JULY 27, 1949.

HON. CARL ERDMAN,
Administrator of Public Housing and Development Authority in the Department of Economic Development, State of New Jersey,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 85.

DEAR SIR:

In re QUESTION CONCERNING PAYMENT FOR PAINTING OF FENCE UNDER LEASE DATED MARCH 27, 1947, between ESSEX COUNTY PARK COMMISSION, Lessor, and ADMINISTRATOR OF PUBLIC HOUSING AND DEVELOPMENT AUTHORITY IN THE DEPARTMENT OF ECONOMIC DEVELOPMENT OF THE STATE OF NEW JERSEY, acting for, etc., STATE OF NEW JERSEY, Lessee.

The question presented for opinion is, as I understand it:

Is the lessee liable, under the lease mentioned, for the cost of painting a certain fence situate along the boundary line between the premises leased and remaining premises of lessor or others?

The lease, with map attached forming part of it, shows the situation to be as stated in the above question.

Paragraph 7 of the lease reads:

"7. The lessee agrees with the Lessor that the Lessee will assume the sole responsibility for the condition, operation, maintenance, management, servicing, and both police and fire protection of the *leased premises,* and that the lessee will take good care of and keep the same, including all improvements, at any time existing thereon, and the appurtenances thereto, in good order and condition, suffering no waste or injury, and shall, without expense to the Lessor, promptly make all needed installation of and repairs and replacements, structural or otherwise, in and to any dwellings, improvements, and facilities upon the *leased premises or connected therewith,* whether above or beneath the surface of the ground, and that the Lessee will not permit the accumulation of waste or refuse within the leased area." (Italics mine.)

Is, then, the fence in question part of the "leased premises" or connected therewith?

There is no specific mention of the fence in the body of the lease. The body of the lease and the map attached show that the fence, being on the boundary line, could as well be without as within the leased area and as well connected with the remaining premises of lessor, or of others, as with the leased premises. But the answer to that question would not be the sole determining factor, in any event.

Paragraph 13 of the lease provides that a certain joint physical survey and inventory of the "leased area" shall be made, etc., and become part of the lease. There has been presented to me what purports to be a copy of this joint physical survey and inventory. On the cover page appear the words "Physical survey of Weequahic Park, Newark, N. J." On the second page, with the signed approvals,

it is stated that the report represents the true physical condition of the "premises leased." On the third page appear the following words:

> "The following data comprises a complete report to a survey of physical condition of utilities and other improvements as listed below under the heading of 'Contents' of that portion of Weequahic Park acquired under lease by" etc.

Under Item #5 h. is "Fences." On a subsequent page are described fences which, taken together, would appear to refer to what is called the fence in this opinion.

That the "leased premises" are by no means identical with property within the "leased area" is quite plain. The description of the "premises leased" on page 3 of the lease specifically excludes

> "all buildings structures, and other installations within the *leased area* * * * which are not the property of lessor; and reserving unto the lessor all its buildings now upon *leased premises,* and the right of uninterrupted use of all the sub-surface installations to which said buildings are presently connected, together with unrestricted ingress and egress" etc. (Italics mine.)

In the physical survey and inventory referred to are contained a hospital heating plant and references to structural details of all existing buildings and structures, which obviously include buildings belonging to the United States Government and those reserved by the lease to lessor.

The inclusion of the fence in this last named document can no more make it part of the "leased premises" than the inclusion of the other buildings mentioned. The lease itself, as pointed out, called for a survey and inventory of the "leased area," not one of the leased premises and property only. Any reference in the survey and inventory to property "leased" which was not so leased under the wording of the body of the lease agreement itself would not, particularly under the circumstances hereafter pointed out, convert such property into part of the "leased premises." In emphasis of this point, the survey and inventory under Item #1 includes a map showing "former Army building" etc.

Additionally, by the terms of the lease the lessee obtained the use of and undertook described responsibility for the repair and upkeep of certain facilities and utilities *outside* the "leased area" necessary for the purposes of the lease.

Regardless of the above, had the lease been between two private individuals for general purposes and had the lessee actually utilizd the fence in question, it might be said that by such action the fence became part of the "leased premises." But, in answer to question propounded by me to lessee, I have a statement from which I quote, in part, as follows:

> "It (lessee) was not concerned with the fence or the need for a fence, and gave no consideration to the existence of the fence. So the answer to your question is that the fence was no part of the consideration for leasing the land * * *. We have made no use of this fence and have no use for it."

Again, this lease is not between two private individuals, nor is it for general purposes.

The lease recites, *inter alia* (on page 2), that it is made pursuant to and under the authority of Chapter 279, P. L. 1946, as amended, and Chapter 323, P. L. 1946. In fact, the lease would probably be a legal impossibility without these statutes.

Lessor is a public corporation created by the State of New Jersey for certain purposes which do not embrace emergency public housing, and lessee is a creature of statute for the purposes and with the authority given by statute, and is described in the lease as "acting for, in behalf of, and in the name of" said State. The authority of lessee is limited by the policy and purposes of the statutes. Without reciting the statutory provisions in detail, it is plain that they relate to a program of *emergency public housing* and nothing else. Furthermore, by Paragraph 4, page 5, the lease itself, by its very terms, restricts the use of the "leased premises" to such project.

By Section 2 of the statute first mentioned in the lease it will be seen that lessor is (and was) *not compelled* to lease its property but that it "may" do so

> "upon such terms, subject to such conditions and in such manner as such park commission may deem proper or necessary for the preservation for park purposes of the lands of such county park commission, and as may be agreed upon between the contracting parties."

This left lessor free to lease upon its own terms, if it could, or not to lease at all. Likewise lessee had no authority to accept terms which incurred expenses totally unrelated to the said emergency public housing program.

The funds for lessee's purposes were originally authorized to be raised by a bond issue (P. L. 1946, Chapter 324, Second Special Session) which statute was put to a vote of the people of the State and adopted at the general election of November 5, 1946, by which statute they were "specifically dedicated to providing housing for Veterans of World War II and other people of the State and shall be disposed of in accordance with this act" etc. It has been suggested that lessee might have the right to pay the cost of painting this fence, even though unnecessary and unused for and unrelated to the emergency public housing program, from rentals received by lessee from occupants of houses provided by the program. In view of this statute, put to public vote, particularly Section 15 (c), general principles of law and the reasoning applied in the case of *City Publishing Co.* vs. *Jersey City,* 54 N. J. L. 437, such suggestion appears to me unsound.

Had the lease specifically and in clear language contained a provision for the liability of the lessee for the painting of this fence, a serious question would arise as to whether he had authority, under the circumstances, to execute the lease with such provision in it. It should be noted that, while the power of the lessee under the statutes is quite broad, it is manifestly so only for whatever may be reasonably necessary for or necessarily incidental to an emergency public housing program. There is no such specific inclusion in the lease, but on the contrary, while going into great detail as to almost every other condition and contingency which might affect lessor deleteriously, the lease itself is without any direct reference to the fence.

Under these circumstances, only lessor, for its own purposes (county park facilities, not state-wide public housing, can benefit from the repair, maintenance or even actual existence of the fence.

With respect to the provisions in Paragraph 12, page 10, of the lease, it need only be said that since the fence is not part of the "leased premises," those provisions have no application. As to Paragraph 5, page 5, of the lease, by refusing to pay for the painting of this fence lessee, in my opinion, is actually complying with the law of the State of New Jersey and to pay for it would be a violation of such law. Concerning the provisions with regard to lessee's obligations or liabilities, if any, to the Federal Government and others mentioned, those are matters (certainly insofar

as this fence is concerned) solely between lessee and these other parties unless and until some actual violation of the lease by lessee makes lessor directly liable to such parties. In this connection, an examination of the Fence Act (R. S. 40:20–1 et seq., particularly 40:20–7) shows that it has no application to the present point.

It, therefore, appears:

1. That the said fence was neither by the lease itself nor any incorporated document, a part of the leased premises.

2. That lessee, whose only authority to lease was for emergency public housing projects, did not need and never used the said fence under the lease or for such projects.

3. That benefit from the existence, maintenance, repair and painting of said fence is solely to the lessor in its conduct of local county park facilities and in no way for emergency public housing.

4. That to divert any proceeds of said bond issue or rentals received by lessor in the conduct of emergency public housing to the payment of the cost of painting the fence, in any event might well be an illegal and improper diversion of such funds.

5. That is not to be presumed that lessor itself intended any such result as set forth in (4) above by the execution of this lease.

It is, therefore, my opinion that there is no liability upon the part of the lessee to pay for the painting of this fence and that any such payment, under the circumstances, would be illegal and improper.

Respectfully submitted,

THEODORE D. PARSONS,
Attorney General of New Jersey.

By: FRANK A. MATHEWS, JR.,
Deputy Attorney General.

m:m

AUGUST 19, 1949.

DR. CHARLES R. ERDMAN, JR.,
Dept. of Conservation & Economic Development,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 86.

DEAR MR. ERDMAN:

An opinion is requested from this office clarifying for the warden force of the Division of Fish and Game, the law relating to the acts legally permissible in hunting for or destroying woodchuck. The following sections of Title 23, commonly known as the Fish and Game Act, pertain to the subject matter: R. S. 23:4–1, R. S. 23:4–12, R. S. 23:4–13 and R. S. 23:4–25. In order to discuss the sections aforementioned we quote herein for your benefit said sections and will discuss them separately.