more reasonable to assume that if the Legislature intended to allow for a rate increase during the entire term of a secondary mortgage loan, it would not have drawn a distinction between the first three years of the loan and thereafter. Consequently, it is our reading of the probable legislative intent that the qualifying conditions imposed by (a) and (b) were only designed to modify the phrase "or thereafter" and thereby indicate that an interest rate could only be increased after three years have expired on the mortgage loan.

This construction of the language of the statute is supported by its overall legislative purpose. The law removed specific interest rate ceilings previously established in connection with a wide variety of loans, including, for example, bank installment loans (N.J.S.A. 17:9A-53, -54), educational loans (N.J.S.A. 17:9A-53.4), bank advance loans (N.J.S.A. 17:9A-59.6), small loans (N.J.S.A. 17:10-14), as well as secondary mortgage loans (N.J.S.A. 17:11A-44). In amending each of the statutes fixing interest rate ceilings on these loans, the Legislature generally provided that the initial interest rate to be charged shall be "such rate or rates as may be agreed by the bank [or lender] and the borrower."[1] Nonetheless, it is obvious that the Legislature recognized the hardship to consumers and other borrowers if interest rates were dramatically and frequently increased by a lender during the course of a loan. Accordingly, in each instance, the statute includes statutory safeguards as to the frequency of interest rate increases, the size of the increase as well as the method of notice to the borrower of the increase. Clearly, these safeguards were intended to provide protection for consumers against unstable short-term market rates. A prohibition against interest rate increases during the first three years of a loan is a vital part of the legislative safeguards provided to consumers and borrowers against short-term interest rate fluctuations.

Further, the remarks of Governor Byrne on signing the bill provide additional insight as to the probable meaning of the act. Where a statute is ambiguous on its face, the messages and statements of the chief executive may be used to determine the legislative intent. *State v. Madden,* 61 N.J. 377, 388 (1972); *Caldwell v. Township of Rochelle Park,* 135 N.J. Super. 66, 73-74 (Law Div. 1975). Governor Byrne made the following statement on signing the bill into law:

> [A] lender may not alter the interest rate during the first three years of the loan. Although the language in the bill could be clearer, I read it to restrict a lender's right to alter interest rates until the loan is at least three years old.

The statement made by Governor Byrne is consistent with a sensible reading of the language of the statute and its beneficial legislative purpose. For these reasons, you are advised that an increase in a rate of interest charged on a secondary mortgage loan may not take effect during the first three years of the loan.[2]

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General

By: DENNIS R. CASALE
Deputy Attorney General

1. Such rates, however, may not exceed the criminal usury rate of 30% for individuals and 50% for corporations, as established by N.J.S.A. 2C:21-19, as amended by P.L. 1981, c. 104.

2. It should be noted that the statute uses the same language with regard to permissible interest rate increases for bank installment loans, educational loans and small loans. For all of the reasons stated above, it is also our opinion that an increase in the interest rate during the first 3 years of each of these loans would likewise be prohibited. On the other hand, the statute provides that the interest rate to be charged on a bank advance loan may be increased from time to time provided the notice requirements are satisfied. It is clear that where the Legislature intended to allow for increases in the interest rate during the entire term of the loan, it stated its intent in unmistakable terms.

July 8, 1982

G. THOMAS RITI, *Director*
Division of Public Welfare
3525 Quakerbridge Road
Trenton, New Jersey 08619

FORMAL OPINION NO. 4—1982

Dear Director Riti:

A question has arisen with regard to the proper construction of certain amendments to the Local Government Cap Law as such amendments pertain to the financing of municipal and county welfare programs. More specifically, the question relates to the types of municipal and county expenditures which would be encompassed by the provisions of Section 1(l) and Section 2(g) of L. 1981, c. 56 and which, as a consequence, could be excluded from the limitations established by the Local Government Cap Law upon increases in spending by local government units. For the reasons set forth below, you are advised that L. 1981, c. 56 would encompass those expenditures of Federal or State funds for administrative or other purposes made by a municipality or county for welfare programs funded wholly or in part by such funds, as well as those expenditures for administrative or other purposes made by a municipality or county as part of a welfare program in order to provide matching funds upon which the receipt of Federal or State funds is conditioned.

The Local Government Cap Law, L. 1976, c. 68, N.J.S.A. 40A:4-45.1 *et seq.,* was enacted in 1976 for the purpose of controlling the spiraling costs of local government in the State of New Jersey. In 1981, the Legislature enacted several amendments to the statute. L. 1981, c. 56; L. 1981, c. 61; L. 1981, c. 64. Included among these enactments were a number of amendments to those provisions of the Local Government Cap Law which set forth the exceptions to the spending limitations set forth in the statute. L. 1981, c. 56, Sections 1 and 2. Among the amendments to the provisions pertaining to such exceptions were those set forth at Section 1(l) and Section 2(g) of L. 1981, c. 56.

The first of these provisions, Section 1(l) was enacted as a substitute for that part of N.J.S.A. 40A:4-45.3(b) which was deleted in the course of enactment of L. 1981, c. 56. As initially enacted in 1976, N.J.S.A. 40A:4-45.3(b) had provided for the exclusion from a municipality's spending limitation of the following:

> b. Capital expenditures funded by any source other than the local property tax, *and programs funded wholly or in part by Federal or State funds in which the financial share of the municipality is not required to increase the final appropriations by more than 5%;* [Emphasis supplied.]

In enacting L. 1981, c. 56, the Legislature deleted that part of N.J.S.A. 40A:4-45.3(b) which followed the words "local property tax" and inserted as a separate subparagraph in N.J.S.A. 40A:4-45.3(1), a parallel provision which provides for the exclusion from a municipal spending limitation of the following:

> 1. Programs funded wholly or in part by Federal or State funds and amounts received or to be received from Federal, State or other funds in reimbursement for local expenditures; . . .

In addition to making this change in N.J.S.A. 40A:4-45.3, the Legislature also determined to establish a new exemption for similar county expenditures. Unlike the provisions of N.J.S.A. 40A:4-45.3(b) pertaining to municipalities prior to its amendment by L. 1981, c. 56, under the Local Government Cap Law as initially enacted in 1976 there was no authorization for counties to exclude from their spending limitation any amounts raised in their tax levies to provide matching funds for Federal or State aid. The Legislature therefore, in enacting L. 1981, c. 56, included Section 2(g) which provides for the exclusion from the statutory limitation on increases in a county tax levy of the following:

> d. That portion of the county tax levy which represents funding to participate in any Federal or State aid program and amounts received or to be received from Federal, State or other funds in reimbursement for local expenditures: . . .

The question to be addressed concerns the proper construction of these two provisions as they pertain to expenditures made to support the operations of municipal and county welfare programs. In resolving this question, reference must be made both to the construction accorded to the Local Government Cap Law, and in particular to N.J.S.A. 40A:4-45.3(b), prior to the enactment of L. 1981, c. 56 and to the legislative intent evidenced during the enactment of the amendment.

In *Formal Opinion No. 3-1977,* the Attorney General addressed the proper interpretation of the language of N.J.S.A. 40A:4-45.3(b) as that provision existed prior to the amendment by L. 1981, c. 56. In particular, the Opinion discussed the construction to be accorded to that part of N.J.S.A. 40A:4-45.3(b) which pertained to "programs funded wholly or in part by Federal or State funds, in which the financial share of the municipality is not required to increase the final appropriations by more than 5%;". The Attorney General advised that this provision was intended to exclude from the statute's spending limitation upon municipalities all expenditures made by municipalities for programs funded either wholly by Federal or State funds or partly by Federal or State funds and partly

by local matching funds upon which receipt of Federal or State funds was conditioned. *Id.* In reaching this conclusion, the opinion noted that N.J.S.A. 40A:4-45.3(b) represented an underlying legislative policy to encourage and enable local governments to participate fully in these types of programs free of the spending restrictions set forth in the statute. *Id.* Thus, it was concluded that the intent of this provision was to exclude from the spending limitation all expenditures of Federal and State aid money as well as all local matching expenditures necessary to secure Federal or State aid for municipal governments.

In *Formal Opinion No. 5-1977,* an inquiry was made as to whether county and municipal shares of public welfare assistance could be excluded from the statute's spending limitation. It was concluded that municipal expenditures made to match and secure available Federal and State aid funds could be excluded from the municipal spending limitation under the provisions of N.J.S.A. 40A:4-45.3(b). It also noted, however, that no similar exclusion existed at that time with regard to comparable expenditures by counties. *Id.* Thus, it was opined that N.J.S.A. 40A:4-45.3(b) encompassed only municipal expenditures of Federal or State aid money and municipal expenditures made to match and secure Federal or State aid for municipal governments.

In enacting L. 1981, c. 56, it is evident that the Legislature intended that the exemption provided under Section 1(1) for programs funded wholly or in part by Federal or State funds and amounts received or to be received from Federal, State or other funds in reimbursement for local expenditures, was intended to be interpreted in the same manner as N.J.S.A. 40A:4-45.3(b) had been interpreted in *Formal Opinion No. 3-1977.* First, in enacting Section 1(1) of L. 1981, c. 56, the Legislature utilized the same language, *i.e.,* "[P]rograms funded wholly or in part by Federal or State funds . . . ." Further, the Senate County and Municipal Government Committee Statement concerning Senate Bill No. 734, the bill which was enacted as L. 1981, c. 56, explicitly indicated that the legislation was intended to provide for the exemption of "expenditures funded wholly or in part by Federal or State funds, or for which reimbursement is provided by Federal, State or other funds, *as such exemption is currently being interpreted pursuant to Attorney General's Formal Opinion No. 3-1977* . . . ." (Emphasis supplied.) This statement clearly indicates that the interpretation set forth in *Formal Opinion No. 3-1977,* with regard to the exemption from the statute's spending limitation on municipalities for programs funded wholly or in part by Federal or State funds and for expenditures for which reimbursement is provided by Federal, State or other funds, was to be continued in the implementation of the Section 1(1) of L. 1981, c. 56.

Turning to the question of the appropriate construction of Section 2(g) of L. 1981, c. 56, that provision creates an exemption from the spending limitation upon counties similar to that provided by Section 1(1) for municipalities. As noted above, the Local Government Cap Law, as initially enacted, did not contain any authorization for counties to exclude from their spending limitation those amounts which they were required to expend in order to obtain Federal or State aid funds. *Formal Opinion No. 5-1977.* In particular, it was noted that, under the statute as it then

existed, counties, could not exclude from their spending limitation those expenditures made by counties as a condition for participation in federally funded public assistance programs.

It would seem evident that, in enacting Section 2(g) of L. 1981, c. 56, the Legislature intended to provide an exemption from the spending limitation on counties, similar to that which already had existed for municipalities, for those amounts expended by counties as matching shares in order to participate in federally funded and State funded programs. Section 2(g) of L. 1981, c. 56 exempts from the limitation upon increases in a county's tax levy "[T]hat portion of the county tax levy which represents funding to participate in any Federal or State aid program . . . ." This language would clearly seem to contemplate those appropriations made by a county from its tax levy which would be necessary to fund its share of and to consequently participate in any Federal or State aid programs. Further, the language of the Senate County and Municipal Government Committee Statement to Senate Bill No. 734 indicates, as noted above, a clear legislative intent both to provide an exemption under the Local Government Cap Law for local government expenditures funded wholly or in part by Federal or State funds or for which reimbursement is provided by Federal, State or other funds and to have the exemption so provided interpreted in the same manner as *Formal Opinion No. 3-1977* had interpreted the exemption previously provided for municipalities.

In light of this clear statement of legislative intent, it is evident that Sections 1(1) and 2(g) of L. 1981, c. 56, are intended to exclude from the statutory limitation on increases in municipal appropriations and county tax levies those expenditures made by municipalities and counties of Federal or State aid dollars, those expenditures for which such bodies are entitled to receive reimbursement from Federal, State or other funds, and those expenditures made by such bodies for the purpose of providing matching funds for available Federal or State aid monies. Accordingly, in the administration of a municipal or county welfare program, a municipality or county may properly exclude from its spending limitation any Federal or State monies it might expend for which it is entitled to receive reimbursement from Federal or State funds. Such monies would, by way of example, include those amounts of State funds which a municipality would receive from the State for provision of public assistance within the municipality pursuant to N.J.S.A. 44:8-108 *et seq,* and those amounts of Federal funds which a county would receive for expenditures made pursuant to 42 U.S.C.A. 603(a)(1) and (3) and N.J.S.A. 44:10-5 for the provision of aid to families with dependent children and for the proper and efficient administration of that aid program.

A county or municipality may likewise exclude from its spending limitation any county or municipal funds appropriated and expended for the purpose of matching available Federal or State funds where the availability of such funds is conditioned upon the appropriation and expenditure of such matching funds. By way of example of such types of matching funds, these amounts would include those monies which a county would appropriate pursuant to N.J.S.A. 44:10-5 to provide matching dollars for those Federal and State funds available under 42 U.S.C.A. 603(a)(1) and N.J.S.A. 44:10-5 to provide aid to families with dependent

children as well as those amounts which a county would appropriate to provide matching dollars for those Federal funds available under 42 U.S.C.A. 603(a)(3) and N.J.S.A. 44:10-5 to meet the administrative costs for that program.

By the same token, however, a municipality or county would not be authorized to exclude from its spending limitations those amounts which it might expend for the support of such programs where the monies expended are not either Federal or State funds, reimbursible from such funds or expended to match Federal or State funds the receipt of which is conditioned upon the expenditure by the local unit of matching funds. To conclude otherwise would be to ignore the manner in which N.J.S.A. 40A:4-45.3(b), as it existed prior to L. 1981, c. 56, had previously been interpreted in *Formal Opinion No. 3-1977* and the explicit indication of legislative intent in the Senate County and Municipal Government Committee Statement to Senate Bill No. 734 that the amendments effected to the Local Government Cap Law through the enactment of L. 1981, c. 56 were intended to be interpreted in the same manner. An example of the type of expenditures which would not fall within N.J.S.A. 40A:4-45.3(1) or N.J.S.A. 40A:4-45.4(g) would be those municipal expenditures made to meet the cost of administering public assistance within a municipality pursuant to N.J.S.A. 44:8-137. Such expenditures do not involve Federal or State funds, are not reimbursible from any such funds and are not made to match any Federal or State funds available for this purpose. Rather, such costs are borne solely by the municipality. N.J.S.A. 44:8-137.

In conclusion, you are, therefore, advised that municipalities and counties may exclude from their spending limitations under the Local Government Cap Law those expenditures made for programs funded entirely by Federal or State funds, those expenditures for which reimbursement from Federal or State funds is available and those expenditures which are made to provide matching funds upon which the receipt of Federal or State funds is conditioned.

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General

By: DANIEL P. REYNOLDS
Deputy Attorney General

June 22, 1982

HONORABLE KENNETH R. BIEDERMAN
State Treasurer
Department of Treasury
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 5—1982

Dear Treasurer Biederman:

You have asked for our advice as to the authority of the Lottery Commission to use three new proposed lottery games to be played on consumer-operated video lottery game terminals as part of the New Jersey State lottery. For the following reasons, it is our opinion that there is no constitutional nor statutory bar to the incorporation of these proposed lottery games as part of the New Jersey State lottery.

This proposal presents an innovative means for stimulating public interest in the state-operated lottery. Therefore, it is necessary to describe the proposal in some detail in order that the legal problems may be placed in the proper perspective. Generally, a consumer-operated video games terminal allows a lottery participant to directly operate a terminal with a television screen which displays a lottery game and the game's instructions. The first proposed game to be offered is a bingo game. In this game, the player deposits $1 into the lottery terminal; four colored bingo boards, each with 25 squares, appear on the television screen, a bingo mixer appears on the screen and the numbered balls begin to tumble and mix. Inside the terminal an electronic computer conducts an electronic drawing to select a numbered bingo ball. The random number selected by the process would range between 1 and 75 corresponding to the numbers appearing on the displayed bingo boards. As soon as a number is drawn, the bingo boards are checked and each occurrence of the selected number on any of the boards is then circled. If any row, column or diagonal of any of the four bingo boards is filled, the player wins the prize associated with that bingo board. A small computer printer inside the terminal would print out a prize winning ticket. The video lottery terminal would be connected to a large computer at a central site in the state.

In the second proposed game, a TV screen would show a planet in space with 150 areas of land marked off with boundary lines. Of the 150 locations, there will be at least three occurrences of each prize amount offered in a treasure chest. The video lottery terminal computer conducts a random drawing that randomly scatters the prize amounts to the 150 locations. The player would select five of the 150 areas for an astronaut to dig for the buried treasure.

In the third proposed game, a five digit score is developed as a result of the player's participation in a amusement game. The five digit score is the player's five digit number in a drawing conducted by the computer terminal. If the player matches all five digits in order, he or she wins the top prize. If the right-most four digits match, a lesser prize would be won and so forth.

From this description of the proposed video games, certain basic

premises are established. All of the games would be games of pure chance without any element of skill. Prizes will be distributed as a result of an electronic randomization among the lottery participants who will have paid monetary consideration to participate in the lottery game.

The public policy of this state has traditionally condemned gambling by lotteries. The Constitution of 1844 expressly forbade lotteries or the sale of lottery tickets within the state. Art. 4, §7, ¶2. In 1897 this provision was extended to deny the right of the legislature to authorize "pool—selling, bookmaking or gambling of any kind." The Constitution of 1947 while generally continuing the ban on legislation authorizing gambling contained specific exceptions to the prohibition. It continued the authorization for pari-mutuel betting on horse races first permitted in 1939 and authorized veterans, charitable, education and other similar organizations to conduct bingo or lotto and to hold raffles. In 1969 a popular referendum was held to authorize the legislature to direct the operation of a state lottery. This amendment appears as Art. 4, §7, ¶2 of the State Constitution and reads as follows:

> C. It shall be lawful for the Legislature to authorize the conduct of State lotteries restricted to the selling of rights to participate therein and the awarding of prizes by drawings when the entire net proceeds of any such lottery shall be for State institutions, State aid for education.

This amendment was implemented by the legislature by the enactment of the State Lottery Law, L. 1970, c. 13, which established a State Lottery Commission with power to promulgate rules and regulations governing the establishment and operation of a state lottery as it deems necessary and desirable.

The constitutional amendment does not provide any clue or definition of its important operative terms, for example, the word "lotteries" or the phrases "selling of rights to participate," or "the awarding of prizes by drawings." Since the probable meaning of these phrases are significant to the resolution of your inquiry, it is necessary to review the commonly understood meaning of those phrases at the time of the adoption of the 1969 amendment.

In this regard, a preliminary question arises as to whether a video lottery game terminal is a "slot machine" and whether or not the same is comprehended within a "lottery." The term "slot machine" was unknown at the common law. *State v. Brandt,* 122 N.J.L. 488, 489 (Sup. Ct. 1939). The question of the definition of a slot machine first arose in the context of whether a "pinball" game fell within the purview of a "slot machine." In *Sterling Distributors v. Keenan,* 135 N.J. Eq. 508 (E. & A. 1944) the Court of Errors and Appeals defined the term as any machine started by dropping a coin into the slot which could entitle the operator to a prize if he should win. Also, in *State v. Ricciardi,* 18 N.J. 441 (1955) the Supreme Court rejected arguments that a "slot machine" applied only to the classic "one-armed bandit." The court held that a pinball machine fell within the interdiction of a statute prohibiting the keeping of slot machines where the result was dictated by chance alone. The import of

the court's decision is that any mechanical device or machine would be subject to the statutory prohibition against the use of a slot machine where the traditional elements of consideration, chance and prize were found in its operation.

The definition of a slot machine is now found in both the Criminal Code and the Casino Control Act. It is generally defined as:

> Any mechanical, electrical or other device, contrivance or machine which, upon insertion of a coin token or similar object therein, or upon payment of any consideration whatsoever, is available to play or operate, the play or operation of which, whether by reason of the skill of the operator or application of the element of chance, or both, may deliver or entitle the person playing or operating the machine to receive cash or tokens to be exchanged for cash, whether the payoff is made automatically from the machine or in any other manner whatsoever. [N.J.S.A. 2C:37-1f; 5:12-45.]

From this discussion of both the judicial and statutory interpretation of the meaning of a slot machine, it is clear that the video lottery games terminal falls within those definitions. It is a machine or device which is available to operate upon the insertion of a coin. Depending on chance, the operation of the machine terminal may deliver or entitle the player to receive a monetary prize.

Notwithstanding our characterization of the video terminal as a form of "slot machine," slot machines in certain cases have been found to be a proper component of a "lottery." For example, a slot machine has been held to be a form of lottery where the perpetrators used the machine as a means to carry into execution an illegal scheme or plan. *State v. Coats,* 74 P. 2d 1102, 1106 (Ore. 1938); *State, et al. v. Circuit Court,* 148 So. 522 (Fla. 1933); *Commissioner v. McClintock,* 154 N.E. 264 (Mass. 1926), a slot machine containing mint rolls and providing for the distribution of premium checks held to be a lottery for the machine was deemed a scheme for the distribution of prizes by chance; *In re Rogers,* 118 P. 242 (Cal. 1911), cigar vending machine would dispense at uncertain intervals three cigars for the price of one and held to be a lottery; *Theyer v. State,* 37 S.E. 96 (Ga. 1900), a nickel slot machine which entitled a player to a cigar and in addition thereto a prize in the amount of 100 cigars for a "royal flush" held to be part of a lottery; *Loiseau v. State,* 22 So. 138 (Ala. 1897). *See also* Annotation, "Coin-Operated or slot machine as lottery, 101 A.L.R. 1126 (1936).

Also, under the case law in this state:

> A lottery is defined as being a scheme for the distribution of prizes by chance, a game of hazard in which small sums are ventured for the chance of obtaining a larger value either in money or other valuables. Where a pecuniary consideration is paid and it is determined by lot or chance, according to some scheme held out to the public what the party who pays the money is to have for it, or whether he is to have anything, it is a lottery. [*State v. Lovell* 39 N.J.L. 461.]

Moreover, the classic form of lottery involved the distribution of prizes by the random selection of a number at some chance event. *See State v. Shorts,* 32 N.J.L. 398 (Sup. Ct. 1868). A lottery was also defined by the criminal law, N.J.S.A. 2A:121-6 prior to its repeal in 1979 as "a distribution of prizes by chance in return for a consideration in the form of money or other valuable thing." Also, the Code of Criminal Justice, enacted in 1979, defines a lottery as:

> an unlawful gambling scheme in which (a) the players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other media, one or more of which chances are to be designated the winning ones; and (b) the winning chances are to be determined by a drawing or by some other method based upon the element of chance; and (c) the holders of the winning chances are to receive something of value. [N.J.S.A. 2C:37-2h.]

Certain common features of a lottery are apparent from both the common law and statutory definition. It was contemplated a lottery would be a public scheme involving multiple participants or players. Also, an essential ingredient of the definition is that a lottery is a game of chance. In the present situation, the video lottery game terminal, although a form of slot machine, is the component for carrying into execution an innovative means of public lottery. The winner thereof is determined by a method of randomized electronic selection so that the prize is determined by pure chance.[1] For these reasons, it is our opinion that the use of a video terminal would permissibly fall within the meaning of a "lottery" under Art. 4, §7, ¶2.

Also, although the use of the proposed video games does not include the purchase of tickets in order to play, there is little doubt in characterizing the depositing of money into the video terminal as the "selling of rights to participate." Also, the constitutional language does not provide any definition of the term "drawing." It may reasonably be assumed that the framers had in mind some form of random selection so that the result be determined purely by chance. The courts have defined "drawing" as not only the act of randomly selecting a winning ticket from among many tickets but also "in a generic sense meaning any chance event upon which the . . . activity is based." *State v. Gatling,* 95 N.J. Super. 103, 109 (App. Div. 1967). A random selection of a winner by computer or electronic

1. In an opinion letter dated Sept. 8, 1981 to the Director of the New York State Lottery, New York Attorney General Abrams rendered an opinion concerning the installation of certain electronic games as part of that state's lottery. The Attorney General concluded that those specific games were prohibited by both the Constitution and statutory law of the State of New York. It is clear to us that the games considered by Attorney General Abrams are distinguishable in a meaningful way from the present proposal. There, blackjack and red devil games were expressly characterized as predominantly games of skill where a player was pitted against a single game machine. In the present situation, it is contemplated that the games be premised on pure chance through a randomized electronic selection mechanism and available to multiple players on a statewide basis.

means would in our opinion fall within the constitutional meaning of a "drawing."

Further, not only does the proposal for the incorporation of a video lottery games terminal as part of the state lottery conform with the literal terms of the State Constitution, but also with its intended scope and purpose. Certain indicia of the framers intent are discernible from public hearings held on the concurrent resolution. Assemblyman Brown expressed the view that the exact nature and structure of the games should be left to the legislature to decide in its discretion at some future date:

> There are so many forms of lottery that I truly feel . . . that the mechanics of it should be left to a later date when public opinion has shown itself as to what it desires. I think the purpose now is to determine do the people or do not the people want this particular thing.
>
> * * *
>
> Now the mechanics can always be worked out later and my own thoughts are very flexible on it because . . . the least amount of revenue anticipated would considerably swell the state's treasury . . . . [Public Hearings before Assembly Judiciary Committee on *Assembly Concurr. Resolu.* 22 Page 7, 9.]

Also, the hearings reveal the intent of the legislature to compete with illegal numbers games so that the state could cut into the profits reaped by organized crime. *Id.* at 5. However, it was consistently agreed by all speakers that the specific format for conducting a lottery should be left to a later date and to those persons responsible for implementing it. Although the legislature could not have comprehended the present proposal in 1969, it is clear to us that it does not fall outside of their broad consensus. Consequently, it is our judgment that there would be no impediment from either the constitutional language or from its basic objective and history to the implementation of a video lottery games similar to the one discussed above.

The statutory framework governing the operation of a state lottery was enacted in 1970. N.J.S.A. 5:9-1 *et seq.* A State Lottery Commission was established with power "to promulgate such rules and regulations governing the establishment and operation of a state lottery as it deems necessary and desirable in order that the mandate of the people, expressed in their approval of the amendment . . . to the Constitution . . . may be fully implemented." It was further provided that rules and regulations may include:

1. The type of lottery to be conducted.

* * *

4. The manner of selecting the winning tickets or shares.
5. The manner of payment of prizes to the holders of winning tickets or shares, including, subject to the approval of the State Treasurer, provision for payment of prizes not to exceed $599.00 by agents licensed hereunder out of moneys received from sales of tickets or shares.

6. The frequency of the drawings or selections of winning tickets or shares, without limitation.
7. Without limit as to number, the type or types of locations at which tickets or shares may be sold.
8. The method to be used in selling tickets or shares. N.J.S.A. 5:9-7.

From this enumeration of the powers of the Commission, the legislature intended to confer broad and pervasive regulatory discretion on the members of the Commission in the actual conduct of the lottery and in structuring its games.

The statutory direction in subsection (5) concerning the payment of prizes to the holders of winning tickets or shares does not pose any obstacle.[2] Although the proposed video game entails no purchase of a ticket in order to play, there should be little difficulty in perceiving the depositing of money into the terminal as the sale of a "share" in the lottery. There is no statutory definition of a share but the term is generally defined as the "portion belonging to, due to, or contributed by, an individual." *Webster's Third International Dictionary (1976).* In the present context, the statutory "share" is the opportunity given to the player to participate in the lottery game and to win a prize. Accordingly, there is no impediment to the exercise of the discretion of the Lottery Commission to adopt a proposal of this nature under the State Lottery Law.

In conclusion, therefore, you are advised that there is no constitutional or statutory bar to the incorporation of a consumer-operated video games terminal into and to be made a part of the New Jersey State lottery.

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

2. A reported case interpreting the state lottery law is *Karafa v. N.J. State Lottery Commission,* 129 N.J. Super. 499 (Ch. Div. 1974). The court held that a lost lottery ticket may not be established by a judicial determination and that it was incumbent on the winner to produce the winning ticket to claim the prize. The court's opinion was predicated to a great extent on the then existing regulatory scheme of the Lottery Commission to require the presentation and validation of a winning ticket. It is therefore apparent that substantial amendments to existing rules and regulations must be made in order to accommodate the video games terminals as part of the Lottery Commission program.

September 17, 1982

HONORABLE MICHAEL M. HORN
Commissioner of Banking
Department of Banking
36 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 6—1982

Dear Commissioner Horn:

You have asked for our advice as to whether there is any impediment to a bank or savings bank chartered under the laws of this State allowing customers of a banking institution chartered in another state or by the federal government to access their accounts in those banking institutions through automatic teller machines (ATM's) located at New Jersey banks or savings banks. It is our opinion that access by customers of a bank chartered in another state or by the federal government to their accounts in those banking institutions through an ATM located at New Jersey banks or savings banks is permissible where the ATM is established, operated and maintained by the New Jersey banking institution.

In order to place the legal issue into the proper context, it is appropriate to discuss the existing scheme for computer operated access in New Jersey and the manner by which access to accounts in foreign banking institutions would affect the existing scheme. We are informed that several New Jersey banks and savings banks are members of a computer support system known as the "Money Access Service." The banks and savings banks have purchased an ATM which is accessed by holders of cards designated as "money access cards." The cards are issued by the banks or savings banks after having determined the qualifications of those customers eligible to receive and use the cards, which prominently identify the New Jersey banking institution through which they were obtained. Further, we are told that each bank or savings bank may determine to exclude cardholders of one or more other banking institutions from having access to the terminal established by it and may terminate access even after it has been previously granted. Moreover, each banking institution retains the discretion to limit the type of banking transactions that the cardholders of other banking institutions may conduct at the terminal. As a general proposition, you have advised us that customers of banking institutions who participate in "Money Access Service" may make deposits withdrawals, balance inquiries and, in that manner, access both time and demand accounts through the use of the ATM's located throughout the State.

Your specific inquiry is based on proposals made by those New Jersey financial institutions who presently are members of the Philadelphia National Bank's (PNB) "Money Access Service." It is contemplated that these New Jersey banking institutions would allow cardholders of financial institutions outside of New Jersey who participate in PNB's "Money Access Service" to have access to time and demand accounts in those out-of-state banking institutions. This would be done on the same terms and conditions presently in place for access by cardholders of New Jersey

banking institutions who participate in the system, except that no acceptance of deposits is proposed. It is envisioned under this proposed scheme that a cash withdrawal made at an ATM is in effect a request to the out-of-state institution to wire funds to a customer at the ATM. The transaction is processed through the central MAC computer support system maintained by PNB in Pennsylvania. In the event the funds requested are available in the customer's account, approval for the disbursement of those funds is wired by the institution to the ATM for transmittal to the customer.

An analysis of whether this proposal is consistent with New Jersey banking law must commence with N.J.S.A. 17:9A-19L, which provides as follows:

> Except as otherwise provided by law, no foreign bank as defined in section 315 [N.J.S.A. 17:9A-315], shall establish, operate or maintain in this State any full branch office, minibranch office or communication terminal branch office.

A foreign bank is defined by the banking laws to include banks organized under the laws of other states as well as nationally chartered banks having their principal offices in other states. N.J.S.A. 17:9A-315. A "branch office" is generally defined to include any office, unit or terminal at which any business that may be conducted in a principal office of a bank or savings bank may be transacted. N.J.S.A. 17:9A-1(14). A communication terminal branch office is defined as:

> a branch office of a bank or savings bank which is either manned by a bona fide third party under contract to a bank or savings bank or unmanned and which consists of equipment, structure or systems, by means of which information relating to financial services rendered to the public is transmitted and through which transactions with banks and savings banks are consummated, either instantaneously or otherwise. [N.J.S.A. 17:9A-1(17).]

Since an ATM may either constitute a "branch office" or a "communication terminal branch office" of a foreign banking institution, it is apparent that such a foreign banking institution may not establish, operate or maintain that facility in this jurisdiction. Although there is no definitive legislative history as to the import of the statutory prohibition, words and phrases in a statute should be given their generally accepted meaning unless some special or different meaning is expressly indicated. *Scatuorchio v. Jersey City Incinerator,* 14 N.J. 72, 87 (1953); *Abbotts Dairies, Inc. v. Armstrong,* 14 N.J. 319 (1954); *Grogan v. DeSapio,* 11 N.J. 308, 323 (1953). The term "establish" is commonly defined to mean "to bring into being on a firm or permanent basis" or "to install or settle in a position, place or business." The word "maintain" is defined as "to keep in existence or continuance" or "to provide for the upkeep and support of; carry the expenses of." The word "operate" is generally defined to mean "to be or keep in operation." *Random House College Dictionary,* Revised Edition (1980). Consequently, the statutory prohibition is designed to prohibit

those foreign banking institutions from taking steps to "establish, operate or maintain in this State" any branch office or terminal branch office.

However, it is noteworthy that the instant proposal does not suggest a foreign bank would either establish, operate or maintain a branch office or a communication terminal branch office in this jurisdiction. Banks and savings banks chartered under the laws of this State have installed the ATM's presently located and currently in use in this jurisdiction. These facilities have been installed with the approval of the Commissioner of Banking pursuant to N.J.S.A. 17:9A-20(c). Moreover, we have been informed that banks and savings banks chartered under the laws of this State have determined the physical location of the ATM, the type and model of the ATM and that no other financial institution, including any foreign banking institution, participated in any manner with the decision to install the ATM nor shared in the cost of the establishment and maintenance of the ATM. Further, we have been informed under the terms of the proposal the banks or savings banks chartered in this State will bear the entire cost and expense of supporting and assisting the ATM. No other institution nor PNB will share in the profits or control of the facility. The foreign financial institution will pay a transaction fee to the New Jersey institution operating the ATM for each transaction but the foreign banking institution will have no employees maintaining the ATM nor will it maintain any office in connection with the operation of the ATM in this State. We are further informed that the daily operation of the ATM remains at the discretion of the New Jersey financial institution under the supervision of the Commissioner of Banking. For example, New Jersey financial institutions will retain the discretion to determine whether cardholders of foreign banking institutions will have access to the ATM, whether to terminate such access, and whether to expand or restrict the scope and degree of banking services to be provided.

It is clear from this factual description of the proposal that the foreign banking institutions participating in the computer support system known as "Money Access Service" will neither establish, maintain nor operate a branch office or communication terminal branch office in this jurisdiction.[1] The branch office or the communication terminal branch office will retain their character in all particulars as branches of a New Jersey financial institution under the supervision of the Commissioner of Banking and subject to the laws of this jurisdiction.[2]

Moreover, this conclusion is supported by a significant opinion issued by the U.S. Comptroller of the Currency interpreting the McFadden Act, 12 U.S.C. §36, to permit national banks to utilize an ATM across state lines where the ATM has been established by a bank headquartered in

1. Parenthetically, any notion that a principal-agent relation exists between the out-of-State institution and New Jersey institution is not supportable. Among the essential charcteristics of a principal-agent relation is the right of a principal to control the conduct of the agent with respect to matters entrusted to him. *Restatement (Second) of Agency* §14 (1957). As more fully spelled out above, there is no control or supervision exercised by an out-of-State banking institution over the ATM's solely established, operated and maintained by the New Jersey institutions.

another state if (1) the compensation for its use is on a transactional fee basis and (2) such use does not give to national banks a competitive advantage over state banks situated in those states. *Comptroller's Letter Opinion* No. 153, (July 1980) CCH Fed. Banking Law Rep. §§85,234-85,235. The Comptroller based his opinion on the holding of the court in *Independent Bankers Ass'n of America v. Smith,* 534 F. 2d 921 (D.C. Cir. 1976) *cert. den.* 429 U.S. 862 (1976), that:

> any facility which performs the traditional bank functions of receiving or disbursing funds is a 'branch' within the meaning of [12 U.S.C. §36(f)] if (1) the facility is *established (i.e., owned or rented)* by the bank, and (2) it offers the bank's customers a convenience that gives the bank a competitive advantage over other banks (national or state). [Emphasis added.] [534 F. 2d at 951.]

The Comptroller, focusing on the above-quoted language, noted that utilizing ATM's on some basis other than ownership or rent, e.g., on a transactional fee basis, would not constitute branch banking under federal law and, therefore, would be permissible even on an interstate basis.

A resolution of this question, however, does not put the matter to rest. N.J.S.A. 17:9A-316B provides that a foreign bank may transact business in this State only as executor or as testamentary trustee or guardian. Thus, foreign banks are generally prohibited from transacting business in this State. The issue of a foreign bank transacting business in this jurisdiction has never been addressed by the New Jersey courts (other than in the context of a foreign bank acting as an executor or testamentary trustee under a will). However, the meaining of a statutory prohibition

2. It should be noted that under the McFadden Act, 12 U.S.C. §36, a national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches at any point within the state in which the association is situated, if such establishment and operation are at the time authorized to state banks by the statute law of the state in question. 12 U.S.C. §36(c). Thus, the branching laws applicable to national banks incorporate the state branching laws of the state in which the national bank is located. Nonetheless, it is well settled that what constitutes a national bank "branch" is a threshold question of federal law to be determined without resort to state law. *First Nat. Bk. in Plant City v. Dickerson,* 396 U.S. 122, 133-134 (1969); *Independent Bankers Ass'n. of America v. Smith,* 534 F. 2d 921, 933 (D.C. Cir. 1976) *cert. den.* 429 U.S. 862 (1976). In this regard, the court in *Independent Bankers Ass'n of America v. Smith, supra,* held that under 12 U.S.C. §36(f), an automatic teller machine (also known as a "customer-bank communication terminal")established and operated by a national bank is a branch of that bank since it is a facility where deposits are received, checks are paid and money is lent. 534 F. 2d at 938-948. *Accord Colorado ex rel. Banking Board v. First National Bank of Fort Collins,* 540 F. 2d 497 (10 Cir. 1976); *Illinois ex rel. Lignouil v. Continental Illinois National Bank,* 536 F. 2d 176 (7th Cir. 1976) *cert. den.* 429 U.S. 871 (1976); *Missouri ex rel. Kosterman v. First National Bank in St. Louis,* 538 F. 2d 219 (8th Cir. 1976) *cert. den.* 429 U.S. 941 (1976). As a branch, a national bank could not lawfully install an ATM in a state other than the one in which its principal office is situated, unless authorized by the law of the state in which the ATM is to be located. 12 U.S.C. §36(c).

against foreign corporations transacting business in this jurisdiction has been addressed by the courts in many different contexts. It is generally recognized that the phrase "transacting business" is a term not susceptible of precise definition and that each case must be dealt with on its own circumstances. *See Materials Research Corp. v. Metron,* 64 N.J. 74, 79 (1973). Common indicia of "transacting business" include the physical presence of a foreign corporation in the State through the holding or leasing of office space, employment of personnel paid by the foreign corporation and located in the state, a significant percentage of business volume in the state compared to the corporation's overall transactions as well as the authority of employees in the state to consummate transactions without confirmation by the foreign corporation's home office. *See United States Time Corp. v. Grand Union,* 64 N.J. Super. 39 (Ch. Div. 1960) (where Connecticut corporation had no office or telephone listings in New Jersey, employed two salesmen who did not reside in New Jersey and whose orders were subject to acceptance at corporation's home office, where New Jersey sales represented some 2 percent of total volume of business, corporation was not "doing business" in the State, and hence was not required to comply with regulatory provisions of New Jersey Corporation Act in order to maintain suit); *Eli Lilly & Co. v. Sav-On Drugs, Inc.,* 57 N.J. Super. 291 (Ch. Div. 1959), *aff'd* 31 N.J. 591 (1960), *aff'd* 366 U.S. 276, (1961) (where Indiana corporation maintained an office in New Jersey, reimbursed its district manager for all expenses incident to maintenance and operation of the office, paid salary of secretary in the office and paid the salary of 18 detail men working in the State under the supervision of the district manager, the corporation was "doing business" in the State and was required to have registered under Corporation Act in order to maintain suit); *Materials Research Corp. v. Metron, supra* (where foreign corporation maintained no office in New Jersey, act of foreign corporation's sales engineer in soliciting orders in New Jersey which were subject to acceptance by home office in New York did not warrant conclusion that corporation was "transacting business" in New Jersey so as to require it to file a certificate of authority before maintaining action in State). *See also Taub v. Colonial Coated Textile Corp.* 54 A.D. 660, 387 N.Y.S. 2d 869 (1976) (where bank organized under laws of foreign country maintains no office, agent or branch in New York and only conducts its business in New York through New York correspondent bank, it is not "doing business" in New York for purposes of long-arm jurisdiction statute); *Bank of America v. Whitney Central Bank,* 261 U.S. 171, 173, (1922) (where a foreign bank has no place of business in New York and no employees or offices there, it was not "transacting business" in New York for purposes of federal jurisdiction when its New York business was conducted by New York banks on a correspondent basis).

It is at once obvious that the instant proposal differs in a material degree from those instances where the courts have determined a foreign corporation has transacted business in this jurisdiction. It bears repeating that the banking transaction will originate in an ATM established, maintained and operated by a New Jersey financial institution consistent with the laws of this State. Further, we are informed that these interstate transactions will not represent a major portion of the foreign bank's overall

business. Moreover, the consummation of the transaction by the New Jersey bank or savings bank is subject to the receipt of instructions by the New Jersey institution from the foreign bank's home offices. It is contemplated that the foreign institution will not employ any personnel in this State in conjunction with the ATM, nor will it maintain any office or other form of tangible presence in New Jersey. For these reasons, it is our view that under the specific facts outlined in the proposal, PNB or other foreign state chartered banking institution or national bank would not be "transacting business" in this State within the meaning of the prohibition set forth in N.J.S.A. 17:9A-316.

For these reasons, it is our opinion that there is no statutory impediment to a bank or savings bank chartered under the laws of this State allowing customers of a banking institution chartered in another state or by the federal government to access their accounts in those banking institutions through automatic teller machines established, operated and maintained by the New Jersey banking institutions under the supervision of the Commissioner of Banking.[3]

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General

3. It should be noted that the Commissioner has pervasive powers to limit or control the exent to which state-chartered banks permit access by foreign bank customers to ATM's located at branch offices established and maintained by the New Jersey institutions. These powers are derived not only from the Commissioner's authority to adopt regulations concerning the operation of communication terminal branch offices, N.J.S.A. 17:9A-20G, but also from his general supervisory powers over banks and savings banks as contained in N.J.S.A. 17:9A-266 *et seq.*

November 10, 1982

HONORABLE JAMES J. BARRY, JR.
Director, Division of Consumer Affairs
1100 Raymond Boulevard
Newark, New Jersey 07102

FORMAL OPINION NO. 7—1982

Dear Director Barry:

You have asked for an opinion as to whether individual Retirement Accounts (IRA), Keogh Plans, Simplified Employee Pension Plans, and bank deposit accounts are consumer contracts within the meaning of the Plain Language Law. For the following reasons, you are advised that all language contained in documents required to open and maintain an IRA account providing professional investment and management services for a fee or a Keogh Plan for self-employed individuals should conform with the "plain language" requirements of the Law, with the exception of language contained or copied from an Internal Revenue Service (IRS) model account form.

The Plain Language Law requires that a consumer contract shall be written in a simple, clear, understandable and readable way. N.J.S.A. 56:12-2. A creditor, seller, insurer or lessor may be liable to a consumer for damages if the failure to write a consumer contract in a simple, clear, understandable and readable way caused the consumer to be substantially confused about his rights and remedies under the agreement. N.J.S.A. 56:12-3. It is further provided that there shall be no liability if a consumer contract is in conformity with an opinion of the Attorney General that the agreement conforms with the plain language requirements of the act. It is therefore clear that prior to invoking the jurisdiction of the Attorney General, it must be determined whether an agreement is a "consumer contract" within the meaning of the law. For purposes of your inquiry, a "consumer contract" is defined in pertinent part to mean a written agreement in which an individual:

> f. Contracts for services including professional services, for cash or on credit and the money, property or services are obtained for personal, family or household purposes. 'Consumer contract' includes writings required to complete the consumer transaction.

Consequently, each of the investment retirement or bank deposit accounts mentioned in your inquiry must be reviewed separately to determine whether they fall within the meaning of a consumer contract as defined by law.

A Keogh Plan is a retirement account which is established by employers for the benefit of the employer or eligible employees. As a general rule, a Keogh Plan is not a consumer contract because the services are not obtained for personal, family or household purposes. Only in an instance where a self-employed individual establishes a Keogh Plan for himself is there an agreement pursuant to which services are obtained for personal, family or household purposes.

A Simplified Employee (SEP) Pension Plan is a plan which permits an employer to pay either $15,000.00 or 15% of an employee compensation (whichever is less) to an individual retirement account. As with Keogh Plans, SEPs are not consumer contracts for personal, family or household purposes.

An IRA provides for the creation of retirement plans by individuals through tax incentives. Contributions to such plans are deductible for federal income tax purposes and no federal tax is paid on earnings on the funds until they are withdrawn. An IRA may include investment services for which a financial institution charges a commission or fee. Also, an IRA may provide in certain cases for investments directed by the customer for which a fee or commission may be charged by the institution for the administration and management of the account.

At the outset, it is clear to us that an IRA which does not provide for investment or management services does not qualify as a "consumer contract". In that instance a consumer does not pay a fee to a financial institution for professional services. A financial institution does not invest, reinvest, acquire, sell, exchange or manage investments. The money placed into that form of IRA is often invested in savings accounts or Certificates

of Deposit either with a nominal or no charge to the depositor and comingled with other deposit monies of the banking institution.

In other cases, an individual may enter into a written agreement with an entity such as a brokerage firm to obtain investment services or the professional management of a variety of investments "self directed" by the depositor. Although the statute does not provide any definition of the meaning of "professional services," a statute should be interpreted according to its common meaning unless some technical or special meaning is indicated. *Service Armament Co. v. Hyland,* 70 N.J. 550, 556 (1976). A profession is generally defined as a calling requiring specialized knowledge and often long and intensive academic preparation. *Webster's Seventh Collegiate Dictionary,* p. 680. "Professional services" are defined in the Local Public Contracts Law to mean services rendered by a person authorized by law to practice a recognized profession whose practice is regulated by law and the performance of which services requires knowledge of an advanced type acquired by a formal course of specialized instruction. N.J.S.A. 40A:11-2(6). The activities of financial institutions are highly regulated under State law and investment decisions are commonly made by persons who have acquired a specialized knowledge and skill in the area. Moreover, trustees and fiduciaries must "exercise care and judgment . . . which persons of ordinary prudence and reasonable discretion exercise in the managment of and dealing with the property and affairs of another." Furthermore, it is provided that "if a fiduciary has special skills or is named as the fiduciary on the basis of representation of such skills or expertise, he is under a duty to exercise those skills." N.J.S.A. 3B:20-13. There can be no question therefore that the investment and management services provided by these entities with regard to the IRA accounts of their customers may be properly characterized as a form of professional services within the meaning of the Plain Language Law.

A bank deposit account is not a contract for professional services nor is a bank deposit account a trust. In *Kronish v. Howard Savings Institution,* 161 N.J. Super. 592 (App. Div. 1978) the court held that deposits paid by mortgagors to mortgagees as a reserve for payment of taxes were not trusts. Further, the court held that the question of whether an agreement is a trust or a debt depends upon the intention of the parties. If the intention is that the money should be kept or used as a separate fund for the benefit of the payor or a third person, a trust is created. If the intention is that the party receiving the money shall have the unrestricted use thereof being liable to pay back a similar amount, with or without interest, a debt is created. This same reasoning was followed by the Supreme Court in *State v. Atlantic City Electric Co.,* 23 N.J. 259 (1957), where the court held that there is a strong presumption that a debt is created rather than a trust when the recipient of money obligates himself to pay a fixed rate of interest. The court also found that there was no trust created because there was no indication in the agreement that the parties intended a relation of confidence. It is therefore clear that a bank deposit account like an IRA account, which does not provide for professional investment or management services, contemplates a creditor-debtor relationship and does not include the receipt of services by the consumer. Neither then would be included as a consumer contract under the Plain Language Law.*

A further question arises as to whether those documents used in the establishment of an IRA fall within the meaning of a consumer contract. The answer is in the affirmative. N.J.S.A. 56:12-1 provides in pertinent part that a consumer contract includes writings required to complete the consumer transaction. Also, N.J.S.A. 56:12-6 provides as follows:

> The use of specific language in a consumer contract required, permitted or approved by a law, regulation, rule or published interpretation of a State or Federal agency shall not violate this act.

We are informed that the IRS provides sponsors of IRA's with model forms. In an instance where an IRA form is adopted by the plan sponsor, there can be no question that the specific language in those documents does not violate the Plain Language Law, since the document has been approved by a published interpretation of a federal agency. We are further advised that IRA sponsors are not required to use the model forms supplied by the IRS. IRA prototype forms are prepared by the sponsor and reviewed by the IRS as to whether the prototype is consistent with federal requirements. Since the statutory language clearly requires a published interpretation of a federal agency to remove an agreement from the purview of the act, it is clear that a prototype form does fall within the meaning of a consumer contract under law. Finally, federal income tax regulations require an IRA sponsor to provide a consumer with a disclosure statement. A disclosure statement, therefore, is clearly a writing required to complete the consumer transaction and is a consumer contract within the meaning of the law.

In conclusion, it is our opinion that a Keogh Plan established by an employer other than a self employed individual and a Simplified Employee Pension Plan are not consumer contracts within the meaning of the Plain Language Law. Further, although some IRA and bank deposit accounts are not consumer contracts within the meaning of the law, an IRA account providing for investment or management services for a fee or commission is a consumer contract that must conform with the requirements of the act. Finally, it is our opinion that language in IRA's patterned on IRS required model account forms are not subject the the requirements of the act but language in prototype forms reviewed by the IRS would be subject the requirements of the act.

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General

By: J. MICHAEL BLAKE
Deputy Attorney General

* A consumer may set up an IRA by buying an annuity or endowment contract from a life insurance company. This form of IRA is not subject to the Plain Language Act. It is subject to the Life and Health Insurance Policy Language Simplification Act. *See* N.J.S.A. 56:12-1(c).

December 13, 1982

JOSEPH F. MURPHY,
Commissioner of Insurance
201 East State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 8—1982

Dear Commissioner Murphy:

You have inquired whether the extension of a regulation establishing procedures for the nonrenewal of "No-Fault" coverages to include physical damage coverages is authorized. For the following reasons, you are advised that the extension of the procedures concerning the nonrenewal of "No-Fault" coverages to include physical damage coverages in automobile insurance policies by N.J.A.C. 11:3-8.1(g) is a valid and enforceable exercise of the Commissioner's rule making power.

Effective January, 1973, the Commissioner adopted regulations which placed restrictions on insurance carriers seeking to nonrenew private passenger automobile policies containing "No-Fault" coverages. N.J.A.C. 11:3-8.1 *et seq.*[1] The regulation in part provides that a notice of nonrenewal is not valid unless it is mailed 60 to 90 days prior to the expiration of the current policy and sets forth the reason(s) for nonrenewal. Section (b). Additionally, the notice must include the text of the portion of the rule permitting the nonrenewal and specific facts which bring the insured under the rule. Section (b)(1). Reasons for nonrenewal deemed to have the Commissioner's approval are set forth at sections (e) and (f). These reasons include, among other things, an insured's involvement in prior accidents, his violation of motor vehicle laws, his use of the car in professional racing, his physical or mental impairment, and his refusal to submit to a medical examination. Additionally, N.J.A.C. 11:3-8.1(d) provides that "any refusal to renew an automobile insurance policy not based upon such reasons be submitted to the Commissioner of Insurance no later than 90 days prior to the expiration of the policy and shall only be issued to the insured with the consent of the Commissioner."

On October 18, 1976, the Department adopted N.J.A.C. 11:3-8.1(g) which provides that "this rule (N.J.A.C. 11:3-8.1 *et seq.*) shall apply to *all* private passenger automobile coverages when included in a policy providing for personal injury protection and liability coverage." In effect, the amendment prohibits auto insurers from nonrenewing physical damage coverages (i.e., collision, comprehensive, etc.) unless the nonrenewal is in compliance with the standards of the existing regulation.

The question presented is whether or not the Commissioner has the authority to regulate the nonrenewals of physical damage coverages. The requisite statutory support is amply supplied by N.J.S.A. 17:22-6.14a 1 and 2 which state in pertinent part:

1. The Commissioner's power to promulgate regulations relative to the nonrenewal of "No-Fault" coverages was confirmed by the Supreme Court in *Sheeran v. Nationwide Mutual Insurance Co., Inc.*, 159 N.J. Super. 417 (Ch. 1978), *aff'd* 163 N.J. Super. 40 (App. Div. 1978), *modified on other grounds*, 80 N.J. 548 (1979).

> All property and casualty insurers doing business in New Jersey shall, upon request of the Commissioner of Insurance, file with the Department of Insurance a copy of their current underwriting guidelines, together with any amendments thereto or modification thereof. Such guidelines, amendments or modifications shall not be arbitrary, capricious or unfairly discriminatory. Where a policy of insurance is not renewed because of failure to meet the then current underwriting standards, the notice of nonrenewal shall identify the underwriting standard and specify in detail the factual basis upon said underwriting standard has not been met.

There is no ambiguity. N.J.S.A. 17:22-6.14a l requires that all property and casualty insurers maintain underwriting guidelines which are not arbitrary, capricious or unfairly discriminatory. Further, these guidelines must be made available to the Department of Insurance upon the request of the Commissioner. N.J.S.A. 17:22-6.14a 2 imposes an obligation on an insurer which intends to nonrenew a policy based on the insured's failure to meet company underwriting standards. Namely, the notice of nonrenewal delivered to the insured must identify the standard upon which the nonrenewal is premised and state the specific factual basis establishing the insured's failure to meet that standard. Given the straightforward terminology of the act there can be little question that it sufficiently authorizes the Commission to review the validity of a company's underwriting standards and to determine whether a nonrenewal is reasonably based on those standards.

N.J.A.C. 11:3-8.1 *et seq.* provides the mechanism by which the Commissioner has implemented the statute. N.J.A.C. 11:3-8.1(d) requires that, at least 90 days prior to the expiration of an automobile insurance policy, a carrier must provide the Commissioner of Insurance with a statement of the reasons for the nonrenewal. The "reasons" (for nonrenewal), as that term is used in this regulation, mean acceptable underwriting reasons relied upon by the insurer in deciding to nonrenew an insured's coverages.[2] After review, the Commissioner will consent to or disapprove the use of that reason. Obvious reasons for nonrenewal, listed at N.J.A.C. 11:3-8.1(e), are deemed to have the approval of the Commissioner and express consent based on any of these reasons is not required. In the event the Commissioner determines that the reasons underlying a proposed nonrenewal submitted to him are not either arbitrary, capricious or discriminatory, the insurer may notify the insured of the intent to nonrenew. It is clear that section (d) of the rule establishes a procedure by which the Commissioner may both request that certain underwriting guidelines be filed with the Department and determine whether those underwriting guidelines are consistent with the statutory standard.

In addition, it is appropriate to examine the statute in light of its surroundings and objectives in order to ascertain the statutory policy sought to be achieved. *In re Berardi,* 23 N.J. 485, 491 (1957); *Schierstead*

2. We are advised that the reasons deemed to have the Commissioner's prior consent, set forth at N.J.A.C. 11:3-8.1(e), are essentially underwriting standards.

v. City of Brigantine, 20 N.J. 164, 169 (1955); *Ward v. Scott,* 11 N.J. 117, 123 (1952). In June, 1970, the Commissioner of Insurance declared a 90-day moratorium on all policy terminations. Effective October 13, 1970, N.J.S.A. 17:22-6.14a *et seq.,* entitled "An Act concerning insurance to improve the stability and availability of insurance protection for the public . . ." became the law in this State. Shortly thereafter, amendments to that act, N.J.S.A. 17:22-6.14a 1 and 2 required that a notice of nonrenewal must set forth a valid underwriting basis for the nonrenewal and particularized facts establishing that the insured has failed to meet the requirements of that guideline. The Commissioner of Insurance is specifically authorized to implement the act, to the extent he determines necessary, by rules and regulations to prevent the arbitrary nonrenewal of coverages vital to the interests of the insuring public.

The regulations set forth at N.J.A.C. 11:3-8.1 *et seq.* as amended, are entirely consistent with the legislative purpose. The regulations require that nonrenewals be limited to those instances where good cause for the nonrenewal can be established. The renewal provisions of that regulation are also totally consistent with the principle that a closely regulated business, having entered a given field of operation, may be required to continue to provide services essential to the public interest despite its preference to discontinue such services. *See Pennsylvania Railroad Co. v. Bd. of Public Utility Commissioners,* 11 N.J. 43 (1952); *DeCamp Bus Lines v. Transportation Department,* 182 N.J. Super. 42 (App. Div. 1981).

In conclusion, it is our opinion that the adoption of N.J.A.C. 11:3-8.1(g) is a permissible exercise of the Commissioner's authority to regulate the nonrenewal of auto property damage coverage by insurers in the State.

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General
By: PATRICK J. HUGHES
Deputy Attorney General

January 18, 1983

HONORABLE MICHAEL M. HORN
Commissioner of Banking
Department of Banking
36 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 1—1983

Dear Commissioner Horn:

You have requested advice as to whether a bank may assess a prepayment penalty against a borrower who prepays an installment loan prior to the due date of the first payment. You are hereby advised that a bank is permitted to assess a prepayment penalty against a borrower who prepays a loan prior to the due date of the first payment.

Article 12 (N.J.S.A. 17:9A-53 *et seq.*) of the Banking Act of 1948, N.J.S.A. 17:9A-1 *et seq.*, provides limitations upon the authority of banks to make installment loans. Among the limitations imposed upon banks with respect to installment loans is that contained in N.J.S.A. 17:9A-54A which provides in relevant part that:

> *if the loan is prepaid within 12 months after the first payment is due, a bank may charge a prepayment penalty* of not more than (a) $20.00 on any loan up to and including $2000.00; (b) an amount equal to 1% of the loan on any loan greater than $2000.00 and up to and including $5000.00; and (c) $100.00 on any loan exceeding $5000.00. [Emphasis added.]

The meaning of this statute must be sought from the language in which the statute is framed. *Vreeland v. Byrne,* 72 N.J. 292, 302 (1977); *Sheeran v. Nationwide Mutual Ins. Co., Inc.,* 80 N.J. 548, 556 (1979). It is clear from a plain reading of this statute that the Legislature established an outside date prior to which prepayment penalties could be assessed against the borrower. This outside date is "within 12 months after the first payment is due," and any payment made prior to the first installment due date is clearly within that time period. Had the Legislature intended otherwise, it could have simply provided that prepayment penalties could not be imposed if the loan is prepaid prior to the date the first installment payment is due. In the absence of such express language, it cannot be presumed that the Legislature intended to impose such a limitation.

Moreover, a statute should be read to give effect to the true intent of the Legislature, *Alexander v. Power & Light Co.,* 21 N.J. 373, 378 (1956), and cannot be construed so as to lead to absurd, unreasonable or anomalous results. *Schwartz v. Dover Public Schools in Morris County,* 180 N.J. Super. 222, 226 (App. Div. 1981); *Citizens for Charter Change in Essex County v. Caputo,* 151 N.J. Super. 286, 290 (App. Div. 1977). The apparent purpose of this statute was to recognize that a bank has initial costs and expenses associated with making a loan and that if the loan is prepaid early, there may be insufficient earnings to compensate the bank for these costs and expenses. This rationale would obviously apply to a loan paid

prior to the due date of the first payment. To interpret the statute to bar imposition of a prepayment penalty in such a circumstance would not only violate this apparent legislative intent, but would also lead to absurd and anomalous results in that a bank would not be able to charge a prepayment penalty in the very case where it may be most justifiable.

For the foregoing reasons, it is our opinion that a bank may assess a prepayment penalty against a borrower when an installment loan is prepaid prior to the due date of the first payment on the loan.*

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General
By DENNIS R. CASALE
Deputy Attorney General

* It should be noted that P.L. 1981, c. 103 amended a variety of other consumer loan and contract statutes to permit a prepayment penalty to be imposed "if the loan [or contract] is prepaid within 12 months after the first payment is due." Such prepayment penalties may be imposed for small business loans (N.J.S.A. 17:9A-59.28); sales finance company loans (N.J.S.A. 17:16C-40.1); retail installment contracts (N.J.S.A. 17:16C-41) and home repair contracts (N.J.S.A. 17:16E-69). For the reasons stated above, it is also our opinion that prepayment penalties may be assessed against borrowers if any of these loans or contracts are prepaid prior to the date the first installment payment is due.

January 18, 1983

MR. BARRY SKOKOWSKI, *Director*
Division of Local Government Services
Department of Community Affairs
363 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 2—1983

Dear Director Skokowski:

Several questions have been raised by local governmental entities with regard to bidding under the Local Public Contracts Law, N.J.S.A. 40A:11-1 *et seq.* Since the Division of Local Government Services in the Department of Community Affairs is authorized to assist local governments in all matters affecting the administration of the Local Public Contracts Law, we are providing you with advice concerning specific questions that have been identified by local governmental entities.

I

What are the criteria that are to be utilized in defining "goods contracts" from "service contracts"

The Local Public Contracts Law applies to all contracts whether or

not the contracts involve the purchase of goods or services. N.J.S.A. 40A:11-3 states:

> Any purchase, contract or agreement for the performance of any work or the furnishing or hiring of materials or supplies, the cost or price of which, together with any other sums expended or to be expended for the performance of any work or services in connection with the same immediate program, undertaking, activity or project or the furnishing of similar materials or supplies during the same fiscal year paid with or out of public funds, does not exceed the total sum of $4,500 in the fiscal year, may be made negotiated or awarded by a contracting agent . . . without public advertising for bids. . . .

The term "materials" is defined in N.J.S.A. 40A:11-2(5) as including

> goods and property subject to article 2 of Title 12A of the New Jersey Statutes, apparatus, or any other tangible thing, except real property or any interest therein.

The term "work," as defined in N.J.S.A. 40A:11-2(9), includes:

> services and any other activity of a tangible or intangible nature performed or assumed pursuant to a contract or agreement with a contracting unit . . .

Therefore, under the Local Public Contracts Law, if the cost of the contract exceeds the statutory threshold of $4,500, and involves the furnishing or hiring of materials or supplies or involves the performance of work, the public bidding requirements apply unless, as to any particular purchase or contract, the Local Public Contracts Law provides a statutory basis for waiving the requirement of open and competitive bidding.

While the distinction between "goods" and "services" does not have importance in terms of the application of the general requirement for public bidding under the Local Public Contracts Law, the distinction does have importance with respect to the ability of local contracting agencies to make purchases under contracts awarded by the State through its Division of Purchase and Property in the Department of Treasury. N.J.S.A. 52:25-16.1 states that:

> The Director of the Division of Purchase and Property may include, in any such contract or contracts on behalf of the State, a provision for the purchase of such *materials, supplies* or *equipment* by any county, municipality or school district from such contractor or contractors. . . . [Emphasis added.]

A companion provision of the Local Public Contracts Law N.J.S.A. 40A:11-12 states:

> Any contracting unit under this act may without advertising for bids or having rejected all bids obtained pursuant to advertising

> therefor, purchase any *materials, supplies or equipment* under any contract or contracts for such *materials, supplies or equipment* entered into on behalf of the State by the Division of Purchase and Property in the Department of the Treasury.

Under N.J.S.A. 52:25-16.3, the Director of the Division of Purchase and Property is to distribute a list of current contracts each year to all local contracting units so that they may determine whether to make purchases under the State contracts or proceed with their own purchases. In this regard, the Division of Local Government Service guidelines state:

> The Division of Purchase and Property periodically makes information available to local officials regarding state contracts which may be utilized. This service in a number of cases has produced savings for local governments and should be considered by all local units. It is suggested that local units authorize their purchasing agents to participate in this program by ordinance or resolution.

It is important to emphasize that the ability of the local contracting unit to make purchases under a State contract turns upon the inclusion in the State contract of a provision allowing such purchases. The plain language of N.J.S.A. 52:25-16.1 makes clear that the Director of the Division of Purchase and Property may include provision for local government purchases when the contract involves *only* the acquisition of materials, supplies or equipment. Similarly, the language of N.J.S.A. 52:25-16.1 indicates that contracts which involve *only* the performance of work are not subject to extension for local government purchasing. The authority of the Director of the Division of Purchase and Property under N.J.S.A. 52:25-16.1 is less clear with regard to local government purchasing under contracts which provide for the acquisition of materials, supplies and equipment as well as related personal services.

As indicated above, the term "materials" is defined in N.J.S.A. 40A:11-2(5) and this definition incorporates the definition of goods in Article 2 of the Uniform Commercial Code, N.J.S.A. 12A:1-101 *et seq.* In N.J.S.A. 12A:2-105, the term "goods" is defined as items that are movable at the time of identification to the contract." In *Meyers v. Henderson Construction Co.,* 147 N.J. Super. 77 (Law Div. 1977), the Court held that a contract to furnish all labor, materials, tools and equipment to install over-head doors was a contract for the sale of goods governed by the Uniform Commercial Code. The Court in *Meyers* applied the test set forth by the Court in *Bonebrake v. Cox,* 499 F. 2d 951 (8th Cir. 1974) and approved in *Pittsburgh-DesMoines Steel Co. v. Brookhaven Manor Water Co.,* 532 F. 2d 572 (7th Cir. 1976).

> The test for inclusion or exclusion is not whether they are mixed [contracts], but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g. contract with artist for painting) or is a transaction of sale, with

labor incidentally involved (e.g. installation of a water heater in a bathroom. [*Bonebrake v. Cox, supra,* 499 F. 2d at 960.]

A determination as to whether the service component or goods component predominates in an overall contract involving the provision of materials, supplies and equipment and personal services related thereto must be made on a case by case basis based upon the terms of a particular contract. If any local contracting unit has specific questions in this regard as to any particular contract whereunder the Director of the Division of Purchase and Property has provided for local government purchases, these questions should be brought to the attention of the Director of the Division of Purchase and Property. These questions may then be referred to the Attorney General for an appropriate legal opinion.

II

How should governmental purchases be aggregated for purposes of determining whether the statutory threshold of $4,500 has been reached?

As stated above, the Local Public Contracts Law requires public bidding when the contract price exceeds the threshold of $4,500. *See* N.J.S.A. 40A:11-3. The question has been raised as to the manner in which it is to be determined whether the statutory threshold has been reached. N.J.S.A. 40A:11-7 generally provides that, for purposes of determining whether particular purchases or contracts fall below the statutory threshold of $4,500, contracts are not to be divided. This statute states:

> No purchase, contract or agreement, which is single in character or which necessarily or by reason of the quantities required to effectuate the purpose of the purchase, contract or agreement, includes the furnishing of additional work, shall be subdivided, so as to bring it or any of the parts thereof under the maximum price or cost limitation of $4,500.00 thus dispensing with the requirement of public advertising and bidding therefor, and in purchasing or contracting for, or agreeing for the furnishing of, any services, the doing of any work or the supplying of any materials or the supplying or hiring of any materials or supplies, included in or incident to the performance or completion of any project, program, activity or undertaking which is single in character or inclusive of the furnishing of additional services or buying or hiring of materials or supplies or the doing of additional work, or which requires the furnishing of more than one article of equipment or buying or hiring of materials or supplies, all of the services, materials or property requisite for the completion of such project shall be included in one purchase, contract or agreement.

The principle is well established in New Jersey that bidding statutes are enacted for the benefit of the taxpayers. Their purposes are to guard against favoritism, improvidence, extravagance and corruption. The goal of the bid laws is to secure for the public the benefits of unfettered competition. *Terminal Construction Corp. v. Atlantic City, Sewerage Auth.,*

67 N.J. 403, 409-410 (1975). The public bidding laws are to be interpreted with sole reference to the public good. The general rule of strict construction of the bid laws is reflected in the observation of Justice Francis in *Hillside Tp. v. Sternin.* 25 N.J. 317, 326 (1957):

> In this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore in such cases speculation as to whether or not it was purposely left that way.

The provision of N.J.S.A. 40A:11-7 must be read in light of the general principles stated above. This statute reflects a considered legislative statement that there be no evasion of the bidding requirements by division of contracts so as to avoid the statutory threshold of $4,500. N.J.S.A. 40A:11-7 indicates in the plainest terms that the nature of character of the purchase, contract or agreement must be looked to in deciding whether the $4,500 limit has been reached. If a project or undertaking is single in character, then its component parts must be aggregated for purposes of applying the requirement of public bidding. The $4,500 limitation is, as stated in N.J.S.A. 40A:11-3, based upon the total expenditures during the fiscal year. Therefore undertaking which are singular in character, and which involve purchases during the course of an entire fiscal year, should be aggregated and not divided as stated in N.J.S.A. 40A:11-7. As the Division of Local Government Services has stated in its advisory guidelines:

> The spirit and intent of the law is that contracting units should anticipate and aggregate their needs for various articles and services, consolidating their needs into bulk for various articles and services, consolidating their needs into bulk purchasing specifications which can be periodically advertised rather than making repeated purchases throughout the year on an as-needed basis.

Additional advisory guidelines have been provided by the Division of Local Government Services and should be looked to by local contracting officers in meeting their statutory obligations. The Division guidelines state:

1. The law does not refer to $4,500 *per vendor* as the criterion.
2. All expenditures for equipment, materials and supplies, work and services (excluding force account) must be added together if they are for the same project, program, activity or undertaking. This places the emphasis on the purchases being added up according to what they are spent for rather than who they are bought from or the individual nature of the various components. The law defines "project" as "any work, undertaking, program, activity, development, redevelopment, construction or reconstruction of any area or areas," but does not define "program, activity or undertaking."
3. Materials and supplies used regardless of departmental lines should be grouped together if:
   a. They are commonly made, stocked or sold by the same sources.

b. They are all used on the same project.
c. They are normally needed over the course of a fiscal year. The figure is to be projected for the full fiscal year, and not year-to-date.

These guidelines are not meant to cover all contracting situations. Indeed it would be difficult to provide general guidelines that would have application to the myriad contracting situations faced by the municipalities and other contracting units. The public bidding laws must be applied practically and sensibly with the understanding that the important public policies served by the bid laws are best carried out by favoring the utilization of the bid process.

III

Treatment of travel costs and costs of conferences under the Local Public Contracts Law

Several questions have been raised with regard to costs incurred by public officials in the attendance of conferences related to their official responsibilities. These conferences may entail expenditures for travel, meals and lodging. The question raised is whether all of these costs should be aggregated or whether they may be divided consistent with N.J.S.A. 40A:11-7. The question has also been raised as to whether attendance at a conference is an item that may be purchased without advertisement for bids.

In this regard it should be noted that N.J.S.A. 40A:5-16.1 states:

> [T]he governing body of any local unit may, by resolution, provide for and authorize payment of advances to officers and employees of the local unit toward their expenses for authorized official travel and expenses incident thereto. Any such resolution shall provide for the verification and adjustment of such expenses and advances and the repayment of any expenses and advances and the repayment of any excess advanced by means of detailed bill of items or demand and the certifications or affidavit required by N.J.S.A. 40A:5-16 which shall be submitted within 10 days after the completion of the travel for which an advance was made.

This statute suggests that official travel and expenses incident thereto are costs that are to be borne initially by the public official either out-of-pocket or with funds advanced for this purpose. The public body reimburses the public official for these incurred costs and does so in a manner consistent with the provisions of N.J.S.A. 40A:5-16.1. Thus according to the statutory scheme, it would appear that the purchases of, for example, transportation or lodging would be purchases made by the affected public officials rather than by the local governing body. Whereas the local governing body does ultimately bear the cost of these expenses, it does so pursuant to the statute and in a manner of reimbursement to the public officers.

Reading the provisions of N.J.S.A. 40A:5-16.1 with the provisions of the Local Public Contracts Law would suggest, therefore, that the reimbursement of official travel expenses by a local governing body would not be the sort of purchase, contract or agreement that comes within the scope of N.J.S.A. 40A:11-1 *et seq.* As stated above N.J.S.A. 40A:11-3 imposes the public bidding requirement for the furnishing or hiring of materials or supplies, or for the performance of any work. In light of the specific provisions of N.J.S.A. 40A:5-16.1, it would appear that the reimbursement of official travel expenses are not the sort of "purchases, contracts or agreements" that the Local Public Contracts Law was intended to cover. Again, these purchases are purchases made by the officials directly. Their reimbursement is subject to review and oversight by the governing body, and any such reimbursement should be made with strict conformity to the statutory requirements of N.J.S.A. 40A:5-16.1

IV

Public Bidding on contracts for services performed at building acquired under in Rem Tax Foreclosure Act.

The question has been raised as to whether in rem tax foreclosures sever the existing contractual realtionships with superintendent personnel in properties acquired by foreclosure under the In Rem Tax Foreclosure Act, N.J.S.A. 54:5-104.29 *et seq.* Property taxes become a lien on the land for which they are assessed on or after the first day of January of the year after the taxes are assessed. N.J.S.A. 54:5-6. When the taxes remain unpaid as of July first of the year following the year in which the taxes became due, the municipality may enforce its lien by selling the property, N.J.S.A. 54:5-19, and the municipality may be the purchaser at the sale. N.J.S.A. 54:5-34. The officer conducting the sale issues a certificate of sale and delivers same to the purchaser. N.J.S.A. 54:5-46. Pursuant to N.J.S.A. 54:5-54, the owner of the property, or one with an interest therein, may redeem within six months from the time when the municipality purchased the property. The municipality may proceed under the In Rem Tax Foreclosure Act to summarily bar the right of redemption if six months have expired from the date of the tax sale. N.J.S.A. 54:5-104.34(a). A judgment entered in an in rem tax foreclosure proceeding:

> shall give full and complete relief, in accordance with the provisions of this act, and in accordance with any other statutory authority, to bar the right of redemption, and to foreclose all prior or subsequent alienations and descents of the lands and encumbrances thereon, and to adjudge an absolute and indefeasible estate of inheritance in fee simple in the lands therein described, to be vested in the plaintiff.

With the entry of the final decree, the local government becomes vested with an estate in fee in the lands. *Clark v. Jersey City,* 8 N.J. Super. 33, 38 (App. Div. 1950). The municipality is collecting the rents and profits from the properties, and is charged with the duties and responsibilities that flow from ownership. Payments to superintendent personnel are payments made with public funds. Since the services performed by superintendents and other personnel constitutes the "performance of work," the contracts or agreements with these individuals is subject to the Local Public Contracts Law if the cost thereof exceeds $4,500.

The question has also been raised as to whether the municipality may give superintendent personnel free apartments and minimal salary in lieu of bidding. The value of the free apartment is clearly consideration flowing to the personnel. Considered along with the payment of a minimal salary, if the total yearly cost exceeds $4,500 there is no basis to avoid public bidding. It is also important to emphasize that depending on the number and source of the personnel needed to superintend a building or buildings, aggregation of several personal service contracts might be required. In any event, the fact that use of an apartment is being offered as payment rather than cash does not bring the contract out from under the requirements of the Local Public Contracts Law.

V.

Conclusion

For the reasons stated herein, you are advised that the Local Public Contracts Law applies to all purchases of goods and services. Local governments may make purchases under contracts awarded by the Director of the Division of Purchase and Property of materials, supplies and equipment pursuant to N.J.S.A. 52:25-16.1. Local contracting units may purchase services under State contracts but only if those services are incidental to the procurement of materials, supplies and equipment. Local contracting units should aggregate all purchases in strict compliance with N.J.S.A. 40A:11-7 in order to further the purposes of the public bidding laws. Travel expenses incurred by local government officials are subject to reimbursement in accordance with N.J.S.A. 40A:5-16.1 and need not be subject to public bidding pursuant to the Local Public Contracts Law. Finally, contracts with superintendent personnel in properties acquired under the In Rem Tax Foreclosure Act are subject to the terms of the Local Public Contracts Law.

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General

By: JOSEPH L. YANNOTTI
Deputy Attorney General

March 14, 1983

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

FORMAL OPINION NO. 3—1983

Dear Chairman Moore:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. *Atlantic City Electric Co. v. Bardin, supra* at 446; *Seaside Realty Co. v. Atlantic City,* 74 N.J.L. 178, 181-182 (Sup. Ct. 1906) *aff'd* 76 N.J.L. 819 (E. & A. 1908). See also cases where constitutional restrictions were held to prevent the grant of tide flowed lands for less than adequate consideration even to a municipality for a public purpose, *Henderson v. Atlantic City,* 64 N.J. Eq. 583 (Chancery 1903); *In re Camden,* 1 N.J. Misc. 623 (S. Ct. 1923), but which also have confirmed the state's "discretion when and how to transmute this property into money, . . ." *Henderson* at 587.

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

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

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

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

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

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

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

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

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

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

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

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

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

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General

March 18, 1983

SCOTT A. WEINER
Executive Director
Election Law Enforcement Commission
28 West State Street, Suite 1114
CN-185
Trenton, New Jersey 08625

FORMAL OPINION NO. 4—1983

Dear Director Weiner:

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

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

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

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

> tric light, heat or power, canal or aqueduct company, or having the right to condemn land, or to exercise franchises in public ways granted by the State or any county or municipality, and *no corporation, person, trustee or trustees, owning or holding the majority of stock in any such corporation,* shall pay or contribute money or thing of value in order to aid or promote the nomination or election of any person, or in order to aid or promote the interests, success or defeat of any political party. [Emphasis supplied.]

At issue is whether, and to what extent, these prohibitions apply to corporations holding an ownership interest in an insurance corporation or to non-insurance subsidiaries of such a holding company.

In the instant matter, the Legislature's intention with regard to contributions by holding companies of the listed industries has been clearly articulated. No corporation owning or holding the majority of stock in a corporation conducting any of these businesses may make political contributions. The mandate is absolute and unambiguous. The words of the statute are to be given their ordinary and well understood meaning according to approved usage of the language. *Service Armament Company v. Hyland,* 70 N.J. 550 (1976).

Moreover, the underlying statutory purpose supports a conclusion that the Legislature intended an absolute ban on political contributions by such holding companies. Although there is little legislative history available concerning the New Jersey statutes, reference to their federal counterpart, 2 U.S.C. 441(b) (formerly 28 U.S.C. 610) is instructive.[2] The primary congressional concern underlying the enactment of that statute was the growing use of aggregated corporate wealth to control the election process and to influence elective officials to act in a manner favoring corporate interests over those of the general public. *Cort v. Ash,* 422 U.S. 66 (1975); *United States v. International Union United Auto etc., Workers,* 352 U.S. 563 (1957). It is reasonable to infer that N.J.S.A. 19:34-45, originally enacted only three years after the federal act, was intended to address the same evil, corporate influence over government officials.

Additionally, the nature of the corporations listed at N.J.S.A. 19:34-45 compels the conclusion that the Legislature particularly intended to insulate elective officials from the influence of regulated industries. Each business listed in the act may be characterized as of a type strongly affected

2. That statute, enacted in 1907, states in pertinent part:

> It is unlawful for any national bank or any corporation organized by any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever to make a money contribution in connection with the election at which Presidential and Vice-Presidential elections or a Senator or Representative in . . . Congress is to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices. . . .

with a public interest. Each business has been made the subject of extensive and pervasive government regulation. Comprehensive regulatory programs, vital to the protection of the public, could become prime targets of elected officials seeking to satisfy perceived debts to corporate benefactors affiliated with a regulated industry. An absolute legislative ban on political contributions by companies holding a majority interest in a regulated industry, such as insurance, is consistent with its intention to eliminate the corruptive influence of corporate political contributions.

The statutory ban on political contributions by a corporation holding a majority interest in a regulated company embraces any subsidiary in which the holding corporation has a controlling interest. This is due to the nature of the holding company—subsidiary company relationship. "The dominant characteristic of a holding company is the ownership of securities by which it is possible to control or substantially to influence the policies and management of one or more operating companies." *North American Co. v. Securities and Exchange Commission,* 327 U.S. 686, 701 (1946). The holding company is capable of materially influencing every operation of its subsidiary corporations, including its political expenditures.

Political contributions, whether paid by a corporation holding the majority interest in an insuance company or by any of its wholly owned or controlled subsidiaries could create a political debt. The repayment of such a debt may take the form of unduly favorable regulatory treatment of the insurance company. To permit the "sister" subsidiary to make these political contributions would allow the holding company to do indirectly that which it is forbidden to do directly. A statute should not be interpreted to reach an unreasonable or anomalous result inconsistent with the salutary legislative goal. *State v. Gill,* 47 N.J. 441 (1966).

In conclusion, it is our opinion that an insurance company doing business in this state and any non-insurance holding corporation of such an insurance company or any of the holding company's subsidiary corporations are prohibited from making political contributions to any candidate for political office under the government of this state or any of its political subdivisions, to any political party in this state or for any political purpose whatsoever in this state.

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General
By: PATRICK J. HUGHES
Deputy Attorney General

April 21, 1983

WILLIAM J. JOSEPH, *Director*
Division of Pensions
20 West Front Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 5—1983

Dear Director Joseph:

A question has arisen concerning the validity of the mandatory retirement ages established for members of certain New Jersey uniformed services by State pension programs in light of *EEOC v. Wyoming,* 460 U.S. 226 (1983). In *Wyoming,* the Supreme Court concluded that Congress could properly extend application of the Age Discrimination in Employment Act (ADEA) to the States. It is our opinion that statutory provisions which require a member of a state administered retirement system to retire prior to his or her attaining age 70 are invalid and unenforceable.

The ADEA prohibits discrimination in employment on the basis of age against individuals between 40 and 70 years of age. 29 U.S.C. §§623(a) and 631(a). As originally enacted, the ADEA provided that, notwithstanding the other provisions of the Act, it shall not be unlawful for an employer to "observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension or insurance plan which is not a subterfuge to evade the purposes of [the Act], except that no employee benefit plan shall excuse the failure to hire any individual." P.L. 90-202, §4(f)(2). In 1978, however, this provision was amended to provide that "no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual." P.L. 95-156, §2(a), codified at 29 U.S.C. §623(f)(2). This prohibition would directly affect the State Police Retirement System (SPRS), N.J.S.A. 53:5A-8(a)(2), the Police and Firemen's Retirement System (PFRS), N.J.S.A. 43:16A-5(1), the Consolidated Police and Firemen's Pension Fund (CPFPF), N.J.S.A. 43:16-1, and the law enforcement officers subchapter of the Public Employees Retirement System (PERS), N.J.S.A. 43:15A-99, all of which provide, in certain circumstances, for the mandatory retirement of their members prior to age 70.

Under the 1978 amendment to the ADEA, a general requirement in a pension plan that persons retire prior to age 70 constitutes a *prima facie* violation of the statute. *EEOC v. Chrysler Corp.,* 546 F. Supp. 54, 67-68 (E.D. Mich. 1982); *Campbell v. Connelie,* 542 F. Supp. 275, 278 (N.D.N.Y. 1982); *see* 29 C.F.R. §1625.9. The forced retirement on the basis of age of persons younger than age 70 imposed by the State uniformed services pension progams may therefore be justified only if the retirement ages established thereby are demonstrated to be bona fide occupational qualifications (BFOQ). 29 U.S.C. §623(f)(1) provides that it shall not be unlawful for an employer to take any actions otherwise prohibited by the Act "where age is bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentation is based on reasonable factors other than age. . . ."

The BFOQs subject to this exception are not further defined by the

statute. The applicable legislative history is silent as to the scope this provision should be afforded. *See* H.R. Rep. 805, 90th Cong., 1st Sess., reprinted in [1967] U.S. Code Cong. & Ad. News 2213, 2222. However, the Equal Employment Opportunity Commission which is charged with the enforcement of this Act, has stated in a regulation interpreting this provision that, for a mandatory retirement age to be valid, the alleged BFOQ must be "reasonably necessary to the essence of the business," and a reasonable factual basis must exist for the belief either that "all or substantially all" of the affected age group would be unable to safely and efficiently perform the duties of the job involved, or that it is impossible to ascertain the continued fitness of persons over the mandatory retirement age on an individualized basis. 29 C.F.R. §1625.6(b). This standard has been implicitly recognized by Congress as the appropriate test for determining whether a mandatory retirement age constitutes a valid BFOQ. *See* S. Rep. No. 95-493, 95th Cong., 2nd Sess. 1-2, [1978] U.S. Code Cong. & Ad. News at 513-14; H.R. Conf. Rep. No. 95-950, 95th Cong., 2nd Sess. 7, [1978] U.S. Code Cong. & Ad. News at 528-29. In addition, this standard has been endorsed by the courts virtually without exception. *See, e.g., Usery v. Tamiami Trail Tours, Inc.,* 531 F.2d 224, 236 (5th Cir. 1976); *EEOC v. City of St. Paul,* 671 F. 2d 1162, 1166 (8th Cir. 1982); *Smallwood v. United Airlines,* 661 F. 2d 303, 307 (4th Cir. 1981), *cert. denied* 456 U.S. 1007 (1982); *EEOC v. City of Allegheny,* 519 F. Supp. 1328, 1333 (W.D. Pa. 1981).

You are therefore advised that the provisions of the SPRS, N.J.S.A. 53:5A-8(a)(2), the PFRS, N.J.S.A. 43:16A-5(1), the law enforcement officers subchapter of the PERS, 43:15A-99, and the CPFPF, N.J.S.A. 43:16-1, which require the mandatory retirement on the basis of age of persons younger than age 70 are invalid and unenforceable. However, such mandatory retirement provisions could be validly established in an amended format if their application is limited to the specific uniformed positions in which continued fitness is reasonably necessary to job performance or protection of the public safety, and it can be established as a factual matter either that all of the persons above such retirement age would be unable to adequately perform their duties or that it would be impossible or impractical for the State to determine the fitness of persons older than the prescribed age on an individualized basis.

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General

June 1, 1983

HONORABLE WALTER N. READ, *Chairman*
Casino Control Commission
3131 Princeton Pike, Bldg. #5
Box CN208
Princeton, New Jersey 08625

FORMAL OPINION NO. 6—1983

Dear Chairman Read:

The Casino Control Commission has requested our opinion whether certain casino-related promotional activities are lawful under those provisions of the Code of Criminal Justice concerning gambling. Among the promotions in question are those related to charter bus tours, in which, under one alternative, all bus patrons receive free gifts upon arrival or, under the second alternative, the bus patrons must participate in a drawing for a chance of winning free prizes. Also of interest are promotions within the casinos themselves, by which tickets are distributed free to all who wish to participate in drawings or other activities. It is our conclusion a promotion should be deemed to be gambling only if a participant risks "something of value" such as money, tangible or intangible property or personal services, on the outcome of a contest of chance based on an understanding or agreement something of value will be won in the event of a specific outcome.

Public policy in New Jersey is strongly against gambling. Except for particular forms of gambling specifically mentioned in the State Constitution the Legislature is prohibited from authorizing any kind of gambling "unless the specific kind, restrictions and control thereof" has been approved at a popular referendum. N.J. Const. (1947), Art. IV, §7, ¶2. The Legislature over the decades has complemented the constitutional prohibition with statutory proscriptions on gambling, the most recent being Chapter 37 of the Code of Criminal Justice. N.J.S.A. 2C:37-1 et seq. N.J.S.A. 2C:37-2 thus defines as criminal the promotion of gambling, while the succeeding sections make criminal the possession of gambling records and the maintenance of a gambling resort. N.J.S.A. 2C:37-3, 4.

Although the Legislature has expressed in this fashion its intent to ban gambling, the more specific characteristics of that prohibition can be ascertained only by considering the statutory definitions of the various elements of the gambling offense. It is these definitions which demarcate the boundary between the lawful and unlawful. "Gambling" is defined as:

> staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the actor's control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome. [N.J.S.A. 2C:37-1(b).]

In pertinent part "something of value" is defined as:

> any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge. [N.J.S.A. 2C:37-1(d).][1]

The "something of value" definition is plainly critical to identifying gambling activity, since gambling does not exist if the participant is not risking something of value or is not entertaining the beliefs that he may receive something of value.

Although the "something of value" definition is not entirely free of ambiguity, its phrasing indicates that legislative intent was to exclude from the statutory elements comprising the gambling offense the sort of personal inconvenience which will constitute consideration sufficient to support a contract. The definition may be parsed to encompass (1) money or property, (2) any token, object or article exchangeable for money or property and (3) any form of credit or promise which either contemplates the transfer of money or property or which involves the extension of a service, entertainment or playing privilege. An analysis of the first two categories produces the conclusion that only money or property or tangible items standing in their stead constitute "something of value." Some analytical difficulty does arise upon consideration of the third category. While its first part continues the pattern of specifying surrogates for money or property, this time by the intangible surrogate of "any form of credit or promise" which contemplates "transfer of money or property or of any interest therein," its second part is more confusing in its reference to "any form of credit or promise" which involves "extension of a service, entertainment or a privilege of playing at a game or scheme without charge." Some of this last phraseology seems not entirely to mesh with the concept of something being risked. However, the precise extent and under what particular circumstances these final words of the "something of value" definition might apply to the risking aspect of a gambling incident need not be decided here, for in all events the activities described require the person involved to bear far more of a burden than that minimal inconvenience which would bind him to a contract.[2]

Difficulty can sometimes be encountered in ascertaining whether, in the context of particular circumstances, money or property or their tangible or intangible surrogates are in fact being risked. In some situations the risking is self-evident, as when a participant hands over money to the

1. Also of significance is the definition of "lottery," which means:

> an unlawful gambling scheme in which (a) the players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other media, one or more of which chances are to be designated the winning ones; and (b) the winning chances are to be determined by a drawing or by some other method based upon the element of chance; and (c) the holders of the winning chances are to receive something of value. [N.J.S.A. 2C:37-1(h).]

operator of a game only then to be allowed to sit down and play. In other situations, however, the nexus between payment and the opportunity to win is more ambiguous, as when the payment made constitutes consideration for both a gambling and a non-gambling activity. The courts have devised standards according to which this sort of operation might be judged, with differentiation being made between "closed participation" and "flexible participation" operations. As a Pennsylvania court has said:

> In the "closed participation" system, as applied to theatre "bank nights," an admission price must be paid to the theatre owner for a theatre ticket in order that the person so purchasing may be assigned a number which is drawn by chance, or lot, in some manner. There need be no increase in the price of the theatre ticket purchased by the possible winner, the price paid for the ticket including the price paid for the chance. . . . [*Commonwealth v. Lund,* 142 Pa. Super. 208, 15 A. 2d 839, 842 (Super. Ct. 1940)]

The *Lund* court held that:

> a drawing conducted upon the basis of a "closed participation" is a lottery, even though the price or cost of the chance is included in the original price of the theatre ticket. In other words, in such a scheme the purchase of the ticket and the fact that one cannot contend for the prize unless he has purchased such a ticket, establishes the fact of consideration. . . . [*Ibid.*]

In the "flexible participation" operation, by contract, "some sort of method is employed by means of which some persons get chances to win

2. Over the decades the courts in New Jersey have struggled to specify the outermost boundary of the "something of value" concept—the least measure of detriment borne which, when combined with the other elements of chance and winnings, will constitute gambling. *State v. Berger,* 126 N.J.L. 39 (Sup. Ct. 1941), and *Furst v. A. & G. Amusement Co.,* 128 N.J.L. 311 (E. & A. 1942), were "Bank Night" cases typical of many from across the nation, in which movie theatres sold drawings for prizes in which those paying an admission price to the motion picture as well as those who did not could participate. The *Furst* court in particular emphasized that "[t]hose that have not paid for admission to the motion picture must at some inconvenience wait outside to be sure of hearing the announcement and of entering the theatre promptly thereafter." 128 N.J.L. at 313. *State v. Berger,* 126 N.J.L. at 43. It was stated in *Formal Opinion* No. 9—1978, however, these decisions do not represent a definition of gambling for purposes of the New Jersey Constitution. At the time of the early decisions the Legislature had in effect created a statutory type of "gambling" which required no consideration whatever or only the most minimal consideration. That this choice by the Legislature does not limit the legislative prerogative to adopt a less-encompassing definition is clear from the later enactment which exempted from the lottery prohibition the minor personal inconvenience incurred in submitting a boxtop or package label so as to participate in a game. N.J.S.A. 2A:121-6 (repealed). This legislative prerogative to choose a narrow definition is exemplified as well by the current definition in the Code of Criminal Justice, which in terms of its risking aspect concerns only valuable items or kinds of personal effort calling for substantially more than mere personal inconvenience.

without purchasing any theatre ticket." Under those circumstances the trier of fact must determine whether something of value is being risked and whether gambling is therefore occurring by considering "the character and practical operation of the scheme as a whole, and not by rare instances of departure from the general scheme and practice." *Id.* at 845.

A number of the promotions would be or have been held in the casinos themselves. Many of the promotions which have been brought to our attention are variations or composites of the six authorized casino gambling games. It is the Casino Control Commission which possesses the expertise and the responsibility for determining whether they are suitable for casino use. N.J.S.A. 5:12-5. *See IGP-EAST, Inc. v. Div. of Gaming Enforcement,* 182 N.J. Super. 562, 566 (App. Div. 1982). Other types of promotion held in the casinos include the "Winter of Winners" promotion where seven hourly drawings were held each day, with three winning tickets drawn per hour. No purchase or casino play was required to participate, and entry tickets having no cash value were available on request to anyone visiting the casino. Each drawing was for cash and merchandise prizes, with there also being daily, weekly and monthly drawings and a grand prize drawing the last day. Under another promotion, "One on the House," participation was similarly broad, with all persons except casino employees and their immediate families eligible to participate by means of coupons having no cash value. On these facts, the promotions do not constitute gambling in general or lotteries in particular. As discussed, the statutory definition of "gambling" hinges upon the phrase "something of value;" the statutory definition of "lottery," N.J.S.A. 2C:37-1(h), does so as well.[1] Here, apparently no risking of something of value is made, either from the standpoint of the individual participants or from the standpoint of the operation as a whole. It appears quite unlike the old "Bank Night" scheme, which was often held unlawful because, even though payment was not literally required, the majority of participants did pay to secure a more favorable position in claiming potential winnings. *Commonwealth v. Lund, supra.* 15 A. 2d at 846. In this instance, by contrast, no such hidden inducement exists for playing, and consequently the operations appear to be genuinely open to all without the necessity of risk.

The same conclusion may be reached with regard to one of the kinds of charter bus tour promotions which have been devised, though not with regard to the other kind. Under the first kind a patron will pay between, $8.50 and $16.50 for the tour to and from Atlantic City, but will receive from the casino a bonus in the form of $10.00 in coins and coupons redeemable for food. It will be recalled that under the Code of Criminal Justice "gambling" means risking something of value "upon the outcome of a contest of chance," N.J.S.A. 2C:37-1(b), with "contest of chance" meaning a game in which "the outcome depends in a material degree upon an element of chance. . . ." N.J.S.A. 2C:37-1(a). Considering that apparently every bus patron receives the bonus without exception, gambling does not exist because of the absence of the chance element. Obviously a casino or a tour bus operator may give away its property if it so desires. That it does so in hopes of attracting a larger patronage and of ultimately higher profits is of no legal consequence.

There is great difficulty with the second kind of charter bus tour

promotion, however. There the bonus is not given to all of the bus patrons. Instead, the bonus would be given only to those patrons selected by a drawing; moreoever, only those patrons buying tickets for that bus tour would be eligible to participate. Not only is the element of chance present,[3] but the chance element functions within the kind of closed participation scheme discussed earlier. The inevitable inference must be that those who bought bus tour tickets did so at least partially because of the drawing and that some part of the puchase price was staked upon the game. Under these circumstances, the promotion is unlawful.

In some instances the bus tour operator is not associated with the casino. The monetary payments made by bus patrons do not themselves constitute the "pot" from which winnings are drawn, for those payments are kept by the operator to cover the costs and profits of the bus operation while the winnings are provided by the casino. Nevertheless, this lack of identity between something of value staked and something of value won does not alter the character of the event as gambling, assuming that all other statutory elements are present. Gambling—the risking of something of value upon the outcome of a contest of chance upon an agreement of understanding of possibly receiving something of value, N.J.S.A. 2C:37-1(b)—is a contract, *Lucky Calendar Co. v. Cohen,* 19 N.J. 399, 414-416 (1955), and, as a principle of general contract law, "[i]t matters not from whom the consideration moves or to whom it goes" as long as "it is bargained for as the exchange for the promise. . . ." *Coast Nat'l Bank v. Bloom,* 113 N.J.L. 597, 602 (E. & A. 1934); *Guaclides v. Kruse,* 67 N.J. Super. 348, 354 (App. Div. 1961). This principle is particularly pertinent to current New Jersey statutory law. As mentioned, "gambling" occurs under N.J.S.A 2C:37-1(b) when something of value is risked upon the agreement that something of value will be won in the event of a specified outcome of a contest of chance or a future contingent event. Nothing in this definition nor in the gambling provisions in their entirety intimates a legislative requirement for identity of wagers and winnings; nor does there appear any such requirement for identity of the person taking the bets and the person distributing the winnings. In view of the social mischief intended to be controlled, *Lucky Calendar Co. v. Cohen,* 19 N.J. at 410, the Legislature is not likely to have imposed such a requirement upon no apparent rationale.

In summary, gambling can occur only when a participant risks "something of value," and that term in its legislative definition means the participant's risking of money or property or tangibles or intangibles as well as personal effort standing in their stead. The definition does not include lesser acts of personal inconvenience. Whether something of value is being risked in any particular situation, moreover, is to be ascertained by considering all of the relevant circumstances. The proposed promotions held in the casinos by which free tickets or coupons are given to all interested persons in anticipation of later drawings for prizes are lawful. The charter bus tour promotions which give a bonus to each bus patron without

3. It is important to note that a game may be a "contest of chance" notwithstanding that the skill of the contestant may also be a factor therein. *Boardwalk Regency v. Attorney General,* 188 N.J. Super. 372 (Law Div. 1982).

exception, is lawful, because of the absence of the element of chance. Another bus tour promotion is not lawful, however, since the bonus there is available to only bus patrons whose names are selected in a drawing and the inference must be that part of the patron's ticket price was staked upon the outcome of the drawing. The promotion is equally unlawful when the payments to the bus operator do not represent the source of the winnings ultimately paid by the casino because that sort of identity is not statutorily required.

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General

July 5, 1983

PAMELA S. POFF, *Director*
Division on Civil Rights
Room 400
1100 Raymond Boulevard
Newark, New Jersey 07102

FORMAL OPINION NO. 7—1983

Dear Director Poff:

You have asked for our opinion as to whether it is unlawful under the Law Against Discrimination for a lending institution to include inquiries in credit applications concerning the marital status of a prospective borrower. The Division on Civil Rights has received numerous inquiries from lending institutions as to whether a designation of marital status may be included on an application for credit when the information is necessary to either enable the institution to obtain an enforceable security interest or to create a valid lien, pass clear title, or waive inchoate rights to property. For the following reasons, it is our opinion that under the Law Against Discrimination a lender may make an inquiry in order to enable it to protect its interest in security provided on account of the loan. A lender, however, may not make an inquiry as to the marital status of a prospective borrower in order to ascertain his or her credit worthiness.

The Law Against Discrimination ("LAD") N.J.S.A. 10:5-12(i), provides that it shall be unlawful:

> For any person, bank, banking organization, mortgage company, insurance company or other financial institution, lender or credit institution to whom application is made for any loan or extension of credit. . . .
>
> 2. To use any form of application for such loan, extension of credit or financial assistance or to make record or inquiry in connection with applications for any such loan, extension of credit or financial assistance which expresses, directly or indirect-

> ly, any limitation, specification or discrimination as to . . . marital status . . . or any intent to make any such limitation, specification or discriminaton; unless otherwise required by law or regulation to retain or use such information.

The evident purpose of this section was to preclude blatant or subtle efforts by lenders to collect information about credit applicants for the purpose of practicing marital status discrimination. It was also designed to preclude lenders from attempting to discourage married or unmarried persons from applying for credit by indicating, directly or indirectly, the lender's intent to discriminate on the basis of marital status. The LAD is "aimed at subtle and covert activities designed to defeat its policy as well as at outright and blatant violations." *Wilson v. Sixty Six Melmore Gardens,* 106 N.J. Super. 182, 185 (App. Div. 1969). *See Passaic Daily News v. Blair,* 63 N.J. 474, 484-488 (1973) (placing job advertisements in sex-segregated advertising columns constitutes the making of a specification, limitation or discrimination based on sex). Where a creditor makes an inquiry as to marital status in a situation where there is no valid business need for that information, or where a valid business need is not obvious and is not explained to the applicant, it is reasonable to infer that the inquiry was actually made for the purpose of excluding or discouraging applicants on the basis of marital status.

On the other hand, there are certain situations in which a lender may have a valid business necessity at an appropriate stage of a credit application process for inquiring about an applicant's marital status. The Federal Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §1691, *et seq.,* for example, generally prohibits inquiries regarding marital status, *Harbaugh v. Continental Ill. Bank and Trust Co.,* 615 F. 2d 1169 (7th Cir. 1980), but allows a creditor:

> to make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness. [15 U.S. §1691(b)(1)].

The ECOA also permits a creditor to request "the signature of both parties to a marriage for the purpose of creating a valid lien, passing clear title, waiving inchoate rights to property, or assigning earnings. . ." 15 U.S.C. §1691d(a). Moreover, in New York, a state having a civil rights statute similar to the LAD,[1] the Division of Human Rights has adopted a regulation which provides that

> it shall not be considered an expression of limitation, specification or discrimination on the basis of sex or marital status if

1. The *New York Executive Law,* §296-a(1)(c), provides that it shall be unlawful for a creditor:

> To use any form of application for credit or use or make any record or inquiry which expresses, directly or indirectly, any limitation, specification, or discrimination as to . . . marital status. . . .

> 2. where application is made for a mortgage and the creditor determines that the signature of the spouse is required in order to pass clear title in the event of a default, a creditor requests information concerning marital status, provided that the information disclosed by such inquiry is used solely for the purpose of perfecting title. [9 N.Y.C.R.R. §466.7.]

The foregoing statutory and regulatory provisions contemplate situations in which a creditor may have valid business reasons for inquiring about the marital status of a credit applicant. These include situations where a loan is to be secured by property in which the applicant's spouse has an ownership interest or in which the spouse may have inchoate rights.

Although the LAD by its literal terms could be read to prohibit all inquiries by creditors regarding marital status, it is fundamental that the statute is to be interpreted sensibly in accordance with its remedial purpose. *N.J. Builders, Owners and Managers Assn. v. Blair,* 60 N.J. 330, 338 (1972). Moreover, "the matter of statutory construction . . . will not justly turn on literalisms . . . it will justly turn on the breadth of the objectives of the legislation and the commonsense of the situation." Id. at 339, *quoting New Jersey City Chapter Prop. Owner's Assn. v. City Council,* 55 N.J. 86, 100 (1969). It would be inconsistent with common sense to presume that the Legislature intended to preclude creditors from making inquiries regarding marital status in situations where such information is necessary to obtain an enforceable security interest. On the other hand, inquiries should be made only where needed for a valid business purpose and at the stage of the application process where such information is clearly needed. Moreover, to avoid the appearance of an intent to discourage applicants on the basis of marital status, such inquiries should be accompanied by a clearly worded written explanation of their business purpose and by a statement that the applicant's marital status will not be used to determine credit worthiness.[2]

In conclusion, it is our opinion that there is no absolute impediment under the Law Against Discrimination to an inquiry made by a lender as to the marital status of a prospective borrower provided, however, any inquiry, whether contained in an application for credit or otherwise, must be supported only by valid business concerns of the lender reasonably relating to the ascertainment and protection of the lender's rights and remedies. It is also our opinion that an inquiry should not be made either as a reason or subterfuge for an investigation into the credit worthiness of the applicant.

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General

2. In order to clearly define the obligations of creditors under N.J.S.A. 10:5-12(i), it is strongly recommended that the Division on Civil Rights and the Department of Banking jointly promulgate regulations setting forth situations in which creditors may make inquiries regarding marital status and specifying procedures to be followed by them.

July 11, 1984

COLONEL CLINTON L. PAGANO
Superintendent
Division of State Police
Department of Law and Public Safety
River Road
P.O. Box 7068
West Trenton, New Jersey 08625

FORMAL OPINION NO. 1—1984

Dear Superintendent Pagano:

You have asked for our opinion as to whether the requirement of certain statutes, that persons appointed to the uniformed law enforcement and firefighting services shall be between 21 and 35 years of age, is valid under the Age Discrimination in Employment Act (ADEA).[1] That Act provides that it shall be unlawful "to fail or refuse to hire . . . any individual [between the ages of 40 and 70] . . . because of such individual's age." 29 U.S.C. §§623(a)(1) and 631(a).

The constitutionality of applying the ADEA to the States was upheld by the United States Supreme Court in *EEOC v. Wyoming,* 103 S. Ct. 1054 (1983). As a result of this decision, it was concluded in *Formal Opinion* No. 5-1983 that the applicable provisions of the State uniformed services pension statutes which require the mandatory retirement of their members prior to age 70 were invalid and unenforceable under the ADEA. For the following reasons, you are advised that maximum hiring ages established by the noted statutes for the uniformed law enforcement and firefighting services are similarly invalid and unenforceable.[2]

It is settled that a restriction which uniformly bars the employment of persons age 40 and older is a *prima facie* violation of the ADEA. *EEOC v. County of Allegheny,* 705 F. 2d 679, 680 (3rd Cir. 1983). Such a hiring age ceiling is permissible under the Act only if demonstrated to be a bona fide occupational qualification (BFOQ) within the meaning of 29 U.S.C. §623(f)(1), which provides that it shall not be unlawful for an employer to take any action otherwise prohibited "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." Although the BFOQs subject to this exception are not further defined by the statute, the Equal Employment Opportunity Commission (EEOC), which is charged with the enforcement of this statute, has promulgated a regulation which states that a BFOQ will be valid only where:

> (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. [29 C.F.R. §1625.6(b).]

The regulation further provides that, "[i]f the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact." *Ibid.*

Two reported decisions have upheld maximum hiring ages for law enforcement personnel under these BFOQ standards. In *EEOC v. Missouri State Highway Patrol,* 555 F. Supp. 97 (W.D. Mo. 1982), the court held that a maximum hiring age of 32 for State troopers validly furthered public safety by maximizing the career length of the average trooper, since "[t]he safest patrolman is one who has acquired several years of experience," and "[a]n experienced patrolman is best able" to serve as an administrator, the job most senior troopers performed, after approximately 11 years experience as a trooper with line duties. 555 F. Supp. at 106. Similarly, in *Poteet v. City of Palestine,* 620 S.W. 2d 181 (Tex. Civ. App. 1981), the court upheld the refusal of a municipal police department to consider applications from persons older than age 40 on the ground that the court had "a factual basis for believing" that it would be impossible or impracticable to assess the physical fitness of persons older than age 36 on an individualized basis and that, accordingly, "[the] public safety would be jeopardized to some degree by eliminating the employer's hiring policy. . . ." 620 S.W. 2d at 184-185.

However, the validity of such maximum hiring ages in the law enforcement field has been decisively rejected by several other courts. In *EEOC v. County of Los Angeles,* 706 F. 2d 1039 (9th Cir. 1983) *cert. den.* 104 S. Ct. 984-985 (1984), the Court of Appeals recognized that police work is physically arduous and requires strength, ability and good reflexes, but affirmed the conclusion of the district court that a maximum hiring age of 35 for county sheriffs and fire department helicopter pilots was invalid since the ability to perform these tasks, as well as the prospective risk from such ailments as heart disease, could be detected by the use of simple, inexpensive and extremely reliable physical performance tests. 706 F. 2d at 1043-1044. The same conclusion was reached in *EEOC v. County of Allegheny, supra,* and *Rodriguez v. Taylor,* 428 F. Supp. 1118 (E.D. Pa. 1976), *damage award vacated* 569 F. 2d 1231 (3rd Cir. 1977), *cert. den.*

1. Identical maximum hiring restrictions are imposed by State statute with respect to State Police, *see* N.J.S.A. 53:1-9, State motor vehicle inspectors, *see* N.J.S.A. 39:2-6.1, as well as with respect to paid municipal firefighters and municipal police officers. N.J.S.A. 40A:14-12,127.

2. In EEOC, the potential impact of the ADEA on a state's mandatory retirement policy was held to be an insignificant intrusion into the area of integral state operations under the Tenth Amendment to the United States Constitution. The court noted that a state would still be in a position to assess the fitness of its employees because the Act only requires the state to achieve its goals in a more individualized manner through a demonstration that age is a bona fide occupational qualification for the particular job involved. The invalidation of uniform maximum entry level ages by the ADEA is no greater an intrusion into the area of integral state operations since in this case the state may also demonstrate that a maximum entry level age is a bona fide occupational qualification for certain jobs in the uniformed law enforcement and firefighting services.

436 U.S. 913 (1978), where the courts invalidated maximum hiring ages of 40 for police officers and municipal security officers on the ground that there was no evidence that substantially all persons over this age would be unable to safely and efficiently perform the duties of these jobs or that it would be impossible to test applicants individually.

It is our opinion that the results reached by these latter cases are more consistent with the applicable provisions of the ADEA. First, there appears to be a valid distinction, as recognized by the court in *EEOC v. County of Los Angeles,* between the physical demands of inter-city bus driving, where age restrictions have been upheld, and police work. The validity of a hiring age restriction for the uniformed services must be considered in light of the fact that the physical demands of such positions, and hence the degenerative consequences of age, are less subtle than those involved in bus driving and are thus easier to objectively ascertain. *See Aaron v. Davis,* 414 F. Supp. 453, 462 (E.D. Ark. 1976). Moreover, the overwhelming weight of authority, involving law enforcement and the related profession of fire fighting, holds that the ability of particular individuals to perform these jobs may adequately be determined on the basis of existing medical testing procedures, and has rejected the contention accepted by the court in *Poteet v. City of Palestine* that an employer need only show that it had a reasonable basis for believing that such procedures would be inadequate. *See EEOC v. County of Los Angeles, supra; EEOC v. County of Allegheny, supra; Rodriguez v. Taylor, supra; Orzel v. City of Wauwatosa Fire Dept.,* 697 F. 2d 743, 755 (7th Cir.) *cert. den.* 104 S. Ct. 484 (1983) *EEOC v. City of St. Paul,* 671 F. 2d 1162, 1166 (8th Cir. 1982); *Johnson v. Mayor and City Council of Baltimore,* 515 F. Supp. 1287, 1298-99 (D. Md. 1981), *cert. den.* 455 U.S. 944 (1982); *Aaron v. Davis, supra,* 414 F. Supp. at 463.

In addition, the conclusion reached by the court in *EEOC v. Missouri State Highway Patrol,* 555 F. Supp. at 106, that a hiring age restriction may constitute a BFOQ because it provides the most collectively experienced police force appears, in essence, to be a restatement of the argument that an age restriction may be valid on the ground that it ensures the maximum return on the economic investment made by the State in training new recruits. *See Smallwood v. United Airlines,* 661 F. 2d 303, 307 (4th Cir. 1981) *cert. den.* 456 U.S. 1007 (1982). However, it is settled that such economic considerations may not be used to establish an age restriction as a BFOQ. *Ibid.; EEOC v. County of Los Angeles, supra,* 706 F. 2d at 1042; 29 C.F.R. §860.103(h); *cf. City of Los Angeles Dept. of Water & Power v. Manhart,* 435 U.S. 702, 716-717 (1978) (cost-jusitification defense not available in Title VII action). Finally, there is no suggestion that the maximum hiring age restriction in the uniformed services is based upon any specific medical or other factual findings regarding the ability of persons above the prescribed age to perform his or her duties. However, it is established that such age restrictions must "be based on something more than mere speculation or the subjective belief" that persons older than a prescribed age are incapable of handling the physical demands of a job, and that in the absence of specific factual proof thereof an age limit will not be sustained. *Orzel v. City of Wauwatosa Fire Dept., supra,* 697 F. 2d at 755; *accord, EEOC v. County of Allegheny, supra,* 705 F. 2d at

681; *EEOC v. County of Santa Barbara,* 666 F. 2d 373, 376 (9th Cir. 1982).

You are therefore advised that the requirement of statutes that appointees to the uniformed law enforcement and firefighting services shall be no older than 35 are invalid and unenforceable under the ADEA.[3] A maximum hiring age may be validly adopted in an amended format only when it can be shown that all or substantially all of the persons above a prescribed maximum hiring age are unable to perform the duties of the position or that it is impossible to assess the fitness of individual applicants over the prescribed age on an individual basis.

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General

3. The ADEA by its terms protects only persons between the ages of 40 to 70 against discrimination in employment. The New Jersey statutory scheme establishes a maximum hiring age for the uniformed services at 35. It would be unreasonable though to assume that the legislature intended a maximum hiring age to apply for persons between 35 and 40 when persons up to 30 years over the age of 40 are not subject to a comparable limitation. A statute should be interpreted sensibly and not to reach an anomalous or irrational result. *Suter v. San Angelo Foundry & Mach. Co.,* 81 N.J. 150 (1979); *Federal Paper Bd. Co., Inc. v. Borough of Bogota,* 129 N.J. Super. 308 (App. Div. 1974). Moreover, a statute may be deemed to be severable only where the offensive portion can be excised without impairing the principal object of the statute as a whole. *110-112 Van Wagenen Avenue Co. v. Julian,* 101 N.J. Super. 230, 235 (App. Div. 1968). In the instant situation, the application of maximum hiring ages to a limited group of persons between the ages of 35 to 40 would not only be unreasonable but also inconsistent with the apparent purpose of the statute to prohibit the appointment of *all* persons of whatever age over 35.

November 15, 1984

HONORABLE MICHAEL M. HORN
State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION NO. 2—1984

Dear Treasurer Horn:

It has been brought to our attention that Public Question Number 2 ("The Human Services Facilities Construction Bond Act"), which was presented on the ballot and approved by the people at the General Election held on November 6, 1984, contained language concerning the refinancing of bonds authorized by the Act which does not appear in section 22 of Senate Bill No. 2095, The Human Services Facilities Construction Bond Act of 1984. The question is raised whether the Issuing Officials may lawfully issue bonds pursuant to the provision of the Bond Act. For the following reasons, it is our opinion that the inclusion of additional wording on the ballot concerning the refinancing of bonds authorized by the Act

constitutes an immaterial deviation from the substantive objective of the Bond Act and the Issuing Officials may lawfully and properly issue the bonds.

On September 13, 1984, the Legislature passed Senate Bill No. 2095, the Human Services Facilities Construction Bond Act of 1984 (hereinafter referred to as the Bond Act or Act). The Act authorized the creation of a debt of the State of New Jersey through the issuance of bonds as direct obligations of the State in the sum of $60 million for the purpose of capital expenditures for the cost of construction of human services facilities. Specifically, it authorized capital expenditures for renovation and improvement of human services facilities; for the maintenance of physical plant accreditation standards; to upgrade solid waste facilities at human services institutions; for grants to establish alternative residential facilities for deinstitutionalized individuals, and for the replacement, rehabilitation, repair and improvement of human services facilities. The Act contained the usual provisions with respect to the issuance of State bonds. It provided that the bonds shall be serial bonds, term bonds, or a combination thereof, which shall be subject to redemption prior to maturity and which shall mature and be paid not later than 35 years from the date of issuance. It also authorized the Issuing Officials to issue refunding bonds and in an amount not to exceed the amount necessary to effectuate the refinancing of all or any bonds issued pursuant to the Act, for the purpose of refinancing any bonds issued pursuant to the Act, subject to the enactment of legislation providing for the issuance of refunding bonds in accordance with and under the authorization of N.J. Const. (1947), Art. 8, Sec. 2, par. 3.

Of significance is the following provision contained in Section 22 of the Act:

> For the purpose of complying with the provisions of the State Constitution this act shall, at the general election to be held in the month of November, 1984, be submitted to the people. To inform the people of the contents of this act, it shall be the duty of the Secretary of State, after this section takes effect, and at least 15 days prior to the election, to cause this act to be published in at least 10 newspapers published in the State and to notify the clerk of each county of this State of the passage of this act, and the clerks respectively, in accordance with the instructions of the Secretary of State, shall cause to be printed on each of the ballots, the following:. . .
>
> HUMAN SERVICES FACILITIES
> CONSTRUCTION BOND ISSUE
>
> Should the 'New Jersey Human Services Facilities Construction Bond Act of 1984,' which authorizes the State to issue bonds in the amount of $60,000,000.00 for the planning, construction, reconstruction, development, erection, acquisition, extension, improvement, rehabilitation, and equipping of human services facilities, *[and in a principal amount sufficient to refinance all or any of these bonds if it will result in a present value savings,]* and providing the ways and means to pay for the principal and interest on these bonds, be approved?
>
> INTERPRETIVE STATEMENT
>
> Approval of this act will authorize the sale of $60,000,000.00 in bonds to be used (1) to bring human services facilities into compliance with Life Safety Code requirements; (2) to maintain physical plant accreditation standards; (3) to upgrade solid waste facilities at human services institutions; (4) to provide grants to establish alternative residential facilities for deinstitutionalized individuals; **and** (5) to replace, rehabilitate, repair and improve human services facilities* [; (6) and provide bonds in a sufficient amount to refinance all or any of these bonds if it will result in a present value savings]*. (Emphasis in original).

The Act explained that the matter enclosed in brackets above [thus] was not enacted and was to be omitted in the law.

Pursuant to section 22 of the Act, the Secretary of State certified to the county clerks of the respective counties that there should appear on the ballot to be voted upon by the voters of the entire State at the General Election to be held on November 6, 1984, as Public Question No. 2, the question and interpretive statement appearing in the Act. The question and interpretive statement published on the ballot used at the election were identical to that set forth in the Act, except that the material contained within the brackets, dealing with how the bonds might be refinanced, was not deleted from, and therefore remained included in, the question and interpretive statement appearing on the ballot with the brackets themselves having been removed from the text. The question so published and stated in the official ballot was also contained in the General Election Sample Ballots distributed to voters in advance of the General Election. The Act was approved by a wide majority of the voters in the General Election of November 6, 1984. In view of the fact that the question and interpretive statement published on the official ballot for the General Election contained information concerning the possible refinancing of the bonds, which had been deleted from the question and interpretive statement stated in the Act, the precise issue is whether bonds may be issued by the State of New Jersey under and pursuant to the Act.

It is significant to note that the Act specifically contained a provision (Section 19) authorizing the Issuing Officials to issue refunding bonds and in an amount necessary to effectuate the refinancing of all or any bonds issued pursuant to the Act, at any time and from time to time, for the purpose of refinancing any bond issue pursuant to the Act, subject to the enactment of legislation providing for the issuance of refunding bonds in accordance with and under the authorization provided by N.J. Const. (1947), Art. 8, Sec. 2, par. 3. The Act further provided that such refunding bonds would constitute direct obligations of the State of New Jersey, and the faith and credit of the State would be pledged for the payment of the principal thereof and the interest thereon. Thus, the information included in the question on the ballot stating that the bonds would be issued "in

a principal amount sufficient to refinance all or any of these bonds if it will result in a present value savings," and the information incorporated in the interpretive statement stating that approval of the Act "will . . . provide bonds in a sufficient amount to refinance all or any of these bonds if it will result in a present value savings" was not substantially different from the refinancing provisions actually contained in Section 19 of the Act.

More importantly, voter approval of the wording on the ballot authorizing the creation of a debt for the purpose of refinancing all or a portion of any outstanding bonds was not even required. Pursuant to an amendment to Art. 8, §2, ¶3, of the State Constitution, approved at the General Election of November 8, 1983, no voter approval is required for any law authorizing the creation of a debt in an amount for the refinancing of all or a portion of any outstanding debts of the state. The wording on the ballot concerning the possible refinancing of bonds which had in fact been deleted by the legislature from the question and interpretive statement in the Act was superfluous. It did not in any way materially alter the substantive object of the Act specifying the principal amount of bonds to be issued and the several purposes to which the proceeds of such bonds would be applied.

The great weight of authority recognizes that the inclusion of information in a question or interpretive statement concerning the technical or financial details of a bond issue, which is in excess of, and not required by, the statute authorizing the placement of the question on the ballot, is unlikely to affect in a meaningful way the choice of the electorate. Consequently, courts have regarded the incorporation of such information as an insubstantial irregularity that does not vitiate the validity of the election. *E.g., Knappenberger v. Hughes,* 35 N.E. 2d 317 (Ill. Sup. Ct. 1941); *Anselmi v. Rock Springs,* 80 P. 2d 419 (Wyo. Sup. Ct. 1938); *Allison v. Phoenix,* 33 P. 2d 927 (Az. Sup. Ct. 1934). Thus, in *Anselmi v. Rock Springs, supra,* the public question placed on the ballot included a provision that the bonds to be issued by the City of Rock Springs, Wyoming, would be issued in an amount not exceeding 2% of the assessed valuation of the city, when computed together with outstanding general bonds. In actuality, the total bond indebtedness of the city at the time of the election was already nearly 4% of the assessed valuation and would be approximately 5-1/2% when computed together with the proposed bonds. Nevertheless, the court approved the bonds. In doing so, the court noted that Wyoming Law did not require that a statement of the city's total indebtedness be included in the question placed on the ballot. Under these circumstances, the information included in the ballot was treated as surplusage which, even though incorrect, was found to be an insignificant irregularity which did not cast doubt on the validity of the election. 80 P. 2d at 424-425. Similarly, in *Knappenberger v. Hughes, supra,* the statute providing that a question be placed on the ballot concerning whether or not an Illinois banking act should be amended did not require or provide that an explanatory statement of the question be included on the ballot. However, the Secretary of State added an interpretive statement on the ballot explaining the purpose of the proposed amendment. In rejecting the contention that the election was rendered invalid because the ballot was not in the form

prescribed by the General Assembly, the court held that although the Secretary of State "overstepped his authority in having [the unnecessary information] placed on the ballot . . . the error was on the side of giving the voters more information and, if not stated so as to mislead them, it affords no ground for declaring the election void." 35 N.E. 2d at 320. Likewise, in *Smith v. Calhoun Community Unit School Dist. No. 40,* 157 N.E. 2d 59 (Ill. Sup. Ct. 1959), the Illinois Supreme Court considered the validity of school bonds to be issued by two counties. A special election for the purpose of submitting the bond issue question to the voters was called for by a resolution adopted by the two counties. The question, as set forth in the resolution, included information specifying the maturity dates of the bonds. However, when the question appeared on the ballot, one of the maturity dates was omitted from the question. As in *Anselmi v. Rock Springs, supra,* the Illinois School Code did not require that information pertaining to the maturity dates of school bonds be set forth in public questions concerning such bond issues. In approving the bonds, the court stated:

> It is well settled that an official ballot will not be vitiated by the incorporation of information beyond that required by the statute. When such additional information is incorporated in the ballot, the test is whether it would tend to confuse or misinform a voter so as to affect his free choice .... There is nothing misleading about the official ballot used in this election. [157 N.E. 2d at 63; citations omitted.]

Furthermore, even in instances where there have been mistakes, misstatements or omissions concerning financial provisions of proposed bond issues which appear in the ballot itself, bond statutes so approved by the voters have not been declared invalid; such irregularities do not have the tendency to mislead, deceive or confuse the people and are not considered subtantial. *E.g., Dunlap v. Williamson,* 369 P. 2d 631 (Okl. Sup. Ct. 1962); *State v. Maxwell,* 60 N.E. 2d 183 (Ohio Sup. Ct. 1945); *San Diego County v. Hammond,* 59 P. 2d 478 (Cal Sup. Ct. 1936). Where the ballot itself correctly sets forth the essential provisions of the bond proposition to be passed upon by the electorate (as in the present situation involving the Human Services Facilities Construction Bond Act (1984)), a misstatement, irregularity or omission of an insubstantial nature in a public question appearing on the election ballot will not suffice to vitiate the law authorizing the proposed bonds. *State v. McGlynn,* 135 N.E. 2d 632 (Ohio Ct. of App. 1955).

In *Formal Opinion* No. 6-1964, issued on December 29, 1964, a question was raised as to the significance of differences between the Higher Education Construction Bond Act of 1964 as enacted and as published by the Secretary of State. The Attorney General concluded that there was no legal defect with respect to the publication because it constituted substantial compliance with the provisions of the Bond Act. It was reasoned that where the differences pertained to technical changes and minor alterations in phraseology and where the published act fully set forth the specific amount of indebtedness incurred for higher education

purposes, those differences did not materially alter the substantive provisions of that Bond Act. Similarly, in the instant situation, the differences between the Bond Act and the wording presented on the ballot dealing with refinancing have no tendency to mislead, deceive or confuse the public with respect to the basic legislative object to incur a debt in the amount of $60 million for improvements to human services facilities.

Decisions which have declared bond acts invalid because of defects in election notices or in the statement of the public questions submitted usually have involved instances where particular provisions or terms of proposed bonds have been in conflict with specific statutory requirements, *Mann v. City of Artesia,* 76 P. 2d 941 (N.M. Sup. Ct. 1938), or where general provisions have been construed by state courts to require the inclusion of the subject matter omitted. *People v. Chicago, Rock Island & Pacific R. Co.,* 128 N.E. 2d 710 (Ill. Sup. Ct. 1955).

New Jersey decisions pertaining to elections in general clearly support the conclusion that the Bond Act has been lawfully adopted. In *Sharrock v. Keansburg,* 15 N.J. Super. 11 (App. Div. 1951) it was contended that an election should be invalidated because of the failure of the county clerk to cause to be printed on the ballot the explanatory statement of the public question in the exact verbiage appearing in the pertinent section of the statute. The court noted that the explanatory statement printed on the ballot "displayed more clarity of expression than the one contained in the statute" and found that the variance in language was clearly insubstantial, stating:

> [I]f it is evident that notwithstanding the dereliction of duty of the officer there was a fair election and an honest return and no violation of such matters as the recognized inherent and inviolable rights of the voters, the courts in the public interest have frequently ignored the harmless irregularity.
>
> . . . .
>
> The right of suffrage in a government of and by a free people must always be regarded with jealous solicitude. To overthrow the expressed will of a large number of voters for no fault of their own and solely because of some harmless irregularity would in many cases defeat the paramount object of the election laws [15 N.J. Super. at 18-19].

It has thus been recognized by the New Jersey courts that technical irregularities in election procedures cannot serve to invalidate the results of an otherwise fair election and thus frustrate the expressed will of the electorate. In *Wene v. Meyner,* 13 N.J. 185, 196 (1953), this essential policy was aptly expressed.

> Where, as here, there is an unwitting omission of a formal requirement otherwise supplied in substance, the ballots are invulnerable; the overturning of the result in such circumstances would frustruate the will of the voters for errors and omissions of form not related to the merits; and this would do violence to

> the legislative will. In this regard, acts and omissions by the district board mandatory before election may for reasons of policy be deemed directory after the election, if it indubitably appears that the election result was not thereby prejudiced. The question is essentially one of fairness in the election. An election is not vitiated by the defaults of election officers not involving malconduct or fraud, unless it be shown that thereby the free expression of the popular will in all human likelihood has been thwarted.

The text of Public Question No. 2 on the official ballot contained all of the information set forth in Section 22 of Senate Bill No. 2095. Thus, the statement contained the question to be voted upon as well as the interpretive statement appearing in the Act. The incorporation on the ballot of additional information concerning how the bonds might be refinanced was merely superfluous. Because the Act already specifically set forth the manner in which the bonds could be refinanced, the inclusion of this information was not misleading; but rather a harmless irregularity. If anything, the voters were given more information than was necessary under the Act and, significantly, voter approval for such refinancing was not required pursuant to Art. 8, Sec. 2, par. 3. It is thus clear that the inclusion of the information on the ballot which had been deleted from the Act concerning the refinancing of bonds did not constitute a material deviation from the substantive objective of the Bond Act. For these reasons, it is our opinion the Human Services Facilities Construction Bond Act of 1984 was duly and validly approved by the people at the General Election. The Issuing Officials may lawfully issue bonds in accordance with the provisions of the Human Services Facilities Construction Bond Act of 1984.

Very truly yours,
MICHAEL R. COLE
Acting Attorney General

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Age—
- Maximum hiring age for law enforcement personnel valid only when it is impossible to assess fitness of individual applicants over prescribed age. F.O. 1, 1984.
- Statutory provisions requiring mandatory retirement prior to age 70 invalid. F.O. 5, 1983.

Alcohol Beverage Control, Division of—
- Malt beverages may be sold for off-premises consumption during same days and hours that municipalities permit on-premises consumption of alcoholic beverages. F.O. 10, 1978.

Attorney and Client—
- Attorneys subject to licensure requirements of Real Estate Act except for professional duties within the scope of practice of law. F.O. 13, 1979.

Automobile—
- Dept. of Transportation may lend federal funds to employers for purchase of van pool vehicles. F.O. 16, 1980.

Automobile—
- *See also* Motor Vehicles.

B.

Banks and Banking—
- Anti-Redlining Act violated when criteria for home mortgages has disproportionate effect on certain neighborhoods. F.O. 7, 1979.
- Bank may assess prepayment penalty against borrower who prepays an installment loan prior to due date of first payment, F.O. 1, 1983.
- Bank moneys may not be used to establish or administer a political action committee. F.O. 14, 1979.
- Customers of out-of-state banking institutions may access their accounts through automatic teller machines operated by New Jersey banks. F.O. 6, 1982.
- Hearings on bank charter applications are contested cases and must be conducted by administrative law judge. F.O. 15, 1979.
- Hearings on branch banking applications are not contested cases required to be conducted before administrative law judge. F.O. 6, 1979.
- Interest rate on secondary mortgage loan may not be increased during first three years of loan term. F.O. 3, 1982.
- Lending institution may inquire into marital status of prospective borrower in order to protect its security interest. F.O. 7, 1983.

Bingo—
- Cable television bingo game does not violate state gambling law. F.O. 9, 1978.

Bonds—
- Additional wording included on ballot of Human Services Facilities Construction Bond Act of 1984 did not constitute material deviation from substantive objective of Act. F.O. 2, 1984.
- Insurance corporation may give financial support to passage of Transportation Rehabilitation and Improvement Bond Issue. F.O. 23, 1979.

C.

Cable Television, Office of—
- Municipality may own and operate cable television system. F.O. 5, 1978.
- Television bingo game does not violate state gambling law. F.O. 9, 1978.

Casino Control Commission—
- Casino may sponsor backgammon tournament provided no admission is charged. F.O. 1, 1980.
- Casino-related promotions constitute unlawful gambling only if participant risks something of value. F.O. 6, 1983.
- Proposed casino craps tournament violates Penal Code's prohibition against gambling. F.O. 9, 1981.

Citizens and Citizenship—
- Public school teachers must satisfy statutory citizenship requirements. F.O. 18, 1980.
- State can require public school teachers to be or declare intention to become citizens. F.O. 12, 1979.

Colleges and Universities—
- Alumni associations and development funds organized and operated independent of state colleges are not subject to statutory requirements imposed on state agencies. F.O. 2, 1981.
- State Colleges may not form independent corporations to carry out college functions unless all statutory requirements imposed on state agencies are satisfied. F.O. 22, 1980.

Community Affairs, Department of—
- Construction of resource recovery facilities subject to Local Public Contracts Law. F.O. 14, 1980.
- Jurisdiction to hear cases under Relocation Assistance Act. F.O. 3, 1979.
- Treatment of proceeds of sale of municipal assets under Local Government Law. F.O. 23, 1980.
- Urban aid moneys treated as modification under Local Government Cap Law. F.O. 21, 1980.

Consumer Affairs, Division of—
- IRA and Keough Plan accounts providing professional management services for a fee are consumer contracts and should conform to Plain Language Law, N.J.S.A. 56:12-2. F.O. 7, 1982.

Corporations—
- State Colleges may not form independent corporations to carry out college functions unless all statutory requirements imposed on state agencies are satisfied. F.O. 22, 1980.

Corrections, Department of—
- Chief executive officer of prison has discretion to restore forfeited commutation credits. F.O. 8, 1979.
- Commutation and/or work credits awarded to sex offenders under Penal Code. F.O. 11, 1980.
- Parolee who absents himself from parole supervision cannot claim credit for "street time." F.O. 25, 1979.
- Single parole eligibility date should be calculated on aggregated sentence. F.O. 26, 1979.

Counties—
- Construction of resource recovery facilities subject to Local Public Contracts Law. F.O. 14, 1980.
- Not authorized to participate in commercially managed deferred compensation plans. F.O. 2, 1980.

D.

Domicile and Residence—
- Residency requirement for licensure of podiatrists unconstitutional. F.O. 24, 1980.

Durgs and Narcotics—
- Pharmacists must substitute generic drugs unless expressly prohibited by prescriber. F.O. 17, 1979.

E.

Education, Commissioner of—
- Auxiliary services contract must be approved by Commissioner of Eduation. F.O. 1, 1984.

Education, Department of—
- State can require public school teachers to be or declare intention to become citizens. F.O. 12, 1979.
- Public school teachers must satisfy statutory citizenship requirements. F.O. 18, 1980.

Educational Services Commission—
- Auxiliary services contract between private agency and local school board must be approved by Commissioner of Education. F.O. 1, 1984.

Election Law Enforcement Commission—
- Bank moneys may not be used to establish or administer political action committee. F.O. 14, 1979.
- Insurance corporation may give financial support to passage of Transportation Rehabilitation and Improvement Bond Issue. F.O. 23, 1979
- Non-insurance holding corporation of insurance company licensed to do business in this state is prohibited from making political contributions. F.O. 4, 1983.

Elections—
- Additional wording included on ballot of Human Services Facilities Construction Bond Act of 1984 did not constitute material deviation from objective of Act. F.O. 2, 1984.
- Qualifications for office. F.O. 5, 1980.

Eminent Domain—
- Department of Community Affairs has jurisdiction to hear cases under Relocation Assistance Act. F.O. 3, 1979.
- No legal impediment to State purchase of property in excess of appraised value. F.O. 8, 1980.

Environmental Protection, Department of—
- DEP may regulate development on "water-front" portion of uplands adjacent to navigable waters or streams. F.O. 6, 1980.
- Solid waste management districts authorized to direct waste to preferred facilities and to establish uniform rates. F.O. 12, 1980.
- Solid waste management districts may require that waste be directed to specific disposal facilities. F.O. 3, 1980.

F.

Food Stamp Program—
- State and county welfare agencies responsible for investigation of abuses in Food Stamp program. F.O. 2, 1978.

Freedom of Religion—
- Refusal of advance consent for blood transfusion does not bar Jehovah's Witnesses from adoption rights. F.O. 20, 1979.

G.

Gaming—
- Cable television bingo game does not violate State gambling law. F.O. 9, 1979.
- Casino may sponsor backgammon tournament provided no admission is charged. F.O. 1, 1980.
- Casino-related promotions constitute unlawful gambling only if participant risks something of value. F.O. 6, 1983.

New Jersey State Lottery may use consumer-operated video game. F.O. 5, 1982.
N.J.S.A. 5:5-64 does not permit carryover of undistributed percentage of pari-mututal pool to the next racing day. F.O. 19, 1980.
Proposed casino craps tournament violates Penal Code's prohibition against gambling. F.O. 9, 1981.
Uncollected checks received by casino licensee and not deposited in accordance with N.J.S.A. 5:12-101(b) and (c) do not constitute taxable gross income. F.O. 7, 1981.

Government Immunity and Liability—
Dept of Transportation is immune from local land use regulations in proceeding with Erie Lackawanna reelectrification project. F.O. 4, 1978.

Green Acres Program—
No legal impediment to State purchase of property in excess of appraised value. F.O. 8, 1980.

H.

Hackensack Meadowlands Development Commission—
HMDC has authority to control flow of solid waste within District. F.O. 18, 1979.

Health Benefits Commission, State—
Equality of benefits for all public employees at State and local level. F.O. 8, 1981.

Health, Department of—
Nursing home rate reimbursement appeal is contested case. F.O. 10, 1979.

Higher Education, Department of—
Alumni association and development funds organized and operated independent of state colleges are not subject to statutory requirements imposed on state agencies. F.O. 2, 1981.
Board of Higher Education does not have authority to license foreign medical schools nor regulate their course of instruction. F.O. 25, 1980.
State colleges may not form independent corporations to carry out college functions unless all statutory requirements imposed on state agencies are satisfied. F.O. 22, 1980.

Hospitals and Nursing Homes—
Rate reimbursement appeal is contested case. F.O. 10, 1979.
Senior citizens who are inpatients in nursing homes or hospital may not be excluded from benefits of Pharmaceutical Assistance for the Aged Program. F.O. 3, 1978.

Hospitals and Nursing Homes—
See also Psychiatric Hospitals.

Human Services, Commissioner—
Senior citizens who are inpatients in nursing homes or hospitals may not be excluded from benefits of Pharmaceutical Assistance for the Aged program. F.O. 3, 1978.

Human Services Facilities Construction Bond Act of 1984—
Additional wording included on ballot did not constitute material deviation from substantive objective of Act. F.O. 2, 1984.

Husband and Wife—
Lending institution may inquire into marital status of prospective borrower in order to protect its security interest. F.O. 7, 1983.
Senior citizen homestead rebate available to surviving spouse who meets certain conditions. F.O. 24, 1979.

I.

Insurance—
Commissioner of Insurance has authority to determine reasonable rates as applied to particular insurance. F.O. 1, 1978.
Insurance corporation may give financial support to passage of Transportation Rehabilitation and Improvement Bond Issue. F.O. 23, 1979.
Non-insurance holding corporation of insurance company licensed to do business in this state is prohibited from making political contributions. F.O. 4, 1983.
Regulation of insurers' nonrenewal of auto property damage coverage. F.O. 8, 1982.

Interest—
Rate on secondary mortgate loan may not be increased during first three years of long term. F.O. 3, 1982.

Intoxicating Liquors—
Malt beverages may be sold for off-premises consumption during same days and hours that municipalities permit on-premises consumption of alcoholic beverage. F.O. 10, 1978.

J.

Jehovah's Witnesses—
Refusal of advance consent for blood transfusion does not bar Jehovah's Witnesses from adoption rights. F.O. 20, 1979.

L.

Labor and Industry, Department of—
Sick leave payments constitute wages for purpose of calculating base year earnings under N.J.S.A. 43:21-27. F.O. 20, 1980.

Legislature—
Legislative veto of agency rules by concurrent resolution violates N.J. Constitution. F.O. 3, 1981.
Qualifications for office. F.O. 5, 1980.

Licenses—
Motor vehicle license suspension hearing is contested case and must be conducted by Administrative Law Judge. F.O. 22, 1979.

"Lifeline" Law—
Board of Public Utilities report does not contain proposed "lifeline" rate. F.O. 1, 1979.

Local Government Cap Law—
Expenditures for programs reimbursed by Federal or State funds excluded from cap. F.O. 4, 1982
Moneys appropriated in anticipation of deficit in municipally owned utility not exempt from budget cap. F.O. 4, 1980.
Municipal or county expenditures for implementation of solid waste management plans not generally exempt from local government cap. F.O. 16, 1979.
Municipality may make emergency appropriation for purpose unforseen at time of budget adoption or for which provision was inadequate. F.O. 26, 1980.
Portion of revenue generated by in-lieu of tax payments may be excluded from municipal budget cap. F.O. 7, 1980.
Treatment of proceeds of sale of municipal assets. F.O. 23, 1980.
Treatment of Urban Aid moneys. F.O. 21, 1980.

Local Government Services, Division of—
Bidding requirements of Local Public Contracts Law applies to all purchase of goods and services. F.O. 2, 1983.
Counties and municipalities not authorized to participate in commercially managed deferred compensation plans. F.O. 2, 1980.
Emergency appropriations under N.J.S.A. 40A:4-46 can only be made for purpose unforseen at adoption of municipal budget. F.O. 10, 1980.

Lotteries—
Cable television bingo game does not violate state gambling law. F.O. 9, 1978.
New Jersey State Lottery may use consumer operated video game. F.O. 5, 1982.

M.

Marlboro State Hospital—
Special police have authority to patrol perimeter adjacent to institution. F.O. 19, 1979.

Marriage and Divorce—
Lending institution may inquire into marital status of prospective borrower in order to protect its security interest. F.O. 7, 1983.

Medical Assistance and Health Services, Division of—
Senior citizens who are inpatients in nursing homes or hospitals may not be excluded from benefits of Pharmaceutical Assistance for the Aged Program. F.O. 3, 1978.

Medical Examiners, State Board of—
Board of Higher Education does not have authority to license foreign medical schools nor regulate their courses of instruction. FO.O. 25, 1980.

Medicare and Medicaid—
Senior citizens who are inpatients in nursing homes or hospitals may not be excluded from benefits of Pharmaceutical Assistance for the Aged Program. F.O. 3, 1978.

Mortgages—
Anti-Redlining Act violated when criteria for home mortgages has disproportionate effect on certain neighborhoods. F.O. 7, 1979.
Interest rate on secondary mortgage loan may not be increased during first three years of loan term. F.O. 3, 1982.

Motor Vehicles—
Conviction on subsequent alcohol related offense not required to revoke driving privileges of motorist who refuses to take breath chemical test on subsequent drunk-driving violation. F.O. 4, 1981.
Truck found on New Jersey highway loaded in excess of weight limitation specified on its foreign registration does not violate N.J.S.A. 39:3-84.3. F.O. 11, 1979.

Motor Vehicles, Division of—
Certificates issued to intrastate carriers of bulk commodities under grandfather clause permit limited activities only. F.O. 12, 1978.
Motor vehicle license suspension hearing is contested case and must be conducted by Administrative Law Judge. F.O. 22, 1979.

Municipal Corporations—
Budgets—Emergency appropriations under N.J.S.A. 40A:4-46 can only be made for purpose unforseen at adoption of local budget. F.O. 10, 1980.
Budgets—Moneys appropriated in anticipation of deficit in municipally owned utility not exempt from budget cap. F.O. 4, 1980.
Budgets—Municipality may make emergency appropriation for purpose unforseen at time of budget adoption or for which provision was inadequate. F.O. 26, 1980.
Budgets—Portion of revenue of in-lieu of tax payments may be excluded from municipal budget cap. F.O. 7, 1980.
Budgets—Spending limitations of cap law do not apply to expenditures made to provide matching funds. F.O. 4, 1982.
Budgets—Treatment of proceeds of sale of municipal assets under Local Government Cap Law. F.O. 23, 1980.
Department of Community Affairs has jurisdiction to hear cases under Relocation Assistance Act. F.O. 3, 1979.
Municipality may own and operate cable television system. F.O. 5, 1978.
No authorization to participate in commercially managed deferred compensation plans. F.O. 2, 1980.

N.

Natural Resource Council—
Absent adequate compensation, Natural Resource Council may not grant perpetual lease of State tidelands to municipality. F.O. 8, 1978.

New Jersey Racing Commission—
Amendatory legislation required to permit telephone wagering at licensed racetracks. F.O. 6, 1981.
N.J.S.A. 5:5-64 does not permit carryover of undistributed pari-mutual pool to the next racing day. F.O. 19, 1980.
New Jersey State Lottery—
May use consumer operated video games. F.O. 5, 1982.
Nursing Homes—
See Hospitals and Nursing Homes.

O.

Officers—
Qualifications for office. F.O. 5, 1980.
Optometrists, New Jersey Board of—
Board's right to prior approval over vision service plans is limited to provision of quality eye care. F.O. 13, 1980.
Regulations which prohibit optometrists from soliciting optometric services are invalid. F.O. 17, 1980.

P.

Parole Board, New Jersey State—
Board may revoke parole for failure to pay fines but may not impose forfeiture of "street time." F.O. 21, 1979.
Commutation and/or work credits awarded to sex offenders under Penal Code. F.O. 11, 1980.
Parole eligibility status of sex offenders sentenced to Adult Diagnostic and Treatment Center. F.O. 5, 1981.
Parolee who absents himself from parole supervision cannot claim credit for "street time." F.O. 25, 1979.
Single parole eligibility date should be calculated on aggregated sentence. F.O. 26, 1979.
Penalties—
Bank may assess prepayment penalty against borrower who prepays an installment loan prior to due date of first payment. F.O. 1, 1983.
Pensions—
Income received by non-resident from New Jersey pension source is subject to Gross Income Tax. F.O. 5, 1979.
Pensions, Division of—
Equality of health benefits for all public employees at state and local level. F.O. 8, 1981.
Statutory provisions requiring mandatory retirement prior to age 70 invalid. F.O. 5, 1983.
Pharmaceutical Assistance for the Aged—
Senior citizens who are inpatients in nursing homes or hospitals may not be excluded from benefits of program. F.O. 3, 1978.
Pharmacy, Board of—
Pharmacists must substitute generic drugs unless expressly prohibited by provider. F.O. 17, 1979.
Plain Languge Law—
Effective date. F.O. 1, 1982.
IRA and Keough Plan accounts providing professional management services for a fee are consumer contracts and should conform to Plain Language Law, N.J.S.A. 56:12-2. F.O. 7, 1982.
Police and Peace Officers—
Off duty municipal police may engage in police related activities so long as they do not constitute business of private detective. F.O. 11, 1978.
Special police at Marlboro State Hospital have authority to patrol perimeter raods adjacent to institutions. F.O. 19, 1979.
Preemption—
Dept. of Transportation is immune from local land use regulations in proceeding with Erie Lackawanna reelectrification project. F.O. 4, 1978.
Pregnancy—
Temporary disability claims based upon pregnancy or childbirth must be treated the same as all other claims. F.O. 2, 1979.
Prisons—
Chief executive officer of prison has discretion to restore forfeited commutation credits. F.O. 8, 1979.
Professional Boards—
Board of Higher Education does not have authority to license foreign medical schools or regulate their course of instruction in this state. F.O. 25, 1980.
Majority of membership of a professional board constitutes a quorum. F.O. 6, 1978.
New Jersey Board of Optometrists right to prior approval over vision service plans is limited to provision of quality eye care. F.O. 13, 1978.
Residency required for licensure of podiatrists through endorsement of out-of-state licenses is unconstitutional. F.O. 24, 1980.
Psychiatric Hospitals, State—
Special police at Marlboro State Hospital have authority to patrol perimeter roads adjacent to institutions. F.O. 19, 1979.
Public Contracts—
Auxiliary services contact between private agency and local school board must be approved by Commissioner of Education. F.O. 1, 1984.
Bidding requirements of Local Public Contracts Law apply to all purchases of goods and services. F.O. 2, 1983.
Construction of resource recovery facilities subject to Local Public Contracts Law. F.O. 14, 1980.
Mandatory disclosure of principal partners or stockholders prior to award of public contrat designed to protect integrity of public bidding process. F.O. 9, 1980.
Public Funds—
Dept. of Transportation may lend federal funds to employers for purchase of vanpool vehicles. F.O. 16, 1980.
No legal impediment to State purchase of property in excess of appraised value. F.O. 8, 1980.
Public Health Council—
Procedural defects in Public Health Council's adoption of rules regulating smoking require new notice and opportunity for hearing. F.O. 7, 1978.
Regulation of smoking in public places is governed by municipal ordinance. F.O. 27, 1979.
Public Officials and Employees—
Counties and municipalities not authorized to participate in commercially managed deferred compensation plans. F.O. 2, 1980.
Public Utilities—
Municipality may own and operate cable television system. F.O. 5, 1978.
Public Utilities, Board of—
Board report does not contain proposed "lifeline" rate. F.O. 1, 1979.
Hackensack Meadowlands Development Commission has authority to control flow of solid waste within District. F.O. 18, 1979.
Solid waste management districts may require that waste be directed to specific disposal facilities. F.O. 3, 1980.
Public Welfare, Division of—
Municipalities governed by Optional Municipal Charter Act may abolish local assistance board. F.O. 15, 1980.
Spending limitations of N.J.S.A. 40A:4-45.1 *et seq.* do not apply to expenditures for matching funds or for programs reimbursed entirely from federal or state funds. F.O. 4, 1982.

Q.

Quorums—
Majority of membership of a professional board constitutes a quorum. F.O. 6, 1978.

R.

Real Estate Commission—
Attorneys subject to licensure requirements of Real Estate Act except for professional duties within scope of practice of law. F.O. 13, 1979.
Riparian Lands—
Absent adequate compensation, Natural Resources Council may not grant perpetual lease of state tidelands to municipality. F.O. 8, 1978.
DEP may regulate development on water-front portion of uplands adjacent to navigable waters or streams. F.O. 6, 1980.

S.

Sales—
Motor fuels retailers may offer discounts for cash sales. F.O. 2, 1982.
Schools and School Districts—
Auxiliary services contract between private agency and local school board must be approved by Commissioner of Education. F.O. 1, 1981.
State can require public school teachers to be or declare intention to become citizens. F.O. 12, 1979.
Separation of Powers—
Legislative veto of agency rules by concurrent resolution violates N.J. Constitution. F.O. 3, 1981.
Sex Discrimination—
Lending institution may inquire into marital status of prospective borrower in order to protect its security interest. F.O. 7, 1983.
Temporary disability claims based upon pregnancy or childbirth must be treated the same as all other claims. F.O. 2, 1978.
Smoking—
Procedural defects in Public Health Council's adoption of rules regulating smoking require new notice and opportunity for hearing. F.O. 7, 1978.
Regulation of smoking in public places is governed by municipal ordinance. F.O. 27, 1979.
Solid Waste Management—
Districts authorized to direct waste to preferred facilities and to establish uniform rates. F.O. 12, 1980.
Municipal or county expenditures for implementation of solid waste management plans not generally exempt form Local Government Cap Law. F.O. 16, 1979.
Solid waste management districts may require that waste be directed to specific disposal facilities. F.O. 3, 1980.
Solid Waste Utility Control Act. F.O. 3, 1980.
State Police, Division of—
Maximum hiring age for law enforcement personnel valid only when it is impossible to assess fitness of individual applicants over prescribed age. F.O. 1, 1984.
Statutory Construction—
Certificates issued to intrastate carriers of bulk commodities under "grandfather" clause permit limited activities only. F.O. 12, 1978.
Effective date of Plain Language Act. F.O. 1, 1982.
Emergency appropriations under N.J.S.A. 40A:4-46 can only be made for purpose unforseen at adoption of municipal budget. F.O. 10, 1980.

T.

Taxation—
Income received by non-resident from New Jersey pension source is subject to Gross Income Tax. F.O. 5, 1979.
Senior citizen homestead rebate available to surviving spouse who meets certain conditions. F.O. 24, 1979.
Temporary disability benefits excludable from Gross Income Tax. F.O. 9, 1979.

Teachers—
Public school teachers must satisfy citizenship requirements. F.O. 18, 1980.
State can require public school teachers to be or declare intention to become citizens. F.O. 12, 1979.
Television and Radio—
Municipality may own and operate cable television system. F.O. 5, 1978.
Temporary Disability Benefits—
Claims based on pregnancy or childbirth must be treated same as all other claims. F.O. 2, 1979.
Excludable from New Jersey Gross Income Tax. F.O. 9, 1979.
Tidelands—
Absent adequate compensation, Natural Resource Council may not grant perpetual lease of state tidelands to municipality. F.O. 8, 1978.
Discretion to fix price for grant of state's interest in tidelands based on underlying value without improvements. F.O. 3, 1983.
Transportation, Department of—
Immune from local land use regulations in proceeding with Erie Lackawanna reelectrification project. F.O. 4, 1978.
Insurance corporation may give financial support to passage of Transportation Rehabilitation and Improvement Bond Issue. F.O. 23, 1979.
May lend federal funds to employers for purchase of vanpool vehicles. F.O. 16, 1980.

V.

Vanpools—
See Transportation, Dept. of

W.

Waterfront Development Law—
DEP may regulate development on "water-front" portion of uplands adjacent to navigable waters or streams. F.O. 6, 1980.
Welfare Assistance—
State and county welfare agencies responsible for investigation of abuses in Food Stamp Program. F.O. 2, 1978.
Women—
Temporary disability benefits based upon pregnancy or childbirth must be treated the same as all other claims. F.O. 2, 1979.
Words and Phrases—
"Bid"—Mandatory disclosure of principal partners or stockholders prior to award or public contract designed to protect integrity of bidding process. F.O. 9, 1980.
"Certificate of registration"—Truck found on New Jersey highway loaded in excess of weight limitation specified on its foreign registration does not violate N.J.S.A. 39:3-84.3. F.O. 11, 1979.
"Consumer contract"—F.O. 7, 1982.
"Emergency"—Municipality may make emergency appropriation for purpose unforseen at time of budget adoption or for which provision was inadequate. F.O. 26, 1980.
"Emergency"—Emergency appropriations under N.J.S.A. 40A:4-46 can only be made for purpose unforseen at adoption of municipal budget. F.O. 10, 1980.
"Pool"—as used in N.J.S.A. 5:5-64. F.O. 19, 1980.
"Rebate"—F.O. 2, 1982.
"Street time"—Board may revoke parole for failure to pay fines but may not impose forfeiture. F.O. 21, 1979.
"Wages"—Sick leave payments constitute wages for purpose of calculating base year earnings under N.J.S.A. 43:21-27. F.O. 20, 1980.
"Water-front"—DEP may regulate development on water-front portion of uplands adjacent to navigable waters or streams. F.O. 6, 1980.

Y.

Youth and Family Services, Division of—
Refusal of advance consent for blood transfusion does not bar Jehovah's Witnesses from adoption rights. F.O. 20, 1979.

Z.

Zoning—
Dept. of Transportation is immune from local land use regulation in proceeding with Erie Lackawanna reelectrification project. F.O. 4, 1978.

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Art. IV, sec. 1, par. 2	F.O. 5, 1980	Art. V, sec. 1, par. 14(a)	F.O. 3, 1981
	F.O. 3, 1981	Art. VIII, sec. 1, par. 5	F.O. 24, 1979
Art. IV, sec. 7, par. 2	F.O. 9, 1978	Art. VIII, sec. 2, par. 3	F.O. 2, 1984
	F.O. 1, 1980	Art. VIII, sec. 3, par. 1	F.O. 16, 1980
Art. IV, sec. 7, par. 2	F.O. 9, 1981	Art. VIII, sec. 3, par. 3	F.O. 16, 1980
	F.O. 5, 1982	Art. VIII, sec. 4, par. 2	F.O. 8, 1978
	F.O. 6, 1983		F.O. 3, 1983

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L. 1970, c. 13	F.O. 5, 1982	L. 1981, c. 103	F.O. 3, 1982
L. 1981, c. 27	F.O. 3, 1981	L. 1981, c. 464	F.O. 1, 1982
L. 1981, c. 56	F.O. 4, 1982		

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2A:121-6	F.O. 9, 1978	19:34-32	F.O. 22, 1979
2A:164-8	F.O. 5, 1981	19:34-45	F.O. 14, 1979
2A:164-10	F.O. 11, 1980		F.O. 4, 1983
2C:33-13	F.O. 27, 1979	20:4-1 *et seq.*	F.O. 3, 1979
2C:37-1*et seq.*	F.O. 1, 1980	24:6E-1	F.O. 17, 1979
	F.O. 6, 1983	26:1A-7	F.O. 7, 1978
2C:37-2	F.O. 9, 1981		F.O. 27, 1979
2C:43-9(b)	F.O. 21, 1979	27:1A-1 *et seq.*	F.O. 4, 1978
	F.O. 25, 1979	30:4-14	F.O. 19, 1979
2C:46-2	F.O. 21, 1979	30:4-92	F.O. 11, 1980
2C:47-4(b)	F.O. 5, 1981	30:4-123.15	F.O. 21, 1979
2C:47-5	F.O. 5, 1981	30:4-123.23	F.O. 21, 1979
5:5-62	F.O. 6, 1981	30:4-140	F.O. 8, 1979
5:5-64	F.O. 19, 1980		F.O. 26, 1979
5:8-24*et seq.*	F.O. 9, 1978		F.O. 11, 1980
5:12-24	F.O. 7, 1981	30:4D-1 *et seq.*	F.O. 3, 1978
5:12-101(b) and (c)	F.O. 7, 1981		F.O. 10, 1979
10:5-12(i)	F.O. 7, 1983	33:1-40.3	F.O. 10, 1978
12:3-7	F.O. 3, 1983	39:2-6.1	F.O. 1, 1984
12:3-37.1	F.O. 8, 1978	39:3-84.3	F.O. 11, 1979
12:5-3	F.O. 6, 1980	39:4-50.4(b)	F.O. 4, 1981
13:1B-13.13	F.O. 3, 1983	39:5-30	F.O. 22, 1979
13:1E-1 *et seq.*	F.O. 12, 1980	39:5E-1 *et seq.*	F.O. 12, 1978
13:1E-2	F.O. 3, 1980	40:55C-40 *et seq.*	F.O. 7, 1980
	F.O. 14, 1980	40:55C-77 *et seq.*	F.O. 7, 1980
	F.O. 16, 1980	40:55D-31	F.O. 4, 1978
13:8A-1 *et seq.*	F.O. 8, 1980	40:62-1 *et seq.*	F.O. 4, 1980
13:17-1 *et seq.*	F.O. 18, 1979	40:66A-31.1 *et seq.*	F.O. 14, 1980
17:6F-1	F.O. 7, 1979	40:69A-90	F.O. 15, 1980
17:9A-10	F.O. 15, 1979	40A:4-45.1 *et seq.*	F.O. 16, 1979
17:9A-10A	F.O. 6, 1979		F.O. 7, 1980
17:9A-54A	F.O. 1, 1983	40A:4-45.3	F.O. 23, 1980
17:9A-315	F.O. 6, 1982	40A:4-45.3(e)	F.O. 4, 1980
17:11A-44	F.O. 3, 1982	40A:4-46	F.O. 10, 1980
17:12B-13	F.O. 15, 1979		F.O. 26, 1980
17:12B-16	F.O. 15, 1979	40A:5-16.1	F.O. 2, 1983
17:29A-1	F.O. 1978	40A:10-25	F.O. 8, 1981
18A:6-51	F.O. 1, 1981	40A:11-1 *et seq.*	F.O. 14, 1980
18A:6-39	F.O. 18, 1980		F.O. 2, 1983
18A:26-1	F.O. 12, 1979	40A:11-7	F.O. 2, 1983
18A:26-8.1	F.O. 18, 1980	40A:14-12	F.O. 1, 1984
18A:56-5	F.O. 8, 1978	40A:14-127	F.O. 1, 1984
	F.O. 3, 1983	43:15A-99	F.O. 5, 1983
18A:68-12	F.O. 25, 1980	43:15B-1 *et seq.*	F.O. 2, 1980

43:16-1	F.O. 5, 1983	52:14B-2(b)	F.O. 10, 1979
43:16A-5(1)	F.O. 5, 1983	52:14B-10(b)	F.O. 6, 1979
43:21-4(f)(1)(B)	F.O. 2, 1979		F.O. 15, 1979
43:21-19	F.O. 20, 1980	52:14B-10(c)	F.O. 15, 1979
43:21-25	F.O. 9, 1979	52:14B-109(c)	F.O. 22, 1979
43:21-27	F.O. 20, 1980	52:14D-1 *et seq.*	F.O. 4, 1979
43:21-39(e)	F.O. 2, 1979	52:14F-1 *et seq.*	F.O. 4, 1979
44:8-14	F.O. 15, 1980	52:14F-5(o)	F.O. 6, 1979
45:1-2.2(d)	F.O. 6, 1978	52:14A-163 *et seq.*	F.O. 2, 1980
45:5-7	F.O. 24, 1980	52:25-16.1	F.O. 2, 1983
45:12-11(p)	F.O. 17, 1980	52:25-24.2	F.O. 9, 1980
45:15-4	F.O. 13, 1979	53:1-9	F.O. 1, 1984
45:19-9(a)	F.O. 11, 1978	54:4-3.80	F.O. 24, 1979
48:2-29.6 *et seq.*	F.O. 1, 1979	54:5-104.29 *et seq.*	F.O. 2, 1983
48:5A-40	F.O. 5, 1978	54A:5-8	F.O. 5, 1979
48:13A-1 *et seq.*	F.O. 12, 1980	52A:6-1	F.O. 9, 1979
48:13A-2	F.O. 3, 1980	55:14J-30(b)	F.O. 7, 1980
52:14-17.28	F.O. 8, 1981	56:6-1 *et seq.*	F.O. 2, 1982
52:14-17.36	F.O. 8, 1981	56:12-1 *et seq.*	F.O. 1, 1982
52:14B-1 *et seq.*	F.O. 7, 1978	56:12-2	F.O. 7, 1982

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3:1-9.11	F.O. 7, 1979	13:19-10.1 *et seq.*	F.O. 22, 1979
10:63-3 *et seq.*	F.O. 10, 1979	13:38-1.4	F.O. 17, 1980
10:69A-4.3(c)	F.O. 3, 1978	13:38-2.7	F.O. 13, 1980
11:3-8.1 *et seq.*	F.O. 8, 1982	13:38-2.8(a)	F.O. 13, 1980
13:2-36.1	F.O. 10, 1978		

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2 U.S.C. § 4416	F.O. 14, 1979	29 U.S.C. § 623(a)(1)	F.O. 1, 1984
7 U.S.C. § 2011 *et seq.*	F.O. 2, 1978	29 U.S.C. § 631(a)	F.O. 1, 1984
15 U.S.C. § 1601 *et seq.*	F.O. 1, 1982		

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F.O. 18, 1960	cited in	F.O. 8, 1978	F.O. 5, 1977	F.O. 21, 1980
F.O. 17, 1961		F.O. 9, 1978	F.O. 8, 1977	F.O. 26, 1979
F.O. 6, 1964		F.O. 2, 1984	F.O. 13, 1977	F.O. 4, 1981
F.O. 10, 1974		F.O. 18, 1980	F.O. 23, 1977	F.O. 11, 1978
		F.O. 12, 1979	F.O. 8, 1978	F.O. 1, 1980
F.O. 1, 1975		F.O. 2, 1979	F.O. 6, 1979	F.O. 10, 1979
F.O. 8, 1976		F.O. 10, 1979		F.O. 15, 1979
F.O. 15, 1976		F.O. 24, 1979	F.O. 12, 1979	F.O. 18, 1980
F.O. 16, 1976		F.O. 26, 1979	F.O. 21, 1979	F.O. 25, 1979
F.O. 3, 1977		F.O. 16, 1979	F.O. 1, 1980	F.O. 9, 1981
		F.O. 4, 1980	F.O. 10, 1980	F.O. 26, 1980
		F.O. 7, 1980	F.O. 22, 1980	F.O. 2, 1981
		F.O. 21, 1980	F.O. 5, 1983	F.O. 1, 1984
		F.O. 23, 1980		

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F.O. 107, 1940	*Bechler v. Parsekian,* 36 N.J. 242 (1961)
F.O. 78, 1950	*Safeway Trails v. Furman,* 41 N.J. 467 (1964)
F.O. 37, 1951	*Sheridanville, Inc. v. Borough of Wrightstown,* 125 F. Supp. 743 (D.N.J. 1954)
F.O. 13, 1953	*State v. Son,* 179 N.J. Super. 549 (App. Div. 1981)
F.O. 27, 1953	*Scheff v. Township of Maple Shade,* 149 N.J. Super. 448 (App. Div. 1977), *certif. den.,* 75 N.J. 13 (1977)
F.O. 5, 1955	*Weinstein v. City of Newark,* 100 N.J. Super. 199 (Law Div. 1968)
F.O. 23, 1956	*State v. Profita,* 183 N.J. Super. 425 (App. Div. 1982)
F.O. 10, 1957	*Bulman v. McCrane,* 64 N.J. 105 (1973)
F.O. 2, 1959	*Bulman v. McCrane,* 64 N.J. 105 (1973)
F.O. 15, 1959	*Citizens for Charter Change in Essex County v. Caputo,* 151 N.J. Super. 286 (App. Div. 1977), *certif. den.,* 75 N.J. 527 (1977)
F.O. 25, 1959	*Reisdorf v. Borough of Mountainside,* 114 N.J. Super. 562 (Law Div. 1971)
F.O. 11, 1960	*Safeway Trails v. Furman,* 41. N.J. (1964)
F.O. 12, 1961	*Rubin v. Glaser,* 166 N.J. Super. 258 (App. Div. 1979), *aff'd,* 83 N.J. 299 (1980)
F.O. 16, 1961	*State v. City of Newark,* 87 N.J. Super. 38 (Law Div. 1965)
F.O. 21, 1961	*Bulman v. McCrane,* 64 N.J. 105 (1973)
F.O. 1, 1962	*Salorio v. Glaser,* 82 N.J. 482 (1980), *cert. den.,* 449 U.S. 874 (1980), *appeal after remand,* 93 N.J. 447 (1983), *cert. den.,* U.S. (1983)
F.O. 4, 1964	*Georgia v. Suruda,* 154 N.J. Super. 439 (Law Div. 1977)
F.O. 3, 1969	*State Board of Education v. Netcong Board of Education,* 108 N.J. Super. 564 (Ch. Div. 1970), *aff'd,* 57 N.J. 172 (1970), *cert. den.,* 401 U.S. 1013 (1971)
F.O. 12, 1974	*Chamber of Commerce of Eastern Union County v. Leone,* 141 N.J. Super. 114 (Ch. Div. 1976), *aff'd,* 75 N.J. 319 (1978)
F.O. 16, 1974	*Summit Policemen's Benevolent Association v. State,* 133 N.J. Super. 262 (Law Div. 1975)
F.O. 4, 1975	*In the Matter of Schmidt and Sons, Inc.,* 79 N.J. 344 (1979)
F.O. 7, 1975	*In the Matter of the Adoption of B.,* 152 N.J. Super. 546 (Cty. Ct. 1977)
F.O. 10, 1975	*Merritt v. Headley,* 169 N.J. Super. 63 (App. Div. 1979)
F.O. 24, 1975	*Wittie Electric Co. Inc. v. State,* 139 N.J. Super. 529 (App. Div. 1976)
F.O. 28, 1975	*Hinfey v. Matawan Regional Board of Education,* 77 N.J. 514 (1978)
F.O. 9, 1976	*Perthy Amboy General Hospital v. Middlesex County Board of Freeholders,* 158 N.J. Super 556 (Law Div. 1978)
F.O. 11, 1976	*State v. Leonardis,* 73 N.J. 360 (1977)
F.O. 22, 1976	*Union County v. State,* 149 N.J. Super. 399 (Law Div. 1977)
F.O. 27, 1976	*Fasolo v. Board of Trustees, Division of Pensions,* 181 N.J. Super. 434 (App. Div. 1981), *later app.,* 190 N.J. Super. 573 (App. Div. 1983)
F.O. 29, 1976	*Cole v. Woodcliff Lake Board of Education,* 155 N.J. Super. 398 (Law Div. 1978)
F.O. 29, 1976	*Crifasi v. Borough of Oakland,* 151 N.J. Super. 98 (Law Div. 1977), *aff'd in part and rev'd in part,* 156 N.J. Super. 182 (App. Div. 1978)
F.O. 29, 1976	*Dunn v. Laurel Springs,* 163 N.J. Super. 32 (App. Div. 1978)
F.O. 29, 1976	*Houman v. Pompton Lakes,* 155 N.J. Super. 129 (Law Div. 1977)
F.O. 29, 1976	*Jenkins v. Newark Board of Education,* 166 N.J. Super. 357 (Law Div. 1979), *aff'd,* 166 N.J. Super. 300 (App. Div. 1979)
F.O. 30, 1976	*Caldwell v. Lambrou,* 161 N.J. Super. 284 (Law Div. 1978)
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F.O. 3, 1977	*Clark v. Degnan,* 163 N.J. Super. 344 (Law Div. 1978), *mod.,* 83 N.J. 393 (1980)
F.O. 3, 1977	*N.J. State Policemen's Benevolent Association v. Irvington,* 80 N.J. 271 (1979)
F.O. 7, 1977	*Gillen v. Sheil,* 174 N.J. Super. 386 (Law Div. 1980)
F.O. 8, 1977	*State v. Lucas,* 164 N.J. Super. 57 (Law Div. 1978)
F.O. 13, 1977	*In the Matter of Bergwall,* 173 N.J. Super. 431 (App. Div. 1980), *rev'd* 85 N.J. 382 (1981)

F.O. 15, 1977	*N.J. Association of Health Care Facilities v. Finley,* 83 N.J. 67 (1980), *cert. den. and app. dism'd, Wayne Haven Nursing Home v. Finley,* 449 U.S. 944 (1980)
F.O. 22, 1977	*Belmar Policemen's Benevolent Association v. Belmar,* 89 N.J. 255 (1982)
F.O. 27, 1977	*In the Matter of the Board of Education of Upper Freehold Regional School District,* 86 N.J. 265 (1981)
F.O. 1, 1978	*In Re Allstate Insurance Company,* 179 N.J. Super. 581 (App. Div. 1981)
F.O. 2, 1978	*Dickinson v. Fund for Support of Free Public Schools,* 187 N.J. Super. 320 (Law Div. 1982), *rev'd,* 187 N.J. Super. 224 (1982), *aff'd in part and rev'd in part,* 95 N.J. 65 (1983)
F.O. 4, 1979	*N.J. Civil Service Association v. State,* 88 N.J. 605 (1982)
F.O. 13, 1979	*Spirito v. N.J. Real Estate Commission,* 180 N.J. Super. 180 (App. Div. 1981)
F.O. 10, 1980	*Camden v. Skokowski,* 88 N.J. 304 (1982)
F.O. 10, 1980	*Passaic v. Local Finance Board,* 88 N.J. 293 (1982)
F.O. 26, 1980	*Passaic v. Local Finance Board,* 88 N.J. 293 (1982)
F.O. 3, 1981	*General Assembly of New Jersey v. Byrne,* 90 N.J. 376 (1982)
F.O. 4, 1981	*State v. Grant,* 196 N.J. Super. 470 (App. Div. 1984)
F.O. 5, 1981	*State v. Smith,* 190 N.J. Super. 21 (App. Div. 1982)