JANUARY 29, 1951.

THE HONORABLE ALFRED E. DRISCOLL,
Governor of New Jersey,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 8.

DEAR GOVERNOR:

Under date of June 8, 1950, we submitted to you a memorandum in which we advised you as to the state of the law respecting the filling of the office of Keeper of the State Prison in the event of a vacancy therein. Recently, you communicated to us your desire that, because of the importance of the question involved, we re-examine the statutes and render a formal opinion in the matter. Our re-examination has developed nothing conducive to a conclusion substantially different from that advised in our aforesaid memorandum.

It is our opinion that when the present Keeper of the State Prison (George W. Page) shall have vacated his office, the board of managers in charge of the State Prison will have both the authority and the duty to appoint, with the approval of the State board (Department of Institutions and Agencies), a chief executive officer of the State Prison who will have all the powers, functions and duties of the Keeper of the State Prison (also referred to in our statutes as the Principal Keeper of the State Prison); but that, in view of pertinent provisions of existing law, it is imperative that such chief executive officer be appointed with the title "Principal Keeper of the State Prison."

Section 30:4–3 of the Revised Statutes provides as follows:

> Unless and until otherwise provided by the State board by rule, regulation or order formally adopted, each board of managers may determine the number, qualifications, powers and duties of the officers and employees of the institutions or agencies committed to its charge, and their compensation except as the same is fixed by statute or otherwise determinable by law. Each board, with the approval of the State board, shall appoint the chief executive officer of each institution or agency in its charge, and determine his official title. The chief executive officer shall appoint, with the approval of the board of managers, all officers and employees of the institution or agency. Nothing herein shall apply to the appointment of the Principal Keeper of the State Prison.

This section (30:4–3) had its source in section 114 of P. L. 1918, c. 147, which act is generally the source of Title 30 (Institutions and Agencies) of the Revised Statutes. The exception contained in R. S. 30:4–3 that nothing therein "shall apply to the appointment of the Principal Keeper of the State Prison" was contained in said source section and obviously was intended to correlate with the constitutional provisions then in effect (1844 Constitution, as amended; Art. VII, Sec. II, par. 3) prescribing that the Keeper of the State Prison (among others) "shall be nominated by the Governor and appointed by him with the advice and consent of the Senate" to hold office for five years. That such was the intendment of that exception is borne out by section 302 of said 1918 act which provided that

> *Unless and until the provisions of the Constitution of this State in this particular shall be changed,* the Principal Keeper shall be appointed by the

then constitutional officer known as the Keeper of the State Prison. And whether referred to in the statutes as the "Keeper of the State Prison" or as the "Principal Keeper of the State Prison," he is one and the same officer.

In our deliberation of this matter we have not overlooked the provision of the Constitution of 1947 (Art. V, Sec. I, par. 12) which prescribes that the Governor "shall nominate and appoint, with the advice and consent of the Senate, all officers for whose election or appointment provision is not otherwise made by this Constitution or by law." This provision is traceable to the Constitution of 1844 (Art. VII, Sec. II, par. 8). Mr. Justice Collins of our Supreme Court (1903) discussing, in *Ross* vs. *Freeholders of Essex,* 69 N. J. L. 143, affirmed 69 Id. 291 (E. & A. 1903), the similar provision of the Constitution of 1844, said: ". . . Had the Park Commission act been silent as to how the commissioners authorized should be appointed, I entertain no doubt that their appointment would have lain with the Governor, on the Senate's advice and consent." We think we have made it clear that the sections of the Revised Statutes above indicated as controlling in the matter here under review, coupled with the legislative history thereof as above set forth, evince an unmistakable legislative intent to make due provision by statute law for filling a vacancy in the office here in question.

Respectfully yours,

THEODORE D. PARSONS,
Attorney General.

By : DOMINIC A. CAVICCHIA,
Deputy Attorney General.

FEBRUARY 9, 1951.

HON. W. T. VANDERLIPP, *Director,*
Division of Planning and Development,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 9.

DEAR MR. VANDERLIPP:

Further consideration has been given to your request for opinion as to whether Frank Holmes has authority to put up 30 or more pilings in the sand below high-water mark in front of his property without a permit from your board.

The answer to this is that he has no authority to make any erection or permanent obstruction of any kind without a permit from your board.

Under the Act of 1864, on the right to occupy lands under water in this State, the riparian commission was instructed to make a survey to ascertain the rights of the State in lands under water and to fix and establish exterior lines beyond which no pier, wharf, bulkhead, erection or permanent obstruction of any kind should be permitted to be made.

Under the second section of that act it was provided that until a report was made no grant or lease of any lands was to be made and permission was granted the commission to stay all proceedings, erections and obstructions until further direction of the Legislature.

Governor, as heretofore, and shall hold his office for the term of five years. (Italics ours.)

This section (302 of the 1918 act) was omitted from the Revised Statutes by the revisers (who nonetheless noted, under section 30:4–3, that Art. VII, Sec. II, par. 3 of the 1844 Constitution should be referred to for appointment and term of the Principal Keeper, and set forth, under section 30:4–138, which we shall presently recite in part, the provision of that Constitution relating to the appointment of the Keeper of the State Prison by the Governor with the advice and consent of the Senate). However, this section, while omitted from the Revised Statutes, supports the view that the exception contained in R. S. 30:4–3, above recited, was necessitated by the then controlling constitutional provisions relating to the Keeper of the State Prison and that it was intended to prevail only so long as such constitutional provisions should remain in force. "The propriety of resorting to the legislative history of legislation to discover the meaning of ambiguous statutes is well recognized." *Murphy* vs. *Zink*, 136 N. J. L. 235, 239 (Sup. Ct. 1947); affirmed 136 Id. 635 (E. & A. 1947). The failure of the revisers to include in the Revised Statutes, section 302 of the 1918 act did not change the sense and meaning of the exception contained in section 114 of the same act, since that exception, as we have already pointed out, was, in the revealing light of its legislative history, intended to correlate with said section 302. "There is a presumption against a legislative intent to effect a change in substance by a revision of the general laws. . . . The intention to effect a change in substance must be expressed in language excluding a reasonable doubt." *Murphy* vs. *Zink, supra.*

Under the Constitution of 1844, as evidenced by the provision of that instrument above recited, the Keeper of the State Prison was a constitutional officer. But the Constitution of 1947, which by its own terms (Art. XI, Sec. I, par. 1) superseded the Constitution of 1844 as amended, makes no specific mention of that officer in any respect. Therefore, as regards the "particular" (sec. 302, 1918 act) concerning his appointment, the Constitution of this State has unquestionably been changed. Accordingly, the conclusion is inescapable that the effect of the exception contained in section 114 of the 1918 act and incorporated in R. S. 30:4–3 has expired, and that the injunction of the same section that "Each board, with the approval of the State board, shall appoint the chief executive officer of each institution or agency in its charge . . ." comprehends the appointment of the chief executive officer of the State Prison (as well as the chief executive officer of each of the other institutions or agencies).

At the outset we stated our opinion to be, in part, that "in view of pertinent provisions of existing law, it is imperative that such chief executive officer be appointed with the title 'Principal Keeper of the State Prison'." While R. S. 30:4–3 provides that each board shall determine the official title of the executive officer of each institution or agency in its charge, R. S. 30:4–138 provides that

> The Principal keeper shall be the chief executive and administrative officer of the board of managers in charge of the State Prison. . . .

This and other provisions of law, in which reference is made to the Keeper (or Principal Keeper) of the State Prison, modify *pro tanto,* we think, that portion of R. S. 30:4–3 dealing with the determination of the titles of chief executive officers. Manifestly the 1918 Legislature, in including the State Prison in the statutory scheme governing various institutions and agencies of the State, was compelled to utilize the

then constitutional officer known as the Keeper of the State Prison. And whether referred to in the statutes as the "Keeper of the State Prison" or as the "Principal Keeper of the State Prison," he is one and the same officer.

In our deliberation of this matter we have not overlooked the provision of the Constitution of 1947 (Art. V, Sec. I, par. 12) which prescribes that the Governor "shall nominate and appoint, with the advice and consent of the Senate, all officers for whose election or appointment provision is not otherwise made by this Constitution or by law." This provision is traceable to the Constitution of 1844 (Art. VII, Sec. II, par. 8). Mr. Justice Collins of our Supreme Court (1903) discussing, in *Ross* vs. *Freeholders of Essex*, 69 N. J. L. 143, affirmed 69 Id. 291 (E. & A. 1903), the similar provision of the Constitution of 1844, said: ". . . Had the Park Commission act been silent as to how the commissioners authorized should be appointed, I entertain no doubt that their appointment would have lain with the Governor, on the Senate's advice and consent." We think we have made it clear that the sections of the Revised Statutes above indicated as controlling in the matter here under review, coupled with the legislative history thereof as above set forth, evince an unmistakable legislative intent to make due provision by statute law for filling a vacancy in the office here in question.

Respectfully yours,

THEODORE D. PARSONS,
Attorney General.

By : DOMINIC A. CAVICCHIA,
Deputy Attorney General.

FEBRUARY 9, 1951.

HON. W. T. VANDERLIPP, *Director,*
Division of Planning and Development,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 9.

DEAR MR. VANDERLIPP:

Further consideration has been given to your request for opinion as to whether Frank Holmes has authority to put up 30 or more pilings in the sand below high-water mark in front of his property without a permit from your board.

The answer to this is that he has no authority to make any erection or permanent obstruction of any kind without a permit from your board.

Under the Act of 1864, on the right to occupy lands under water in this State, the riparian commission was instructed to make a survey to ascertain the rights of the State in lands under water and to fix and establish exterior lines beyond which no pier, wharf, bulkhead, erection or permanent obstruction of any kind should be permitted to be made.

Under the second section of that act it was provided that until a report was made no grant or lease of any lands was to be made and permission was granted the commission to stay all proceedings, erections and obstructions until further direction of the Legislature.