

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.

23:4-1. No person shall capture, kill, injure, destroy or have in possession any reed-bird, wild swans, wood duck, wild geese, brant, wild ducks, rails or marsh hens, gallinules, coot (commonly known as crow duck), upland plover, black bellied plover, golden plover, greater or lesser yellowlegs; willets, sandpipers, dowitchers or robin snipe, brown backs, curlews, turnstones or calico backs, godwits or marlin, tattlers, Wilson snipe or jacksnipe, woodcock or any other birds commonly known as shore birds, surf snipe or bay snipe, unless an open season is prescribed therefor by the regulations of the United States Bureau of Biological Survey, made under the provisions of an Act of Congress relating to migratory birds and then only during the respective open seasons fixed for such birds by such regulations.

No person shall capture, kill, injure, destroy or have in possession any quail, rabbit, hare, gray, black or fox squirrel, raccoon, woodchuck, English or ring-necked pheasant, ruffed grouse, wild turkey, partridge, or any other game bird or game animal, other than those mentioned in the first paragraph of this section, unless an open season is prescribed therefor by the State Fish and Game Code, and then only during the respective open seasons fixed by such code; or, in the absence of such provision in said code, unless an open season is prescribed therefor by law, and then only during the respective open seasons fixed by this section.

Unless otherwise prescribed by the State Fish and Game Code, the open season for quail, rabbit, hare, gray, black or fox squirrel, male English or ring-necked pheasant, ruffed grouse, or partridge, except as hereinafter in this article is restricted; shall be from November tenth to December tenth; provided, however, no person shall capture, kill, injure, destroy or have in his possession any of the birds or animals mentioned in this paragraph on the first day of any open season for such birds and animals before nine ante meridian.

Unless otherwise prescribed by the State Fish and Game Code, the open season for woodchuck, shall be from July first to September thirtieth; provided, however, that notwithstanding any provision of the State Fish and Game Code, or of this section to the contrary, woodchuck may be taken at any time from cultivated farms, by landowners or occupants of farms, members of their family, guests or hired help.

Unless otherwise prescribed by the State Fish and Game Code, the open season for raccoon shall be from November first to January fifteenth between sunset and sunrise only, except during the open season for deer.

Unless otherwise provided by the State Fish and Game Code, the birds and animals for which an open season is prescribed by this section may be possessed during the respective open seasons therefor and for the additional period of ten days immediately succeeding the open seasons.

Except as otherwise specifically provided by this act or any other law, for capturing, killing, injuring, destroying or having in possession any of the game birds or game animals mentioned in this section, or any other game bird or game animal other than during the respective open seasons, if any, and at the times, if any, fixed therefor by the respective provisions of the State Fish and Game Code, or, in the absence of any such provisions in said code, fixed therefor by this section, or for violating any other provision of this section, a person shall be liable to a penalty of twenty dollars (\$20.00) for each bird or animal or part thereof unlawfully captured, killed, injured, destroyed or had in possession.

23:4-12. No person shall kill, destroy or injure, pursue with intent to kill or injure or in any manner attempt to take or injure any anatidæ commonly known as swans, geese, brant and river and sea ducks; rallidæ, commonly known as rails, gallinules, coots and mud hens; limicolæ, commonly known as shore birds, surf snipe or bay snipe, among them being yellowlegs, plovers, willets, sandpipers, dowitchers or robin snipe, brown backs, burlews, turnstones or calico backs, godwits or marlin, tattlers and woodcocks, gallinæ, commonly known as wild turkey, grouse, prairie chickens, pheasants, partridge and quails; or any hare, commonly known as rabbit; gray, black or fox squirrels; or any other game bird or game animal, except in the manner prescribed by the provisions of the State Fish and Game Code, or, in the absence of such provision in said code, except in the manner usually known as hunting with a gun, the gun being not larger than ten gauge and held at arm's length and fired from the shoulder without rest, or by the use of bow and arrow, under a penalty of twenty dollars (\$20.00) for each offence; provided, however, that woodchucks, commonly called groundhogs, may be dug out of their dens or killed in any manner, at any time, by landowners or occupants of farms, or by members of their family, guests, or hired help, when such dens are located on farms, and woodchucks may also be taken in any manner during the regular open woodchuck season by any other person.

23:4-13. No person shall use in hunting any fowl or animals of any kind any firearm except as permitted by the provisions of the State Fish and Game Code, or, in the absence of such provision in said code, except a shotgun being not larger than ten gauge, and capable of holding not more than two cartridges at one time, or that may be fired more than twice without reloading, or use a silencer on any firearm when hunting for game or fowl, under a penalty of twenty dollars (\$20.00) for each offense; provided, however, that the division in its discretion may issue permits for the use of a rifle for shooting woodchucks only. No person shall have any missile larger than as permitted by the provisions of the State Fish and Game Code, or, in the absence of such provision in said code, larger than number four shot in possession in the woods or fields at any time other than during the open season for killing deer, under a penalty of one hundred dollars (\$100.00) for each offense.

23:4-25. The owner, lessee or custodian of a dog found running at large in the woods or fields, or a person going into the woods or fields with a hound or firearm, except during the open season for quail, rabbit, squirrel, English or ring-necked pheasant, raccoon, woodchuck, ruffed grouse, or partridge, shall be liable to a penalty of twenty dollars (\$20.00) for each offense.

The occupant of a farm may permit his dog to run at large on the land he occupies, except during the open season for deer. The owner, lessee or custodian of a dog may go into the woods or fields with the dog without firearms for the purpose of exercising or training it in daylight at any time, except during the open season for deer. Nothing in this section contained shall be construed to prohibit the training of raccoon dogs between the hours of sunset and sunrise for a period of four weeks prior to the last week preceding the opening of the raccoon season.

This section shall not apply to hunting deer, raccoon, woodchuck, woodcock, snipe, rail, mud hen and waterfowl at the time and in the manner provided by the respective provisions of the State Fish and Game Code, or, in the absence of such provisions in said code, at the time and in the manner provided by law, or

to the killing of crows, hawks, woodchuck and vermin at any time of the year when in the act of destroying poultry, crops or property.

Discussing the aforementioned pertinent sections of Title 23 relating to the subject, we shall comment briefly on each section.

Section 23:4-1 has a proviso that notwithstanding any provision of the State Fish and Game Code, or of this section to the contrary, woodchuck may be taken at any time from cultivated farms, by landowners or occupants of farms, members of their family, guests or hired help.

Section 23:4-12 prohibits the taking of all game birds or game animals except in the manner prescribed, but also contains a proviso that woodchuck, commonly called groundhogs, may be taken out of their dens or killed in *any manner, at any time*, by landowners or occupants of farms, or by members of their family, guests or hired help, when such dens are located on farms. (Italics supplied).

Section 23:4-13 designates the type of firearm that is legal for hunting in New Jersey. It outlaws the use of a rifle for hunting but the section further provides that the Division of Fish and Game may in its discretion issue permits for the use of a rifle to persons shooting woodchuck only.

Section 23:4-25 prohibits a person from going into the woods or fields with a firearm except during certain open season, but you will note that the last paragraph in this section has a proviso to the effect that it shall not apply to the killing of crows, hawks, woodchuck and vermin at any time of the year when in the act of destroying poultry, crops or property.

It appears from a reading of the sections referred to herein, that the Legislature intended to except from the provisions of said sections, the destroying of woodchuck by farmers on their own property in any manner and at any time. The act gives the landowner, the occupants of the land or farm members of the family, guests and hired help the right to protect the property from woodchuck.

We understand that arrests have been made and fines imposed for killing woodchuck out of season where the killing took place on the land owned by the person charged with the violation. We have been informed that much damage has been caused by woodchucks.

We are therefore of the opinion and so advise you that a landowner or occupant on a farm, the members of his family, guests or hired help, can hunt woodchuck at any time (including Sunday) and in any manner without a permit.

We do not deem it necessary to comment on R. S. 23:4-11 or R. S. 23:4-24 because a reading of R. S. 23:4-12 clearly reflects the right of a landowner to take or kill woodchucks in any manner, at any time.

Yours very truly,

THEODORE D. PARSONS,  
*Attorney General.*

By: BENJAMIN M. TAUB,  
*Deputy Attorney General.*