Department. During that period the employee must demonstrate that he is competent to discharge the duties of the position."

And see Civil Service Rule 45, paragraph 2:

"2. * * * At the end of the working test or probationary period the appointing authority may discontinue the service of any such appointee if in the opinion of such appointing authority the working test indicates that the appointee is unable or unwilling to perform the duties of his position satisfactorily or is of such reputation, habits and dependability as not to merit continuance in the service. * * *"

In setting up the probationary period for training, the Police Training Act did not attempt to preempt the area of probationary periods to the exclusion of the probationary work period provided under Civil Service law. The probationary appointment period under the Police Training Act is permissive. N.J.S.A. 52:17B-69 provides that a probationary or temporary appointment *may* be made "for the purpose of enabling a person seeking permanent appointment to take a police training course as prescribed in this act." But R.S. 11:22-6 provides that permanent appointment to Civil Service positions "*shall* be for a probationary period of three months." (Emphasis added.)

For the foregoing reasons we are of the opinion that the probationary period outlined in section 4 of the Police Training Act is separate from and supplementary to the probationary period provided for in R.S. 11:22-6 of the Civil Service law.

Very truly yours,

ARTHUR J. SILLS
Attorney General

By: LARRY F. LEFKOWITZ
Law Assistant

DECEMBER 20, 1963

HON. JOHN A. KERVICK
State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION 1963—No. 7

DEAR MR. KERVICK:

You have requested our opinion as to whether corporations operating pursuant to and within the framework of the Capehart Act (Housing Amendments of 1955, act of August 11, 1955, c. 783, secs. 403 *et seq.* 69 Stat. 651, 42 U.S.C. 1594 *et seq.*) are taxable by the State of New Jersey under the Corporation Business Tax Act (1945), N.J.S.A. 54:10A-1 *et seq.* The corporations to which you have referred were incorporated under the laws of another state for the purpose of constructing military housing facilities under the Capehart Act. The entire capital stock of said corporations has been assigned to and is presently owned by the Federal government.

In our opinion said corporations are not subject to the New Jersey Corporation Business Tax Act, for the reasons stated below.

Your question requires an analysis of the Capehart Act. The Capehart Act is the popular name for the Housing Amendments of 1955 which provide for the construction of housing for military personnel and the military housing mortgage insurance program. This law supersedes the [Wherry] Military Housing Act of 1949 (Act of August 8, 1949, c. 403, 63 Stat. 570). Title IV of the Housing Amendments of 1955 adds Title VIII (Armed Services Housing Mortgage Insurance) to the National Housing Act. Sections 401 and 402 of Title IV are codified in Title 12 of the U.S. Code (12 U.S.C. 1748 to 1748g and 1720). Sections 403 to 410 of Title IV of the Housing Amendments of 1955 deal with the functions of the Defense Department in obtaining and operating housing for military personnel and are codified in Title 42 of the U.S. Code (42 U.S.C. 1594 to 1594f).

The purpose of the Capehart Act is to:

> "* * * provide for the construction of urgently needed housing on lands owned or leased by the United States and situated on or near a military reservation or installation for the purpose of providing suitable living accommodations for military personnel of the armed services assigned to duty at the military installation at or in the area where the housing is situated. * * *." Housing Amendments of 1955, § 403(a), as amended, 69 Stat. 651, 70 Stat. 1110, 42 U.S.C. 1594(a).

The actual operation of the Capehart Act is extremely complex. Stated as simply as possible, the Capehart Act provides for the construction of housing facilities on government-owned land by private contractors. Housing Amendments of 1955, § 403(a), as amended, 69 Stat. 651, 70 Stat. 1110, 42 U.S.C. 1594(a). The contracts are awarded on the basis of competitive bidding which includes cost of construction and the builder's profit. Housing Amendments of 1955, § 403(b), as amended, 69 Stat. 651, 70 Stat. 1110, 42 U.S.C. 1594(b). The government then leases the land under a long-term lease at a nominal rental to the successful bidder. National Housing Act, § 805, as amended Aug. 11, 1955, c. 783, Title IV, § 401, 69 Stat. 651, 12 U.S.C. 1748d. The builder thereupon obtains a loan to cover the bid and to finance the construction by placing a mortgage on the entire property. National Housing Act, § 803, as amended Aug. 11, 1955, c. 783, Title IV, § 401, 69 Stat. 647, 70 Stat. 1109, 12 U.S.C. 1748b(b), 24 C.F.R. § 803.7, 8, 9; § 803.13; § 803.251. After the completion of the housing facilities, the entire project, subject to the mortgage encumbrance, is turned over to the Secretary of Defense or his designee who pays directly the principal and interest of the long-term mortgage. Housing Amendments of 1955, §§ 403, 405, as amended, 69 Stat. 651, 652, 70 Stat. 1110, 42 U.S.C. 1594(a), 1594b. If the builder-mortgagor is a corporation, its capital stock also is surrendered to the Secretary who thereafter is entitled to exercise the rights of a stockholder during the life of the corporation and to dissolve the corporation when the mortgage has been paid and satisfied. Additionally, all corporate directors and officers must submit their resignations to the Secretary. Housing Amendments of 1955, § 403(a), (c), as amended, 69 Stat. 651, 70 Stat. 1110, 42 U.S.C. 1594(a), (c), 24 C.F.R. § 803.25. The original principals of the corporation thereafter have no direct interest in the project. The Federal Housing Commissioner is authorized to insure the mortgages, including the advances on such mortgages during construction. National Housing Act, § 803(a) as amended, Aug. 11, 1955, c. 783, Title IV, 69 Stat. 647, 70 Stat. 1109, 71 Stat. 297, 303, 72 Stat. 73, 73 Stat. 322, 682, 74 Stat. 185, 186, 75 Stat. 111, 177, 12 U.S.C. 1748b(a). Additionally, the Secretary of Defense is authorized to guarantee the payment of the notes

and mortgage instruments required by the Commissioner. Housing Amendments of 1955, § 403(c), as amended, 69 Stat. 651, 70 Stat. 1110, 42 U.S.C. 1594(c).

The Corporation Business Tax Act (1945) imposes a tax upon every domestic or foreign corporation "for the privilege of having or exercising its corporate franchise in this State or for the privilege of doing business, employing or owning capital or property, or maintaining an office in this State." N.J.S.A. 54:10A–2. It is a franchise tax, not a tax on property. *Werner Machine Co.* v. *Director of Division of Taxation*, 17 N.J. 121 (1954), *affirmed* 350 U.S. 492, 76 S. Ct. 534 (1956); cf. *Household Finance Corp.* v. *Director of Div. of Taxation*, 36 N.J. 353 (1962), *appeal dismissed* 371 U.S. 13, 83 S. Ct. 41 (1962).

In the absence of Congressional consent, a federal instrumentality cannot be subjected to the plenary taxing power of the states. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819). Congress has the power to determine, however, within the limits of the Constitution, the extent to which an instrumentality of the federal government may be subjected to state taxation. *Federal Land Bank of Wichita* v. *Board of County Commissioners*, 368 U.S. 146, 82 Sup. Ct. 282 (1961). The salient issue, therefore, is whether a corporation organized by private, nongovernmental interests for the purpose of constructing military housing facilities pursuant to the Capehart Act is a federal instrumentality or agency, after the military housing project has been completed and the capital stock of the corporation has been assigned to the federal government. Assuming that such a Capehart corporation is an instrumentality of the federal government, it must then be determined whether Congress has sanctioned the imposition upon the corporation of a state or local franchise tax.

In *S. S. Silverblatt, Inc.* v. *Tax Com'n of State of New York*, 5 N.Y. 2d 635, 159 N.E. 2d 195 (Ct. of App. 1959), *cert. denied*, 361 U.S. 912, 80 S. Ct. 253 (1959), the New York court determined that such a Capehart corporation is created for a commercial purpose for private profit and, therefore, was not an instrumentality of the federal government. Accordingly it was held that such a corporation was not immune from a state tax upon the privilege of recording the underlying mortgage. It is to be noted, however, that *Silverblatt* did not consider the status of such a Capehart corporation *after* the military housing project had been completed and *after* its entire capital stock had been assigned to the federal government. Under the Capehart Act, the demised premises and military housing facility improvements upon completion are owned, operated and maintained entirely by the federal government. The federal government operates the housing as public quarters in the same manner that it operates housing built with federally appropriated funds. Service personnel are assigned by the federal government to the housing quarters, for which no rent is paid, and the project is maintained out of federally appropriated maintenance and operations funds. Once the capital stock of a mortgage-builder corporation has been transferred to the federal government, the corporation continues in existence merely as the nominal lessee and mortgagor. Pursuant to the guarantee of payment by the Secretary, the mortgage debt is amortized with federally-appropriated funds, and the federal government itself pays directly the principal and interest under the mortgage. The corporation has no income and makes no disbursements and engages in no activities. When the federal government has repaid the loan, it terminates the lease and dissolves the corporate-mortgagor.

In *Clallam County, Wash.* v. *United States*, 263 U.S. 341, 44 S. Ct. 121 (1923), the United States Supreme Court held that a corporation organized under the laws

of the State of Washington by the Director of Aircraft Production for the purchase, production, manufacture and sale of aircraft or equipment for the United States and its allies for the prosecution of the war was an instrumentality of the federal government and its property was immune from a state property tax. The Court stated:

> "The State claims the right to tax on the ground that taxation of the agency may be taxation of the means employed by the government and invalid upon admitted grounds, but that taxation of the property of the agent is not taxation of the means. We agree that it 'is not always, or generally, taxation of the means,' as said by Chief Justice Chase in *Thomson* v. *Union Pacific R.R. Co.*, 9 Wall. 579, 591, 19 L. Ed. 792. But it may be, and in our opinion clearly is when as here not only the agent was created but all the agent's property was acquired and used, for the sole purpose of producing a weapon for the war. *This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account.* The incorporation and formal erection of a new personality was only for the convenience of the United States to carry out its ends." (Emphasis supplied.) (263 U.S. at pp. 344, 345; 44 Sup. Ct. at p. 122.)

In *Clifton* v. *State Board of Tax Appeals*, 126 N.J.L. 205, 208 (Sup. Ct. 1941), it was stated:

> "* * * And when the national government lawfully acts through a corporation which it owns and controls, those activities are government functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments."

After its capital stock has been assigned to the federal government upon the completion of the military housing project, a Capehart corporation serves no private or non-governmental end. It functions solely on behalf of the United States. Since, by the proceeds of the mortgage it has already been paid for the cost of construction, including its builder's profit, and, since it earns no income after its stock has been assigned to the federal government, the corporation cannot be said to be "interested in profit for its own account." To the extent that such a corporation, existing merely as a nominal lessee and mortgagor, functions or acts as all, it does so only for the purposes of the United States under the Capehart Act. It must, therefore, be considered an instrumentality or agency only of the federal government.

There remains to be determined the question of whether Congress has consented to or authorized the imposition of a state franchise tax upon a Capehart corporation whose stock has been assigned to the federal government. In many areas and in many instances Congress has consented to or expressly authorized the imposition of state or local taxes upon federal instrumentalities or their property. E.g., *Reconstruction Finance Corp.* v. *Beaver County, Pa.*, 328 U.S. 204, 66 S. Ct. 992 (1946); *First Nat. Bank* v. *Adams*, 258 U.S. 362, 42 S. Ct. 323 (1922). As a corollary, Congress may provide specifically for the tax exemption of federal instrumentalities or property of the federal government and its instrumentalities. E.g., *Federal Land Bank of Wichita* v. *Board of County Commissioners, supra*; *Reconstruction Finance Corp.* v. *Beaver County, Pa., supra.* A Congressional consent to state taxation of federal instrumentalities, however, will not be extended beyond its clear terms and provisions and, unless the object of state taxation falls clearly within the area of permissible taxation

specified by Congress, it will be immune therefrom. *Rohr Aircraft Corp.* v. *County of San Diego*, 362 U.S. 628, 80 S. Ct. 1050 (1960).

There are limited areas wherein Congress has consented to the taxation of the interests of private persons constructing military housing. In *Fort Dix Apartment Corp.* v. *Borough of Wrightstown*, 225 F. 2d 473, 475-476 (3d Cir. 1955), *cert. denied* 351 U.S. 962, 76 S. Ct. 1024 (1956), it was held that the leasehold interest of a corporation organized pursuant to the Wherry Military Housing Act was subject to a property tax of New Jersey, N.J.S.A. 54:4–2.3 *et seq.* In *Offutt Housing Company* v. *County of Sarpy*, 351 U.S. 253, 76 S. Ct. 814 (1956), the United States Supreme Court, citing *Fort Dix Apartment Corp.* v. *Borough of Wrightstown, supra,* likewise held that the leasehold interest of a Wherry housing corporation was subject to a state property tax. Both decisions recognized that the tax upon the private lessee's leasehold interest was not a tax upon the underlying fee owned by the federal government. Thus, they illustrate the principle that a state may impose a tax upon the property interests of private persons dealing in federal property, or with the federal government, provided the tax is not directly upon the federal government or its property. *City of New Brunswick* v. *United States*, 276 U.S. 547, 48 S. Ct. 371 (1928); *United States* v. *City of Detroit*, 355 U.S. 466, 78 S. Ct. 474 (1958).

The Capehart Act provides that:

> "* * * Nothing contained in the provisions of title VIII of the National Housing Act in effect prior to August 11, 1955 [sections 1748-1748h of Title 12], or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal Government in or with respect to any property covered by a mortgage insured under such provisions of title VIII * * *." (Housing Amendments of 1955, § 408, as amended, 42 U.S.C. 1594 note.)

It is reasonably clear that by this provision Congress has not precluded state taxation of a lessee's interest under the Capehart Act. The New York court in *S. S. Silverblatt, Inc.* v. *Tax Com'n of State of New York, supra,* pointed out, however, that the foregoing "Savings Provision" pertains solely to the taxation of a private interest in property. The New York state tax was not a tax on property but upon the privilege of recording a mortgage; it was not therefore based upon the "Savings Provision." *A fortiori*, the "Savings Provision" cannot by implication be construed to provide a Congressional consent to a state corporate franchise or privilege tax upon a Capehart corporation when it is owned and controlled completely by the federal government. Nor are there any other provisons in the Capehart Act or any related statute which would authorize the imposition of such a state corporation franchise tax.

In summary, we conclude (1) a Capehart corporation, upon the completion of the military housing project and the assignment of its capital stock to the federal government, is owned and controlled entirely by the federal government and functions only for a federal purpose; as such, it is an instrumentality of the federal government; (2) Congress has not in the Capehart Act, or in any related statute, or by implication, authorized or consented to the imposition of a state tax upon the franchise of such a corporation. We advise you, therefore, that a Capehart corporation, the capital stock of which has been assigned to the federal government, pursuant to the

Capehart Act, is not subject to the Corporation Business Tax Act (1945), N.J.S.A. 54:10A-1 *et seq.*

Very truly yours,

ARTHUR J. SILLS
Attorney General

By: ALAN B. HANDLER
Deputy Attorney General

JANUARY 9, 1963

HONORABLE H. MAT ADAMS
Commissioner, Conservation and Economic Development
Trenton, New Jersey

MEMORANDUM OPINION—P-1

DEAR COMMISSIONER ADAMS:

You have asked whether a county housing authority can be created under the provisions of the Local Housing Authority Law, N.J.S.A. 55:14A-1 *et seq.*, in a county where several local housing authorities have already been created under this same act. In our opinion the county may establish a county housing authority, but the area of its operation is limited to those municipalities who have not already created a local authority and who by ordinance consent to join such a county authority.

N.J.S.A. 55:14A-4 provides for the creation of housing authorities. With respect to county housing authorities the applicable portions of N.J.S.A. 55:14A-4 are as follows:

> "Any governing body may, by resolution in the case of counties, * * *, create a body corporate and politic to be known as the 'Housing Authority of ————————————' inserting the name of the * * * county creating such authority. Such authority shall constitute an agency and instrumentality of the * * * county creating it. * * * Where there is no housing authority in existence in any municipality of a county, the governing body of said county may create a housing authority; *provided*, the Director shall certify that there is a need for housing within said county; thereafter, no municipality within said county shall create an authority or join in the creation of a regional authority without the consent of the governing body of said county and without the consent of the county's housing authority."

The "area of operation" of a county authority is defined by N.J.S.A. 55:14A-3(e) as follows:

> "* * * (3) in the case of a housing authority of a county, shall include all of the county except that portion which lies within the territorial limits of a municipality or group of municipalities for which a housing authority has been created; with respect to any municipality which has not created or joined in the creation of an authority, a housing authority of a county shall not include such municipality within its area of operation, unless it has first