were not taxed. The lease between the City of Newark and the tenant was made in 1941 at an annual rental of $5,000 for a term of 50 years and gave the tenant an option to purchase the city's fee at any time during the term for a fixed consideration.

The Supreme Court held that the use of the property was exclusively private and commercial and that there was no present public use nor any prospect of a future public use within the terms of the lease, although the lease provided that the building erected on the premises would become a part of the freehold estate of the landlord. The court held that such a provision was not a conclusive barrier against taxation. The lease also provided that the City would pay taxes upon the improvements to be erected by the tenant. The court held that the undertaking by the City to pay taxes did not give the building a tax exempt status, nor did it relieve the Assessor from the duty to make an assessment for the purpose of taxation.

The court clearly held in 2 N.J. at 332 that both the land and the buildings were taxable since they were not "used for public purposes" within the meaning of the tax exemption provided in R.S. 54:4–3.3. The court held that public use as well as public ownership were required as conditions of exemption from taxation and that "the receipt of rentals from a private lessee does not transform a private use into a public use." 2 N.J. at 333.

Jamouneau v. *Local Government Board*, 6 N.J. 281 (1951), dealt with real property leased by the City of Newark to a non-exempt owner for a term of 50 years commencing January 1, 1929. The lessee was required to construct a fire-proof building on the premises and to keep the building in good repair. The lease further provided that the building should be deemed to be attached to the freehold and the land and building would both be surrendered to the lessor at the expiration or other termination of the lease. The lessee agreed to pay a fixed rent for the land plus, as additional rent, all taxes "upon the buildings and improvements upon said property," but not "taxes on the ground." 6 N.J. at 285. The building in question is located at Commerce Street and Raymond Boulevard in the City of Newark. The Raymond-Commerce Corporation was the successor in interest to the original lessee and was the lessee at the time of the *Jamouneau* case.

The *Jamouneau* case arose out of an effort by the Raymond-Commerce Corporation to purchase the land and cancel the lease. The actual transfer was prevented by the court on the ground that the City would not receive a fair consideration in the transaction for the property sold and the rights surrendered. However, in the decision the court passed upon the question of liability for the payment of taxes "on the land as distinguished from buildings and improvements." 6 N.J. at 291. The court noted that: "The land is not in public use and therefore is taxable * * *." In 6 N.J. at 291 the court said as follows:

> "A question is raised about liability for the payment of taxes on the land as distinguished from buildings and improvements. We construe the lease to mean that during the term thereof the lessee shall not be called upon to pay the land tax. The land is not in public use and therefore is taxable, *Jamouneau* v. *Division of Tax Appeals*, 2 N.J. 325 (1949), but the obligation upon the municipal owner to pay the land tax out of its land rental is not unreasonable, is not an excessive part of the receipts from the use of the land and, in our opinion, is not an unlawful incident. It is not, as appellant appears to contend, a grant of tax exemption. It is a retention of the tax obligation as a burden on the owner to be met from the annual rent charges and is not within

the application of *Whipple* v. *Teaneck Township*, 135 N.J.L. 345 (E. & A. 1946). There is nothing novel about the obligation of a municipality to pay taxes on property owned by it and not devoted to a public use. *Newark* v. *Township of Clinton*, 49 N.J.L. 370 (Sup. Ct. 1887); *City of Perth Amboy* v. *Barker*, 74 N.J.L. 127 (Sup. Ct. 1906); *Essex Co. Park Commission* v. *State Board*, 129 N.J.L. 336 (Sup. Ct. 1943). To the extent that a yearly tax on the land would result in a reduced net income from rental, it lessens the worth of the lease as an asset to the city * * *."

Where such a lease provides that the municipality will pay taxes levied upon land and buildings, the levying of municipal taxes which are then paid out of rentals from the property does not alter the net return to the city on the lease. However, by taxing the land and buildings, the assessments become part of the aggregate of assessments of the municipality for the purpose of allocating county taxes. See *Passaic* v. *Passaic County Board of Taxation*, 31 N.J. 413 (1960). Thus, it would be unfair to other municipalities sharing the county tax burden not to assess municipally owned land which becomes taxable when leased and used for private purposes.

You also have asked whether the provisions of L. 1949, c. 177, N.J.S.A. 54:4–2.3 *et seq.* are applicable to the leases under discussion. The act in question provides for the taxing of leasehold estates and appurtenances as the property of the lessee of real estate when the real estate is exempt from taxation and is leased to a non-exempt entity, "the leasing of which does not make the real estate taxable * * *." N.J.S.A. 54:4–2.3. An example of a lease within the purview of this section is a lease of land owned by the Federal Government which is tax exempt, the leasing of which to a non-exempt entity for non-public purposes nevertheless does not make the land, as such, taxable. In such a case, the leasehold estate of the non-exempt entity would be taxable and would be "assessed as real estate." N.J.S.A. 54:4–2.3.

L. 1949, c. 177 is not applicable to land owned by a municipality and leased to a non-exempt entity. The leasing in that case, as stated above, does make the land taxable. The act is otherwise made inapplicable by the express provision in N.J.S.A. 54:4–2.12(2). This section specifically excludes from the application of the act leasehold estates of persons leasing real property owned by any municipality.

Under the circumstances we advise you that land owned by a municipality which is leased to a non-tax-exempt entity and not used for public purposes should be assessed and taxed regardless of the provisions in the lease which determine whether the taxes are to be paid by the municipal lessor or by the tenant.

Very truly yours,

THEODORE I. BOTTER
Acting Attorney General