The phrase "appointing authority" is defined in R.S. 11:19-1 and means the ". . . officer, commission, board or body having power of appointment or election to, or removal from, subordinate positions in an office, department, commission, board or institution of a county, municipality or school district operating under this title." R.S. 40:41-31 provides in part, "*The sheriff shall select and employ* the necessary deputies, chief clerks and other employees, who shall receive such compensation as shall be recommended by the sheriff and approved by the board of freeholders. . . ." (Emphasis added).

Read together, the quoted statutes make it clear that the county sheriff and not the Board of Chosen Freeholders is the "appointing authority" for his deputies, chief clerks and other employees. *Scancarella* v. *Dept. of Civil Service*, 24 N.J. Super. 65, 72 (App. Div. 1952).

Very truly yours,

DAVID D. FURMAN
Attorney General

By: DAVID LANDAU
Deputy Attorney General

SEPTEMBER 25, 1958

MR. EDWIN L. DAVIS
Member, Burlington County
Board of Taxation
County Office Building
Mount Holly, New Jersey

MEMORANDUM OPINION—P-27

DEAR MR. DAVIS:

We have been asked whether the third of the three members of a county board of taxation (see N.J.S.A. 54:3-2) may act as the board on appeals by an individual taxpayer from the assessed valuation of his property pursuant to N.J.S.A. 54:3-21 when one member's position has been vacated by death and a second has disqualified himself because he is the owner of the property which is the subject of appeal.

N.J.S.A. 54:3-25 provides that:

> "A majority of the members of the board shall constitute a quorum for the transaction of business."

It is of no consequence whether the expression "members of the board" in this section intends the members presently serving, in this case two, or the total number when all vacancies are filled (N.J.S.A. 54:3-2, *supra*). It is clear that "majority" means "more than 50%." *Downing* v. *Rugar*, 21 Wend. 178, 34 Am. Dec. 223, 225 (N.Y. Sup. Ct. 1839); 42 *Am. Jur., Pub. Admin. Law*, sec. 72 (1942).

"More than 50%" of either two or three members signifies two. Therefore, in the situation presented the county board is impotent to act on the merits of the appeal.

However, the taxpayer-board member is not deprived of a right of appeal on the assessed valuation of his property. His disqualification only bars him from acting on the merits of his own appeal. He may join with the remaining member to form

a quorum of the county board to enter a judgment that the appeal must be dismissed without prejudice because of the lack of a quorum qualified to determine the merits. The taxpayer-county board member may then file an appeal to the Division of Tax Appeals in the Department of the Treasury pursuant to N.J.S.A. 54:2-39. This section permits an appeal to the Division by any taxpayer "who is dissatisfied with the judgment of the county board of taxation." It does not require that the Division must find that the county board committed a legal error in the strict sense before the Division may afford relief to the taxpayer. The Division is to use every lawful resource to do full justice to the parties. Cf. *Gibraltar Corrugated Paper Co.* v. *North Bergen Twp.*, 20 N.J. 213 (1955). The hearing before the Division will be as full as one before the county board since it is de novo. N.J.S.A. 54:29A-33; *Delaware, L. & W. R. R.* v. *Hoboken,* 10 N.J. 418, 425 (1952); *Central R. R.* v. *Neeld,* 26 N.J. 172, 181, 183 (1958), cert. denied 357 U.S. 928 (1958).

Very truly yours,

DAVID D. FURMAN
Attorney General

By: WILLIAM L. BOYAN
Deputy Attorney General

SEPTEMBER 25, 1958

HONORABLE SALVATORE A. BONTEMPO
Department of Conservation and Economic Development
State House Annex
Trenton, New Jersey

MEMORANDUM OPINION—P-28

DEAR COMMISSIONER BONTEMPO:

The Township of Green Brook in Somerset County, which at one time had asked for a grant of an estate in a small portion of Washington Rock Park on which it wishes to locate fire fighting equipment to protect the mountain areas of the township and which request had been refused because of the conclusions contained in a Memorandum Opinion which we furnished your immediate predecessor in office under date of January 8, 1957, now asks that we reconsider those conclusions. That opinion held that no greater right than a license could be granted because of the nature of the language in the deed by which the State took its title.

The township authorities have taken exception to the conclusions in that opinion and have renewed their plea for the conveyance on the ground that there is an ever increasing growth in population in the mountain areas which have no adequate fire protection available presently. They also note that there is considerable State property of historic value in the park itself, the safety of which is jeopardized by the lack of first class fire protection. The township proposes to construct, outfit and maintain on the tract sought to be acquired a building suitable for a fire company.

The deed to the State for Washington Rock Park was made by Charles W. McCutcheon on November 29, 1913 for 27 acres and the acceptance of the conveyance was authorized by L. 1913, c. 141. A portion of the preamble to the statute set forth that "Washington Rock was of historic importance and was to be acquired and

maintained as a public park." The enacting part of the statute provided for the appointment by the Governor of a commission to be known as the Washington Rock Park Commission with power "to take care of, care for, keep, improve, maintain and develop the said lands as a public park in commemoration of * * *." The granting clause contained words which operated to convey a fee simple title while by the habendum the grantee was to have and hold the premises "for the use and purposes of a public park, to take over, care for, keep, improve, maintain and develop the said lands as a public park in commemoration of * * *." The habendum clause also contains the condition that the "conveyance is made subject to the terms and conditions of an act of the Legislature approved March 27, 1913." (L. 1913, c. 141) So it is to be seen that the deed in question and the statute authorizing its acceptance contain somewhat identical language with reference to the nature of the estate conveyed and no conditions are expressly stated, nor does the grantor reserve to himself, or his heirs, a right of re-entry for a condition broken.

Several questions present themselves and will be answered categorically.

The first concerns itself with the problem as to whether you, as Commissioner of the Department of Conservation and Economic Development, have the authority by statute to convey lands acquired for park purposes. The park was acquired by the State in 1913 and a special commission denominated the Washington Rock Park Commission was established to administer it. L. 1913, c. 141, as amended L. 1924, c. 56. In 1931 the Commission on Historic Sites was created with power *inter alia* to care for monuments to which the State had title but which were not entrusted to any special commission. L. 1931, c. 24, §5; R.S. 28:1-1, 6. Control of Washington Rock Park was transferred to the Historic Sites Commission in the following year. L. 1932, c. 208 at 478; R.S. 28:1-13. In 1945 a Department of Conservation was established with five divisions, including a Division of Forestry, Geology, Parks and Historic Sites. L. 1945, c. 22, §4; N.J.S.A. 13:1A-4. The powers and property of the Commission on Historic Sites was transferred to this division. L. 1945, c. 22, §24; N.J.S.A. 13:1A-24. The Department of Conservation became part of the Department of Conservation and Economic Development in 1948. L. 1948, c. 448, §1; N.J.S.A. 13:1B-1. At that time the functions of the Division of Forestry, Geology, Parks and Historic Sites were transferred to the Division of Planning and Development. L. 1948, c. 448, §7; N.J.S.A. 13:1B-7. The control of Washington Park rests today in this Division of Planning and Development.

The Division of Planning and Development, as successor to the Division of Forestry, Geology, Parks and Historic Sites, N.J.S.A. 13:1B-7, *supra,* which in turn was the successor to the Board of Conservation and Development, L. 1945, c. 22, §24; N.J.S.A. 13:1A-24, has power, in the service of the best interests of the State, "to lease, sell or exchange * * * any portion of the * * * properties acquired for the purposes indicated in [article 3 of chapter 1 of title 13 of the Revised Statutes]," R.S. 13:1-23, including property acquired for the purpose of "a State park * * * or other State reservation * * * made for historic * * * scenic * * * or * * * any other purpose * * *." R.S. 13:1-18.

You are therefore advised that, as Commissioner of the Department of Conservation and Economic Development, you have the full right and power to sell, lease or exchange for other lands, the lands in question to Green Brook Township to be used for a fire fighting station subject to a finding that the contemplated transaction will be in the best interests of the State (R.S. 13:1-23). If you sell, or exchange the lands for other lands of the township, then you must have the approval of the Governor, R.S. 13:1-23. If such lands are to be leased, no approval is necessary.

The next question is whether or not the deed or the statute in question limits those rights which you have under R.S. 13:1-23. We find nothing in the deed or statute which imposes any condition on the conveyance by McCutcheon to the State that the lands in question be used solely and exclusively for a public park, nor is there anything present which provides for, or which, by implication, may be taken to hold that upon the failure of the State to maintain all or any part of the Washington Rock Park that the title to all or part of that area shall revert to the grantor or his heirs.

Support is given by the text contained in 19 Am. Jr. (Estates) §71 as follows:

> "A condition will not be raised by implication from a mere declaration in the deed that the grant is made for a special and particular purpose without being coupled with words appropriate to make such a condition. Such recitals are usually construed as giving rise, at most, to an implied covenant that the grantee will use the property only for the specified purpose. They are merely to restrain the generality of the preceding clauses; and in the case of sales to municipal and other corporations, they are considered as having been inserted merely for the purpose of showing the grantee's authority to take, even though the authorization under which the land is taken itself limits its use to the purpose specified.
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> * * *
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> " * * * and following the rule as to strict construction in favor of covenants, the courts have held in effect that the fact that deeds were without consideration would not, standing alone, render a recital in the deed as to the purpose for which the land was to be used a condition subsequent, but that unless an intent on the part of the grantor to impose a condition was apparent, such a recital should be regarded as a covenant or a trust. * * *"

See also discussion of fees simple defeasible, *Restatement, Property* §§44 and 45 (1936).

Therefore, you are advised that it is our opinion that the State holds an unqualified fee simple title to the lands in question.

Since the township wishes to pay no money consideration for the conveyance, it is suggested that the grant be made upon condition that the facilities and services of the fire department of the township in the mountain area shall be available at all times of emergency to agencies of the State located in the township and that in the event that the grantee shall at any time in the future discontinue the use of the premises for the purpose of maintaining fire fighting facilities and other appropriate buildings, then title thereto shall revert to the State of New Jersey. If the grantee should be a volunteer fire company and the grant is made to it as a corporation, organized not for pecuniary profit (R.S. 15:8-1; R.S. 15:1-1), it is our opinion that the conveyance would not violate any constitutional provision regarding gifts to private corporations (N.J. Constitution Art. 8, Sec. 3, par. 3), and that the receipt by the State of fire protection services in return for the lands would constitute consideration. The presence of a reverter clause in the deed from the State would eliminate the possibility that the lands might eventually be used for private purposes.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: SIDNEY KAPLAN
Deputy Attorney General