Commonwealth of Pennsylvania

OPINIONS

OF THE

ATTORNEY GENERAL

OF

Pennsylvania

January 17, 1967

to

April 9, 1969

WILLIAM C. SENNETT
Attorney General

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PREFACE

DEPARTMENT OF JUSTICE

The Department of Justice is the law office of the Commonwealth. It is required by the Administrative Code to furnish legal advice to the Governor and to all departments, boards and commissions of the state government and to represent the Commonwealth in litigation to which it is a party.

The department is headed by the Attorney General, the chief law enforcement officer of the Commonwealth. He is appointed by and serves at the pleasure of the Governor. By virtue of his office he also is a member of the Board of Pardons, the Board of Finance and Revenue, the Board of Property and the Board of Commissioners on Uniform State Laws. With the approval of the Governor, he has the power to appoint deputy attorneys general and other counsel to assist him in representing the Commonwealth in legal matters.

ATTORNEYS GENERAL

William Bradford	June	9,	1791
Jared Ingersoll	Aug.	20,	1791
Joseph B. McKean	May	10,	1800
Mahlon Dickerson	July	22,	1808
Walter Franklin	Jan.	9,	1809
Richard Rush	Jan.	26,	1811
Jared Ingersoll	Dec.	13,	1811
Amos Ellmaker	Dec.	21,	1816
Thomas Sergeant	July	7,	1819
Thomas Elder	Dec.	20,	1820
Frederick Smith	Dec.	18,	1823
Calvin Blythe	Feb.	5,	1828
Amos Ellmaker	May	6,	1828
Philip S. Marclay	Aug.	17,	1829
Samuel Douglass	Feb.	10,	1830
Ellis Lewis	Jan.	29,	1833
George M. Dallas	Oct.	14,	1833
James Todd	Dec.	18,	1835
William B. Reed	Mar.	27,	1838
Ovid F. Johnson	Jan.	15,	1839
John K. Kane (resigned)	Jan.	21,	1845
John M. Reed (resigned)	June	23,	1846
Benjamin Champneys	Dec.	18,	1846
James Cooper (resigned Dec. 30, 1848)	July	31,	1848
Cornelius, Darrah	Jan.	4,	1849
Thomas E. Franklin	Apr.	28,	1851
James Campbell (resigned March 8, 1853)	Jan.	21,	1852
Francis W. Hughes	Mar.	14,	1853
Thomas E. Franklin	Jan.	17,	1855
John C. Knox	Jan.	19,	1858
Samuel A. Purviance	Jan.	16,	1861
William M. Meredith	June	3,	1861
Benjamin Harris Brewster (resigned Oct. 25, 1869)	Jan.	16,	1867
F. Carroll Brewster	Oct.	26,	1869
Samuel E. Dimmick (died Oct. 11, 1875)	Jan.	22,	1873
George Lear	Dec.	7,	1875
Henry W. Palmer	Feb.	26,	1879
Lewis C. Cassidy	Jan.	17,	1883
William S. Kirkpatrick	Jan.	18,	1887
W. U. Henset	Jan.	10,	1897
Henry C. McCormick	Jan.	15,	1895
John P. Elkin	Jan.	18,	1899
Hampton I. Carson	Jan.	21,	1903
Moses Hampton Todd	Jan.	16,	1907
John C. Bell	Jan.	17,	1911
Francis Shunk Brown	Jan.	19,	1915
William I. Schaffer (resigned Dec. 14, 1920)	Jan.	21,	1919
George R. Alan	Dec.	14,	1920
George W. Woodruff	Jan.	16,	1923
Thomas J. Baldridge (resigned Jan. 28, 1929)	Jan.	18,	1927
Cyrus I. Woods(resigned Nov. 1, 1930)	Jan.	28,	1929
William A. Schnader	Nov.	1,	1930
Charles J. Margiotti	Jan.	15,	1935
Guy H. Bard	April	29,	1938
Claude Trexler Reno	Jan.	17,	1939
E. Russell Shockley	Jan.	1,	1943
James H. Duff	Jan.	20,	1943
T. McKeen Chidsey (resigned July 5, 1950)	Jan.	21,	1947
Charles J. Margiotti (resigned March 1, 1951)	July	5,	1950
Robert I. Woodside (resigned Sept. 30, 1953)	March	7,	1951
Frank F. Truscott	Oct.	13,	1953
Herbert B. Cohen (resigned Dec. 17, 1956)	Jan.	18,	1955
Thomas D. McBride (resigned Dec. 15, 1958)	Dec.	17,	1956
Harrington Adams (Acting)	Dec.	16,	1958
Anne X. Alpern (resigned Aug. 28, 1961)	Jan.	20,	1959
David Stahl	Aug.	29,	1961
Walter E. Alessandroni (died May 8, 1966)	Jan.	15,	1963
Edward Friedman (Acting)	May	11,	1966
*William C. Sennett	Jan.	17,	1967

SENNETT, William C., *Attorney General*
FRIEDMAN, Edward, *Counsel General*
McCORD, John P., *Executive Deputy Attorney General*
GOLDBERG, Richard M., *Executive Assistant to the Attorney General*

DEPUTY ATTORNEYS GENERAL

ANASTASIO, Eugene J.
ANTOUN, Frederic G.
BAKER, Edward T.
BOLLA, Elmer T.
BONNO, Harold F.
CASPER, Edgar R.
FERNSLER, John P.
FLANNERY, John W.
GAFFORD, Francis J.
GILES, Frederick D.
GOLDBERG, Richard M.
KEITEL, George W.
KLEIMAN, Raymond
LANE, Thomas H.
LAWLEY, Frank P., Jr.
MILLER, Raymond C.
MORGAN, Warren G.
SMELTZ, David
STEINROCK, G. Fred
WASHINGTON, Patrick
WEISS, R. Joel
WOODS, Charles A., Jr.
WORK, Joseph P.
WRAY, Henry
YAKOWICZ, Vincent X.

OFFICIAL OPINION No. 272

Commonwealth leases—Approval of branch office—Board of Commissioners of Public Grounds and Buildings—Quorum.

The Board of Commissioners of Public Grounds and Buildings, consisting of the Governor, Auditor General and State Treasurer is empowered to approve or disapprove proposed leases for branch offices, rooms, and accommodations outside the capitol city.

An affirmative vote or approval of a majority of a quorum of the Board, or two members of the Board, is legally sufficient for approval of a branch office lease.

The absence of the signature of a dissenting member would in no way affect the legal sufficiency of the action of the majority of the Board.

Harrisburg, Pa., October 23, 1967.

Honorable Perrin C. Hamilton, Secretary of Property and Supplies, Harrisburg, Pennsylvania.

Sir: We have your request for advice as to the method whereby the Board of Commissioners of Public Grounds and Buildings execute the powers and duties conferred upon them. Specifically, you inquire as to the number of the members of such Board required to approve a branch office lease outside of the capital city.

Leases of real estate to the Commonwealth are entered into on behalf of the Commonwealth through the Department of Property and Supplies in compliance with the provisions in Section 2402 (d) of The Administrative Code of 1929, Act of April 9, 1929, P. L. 177, 71 P. S. §632 (d) which directs the Department of Property and Supplies as follows:

> "(d) To contract in writing for and rent proper and adequate offices, rooms, or other accommodations, outside of the Capitol buildings, for any department, board, or commission, which cannot be properly and adequately accommodated with offices, rooms, and accommodations in the Capitol buildings; and, *in all cases in which the head of a department, for such department or for a departmental administrative board or commission within such department, or an independent administrative board or commission, with the approval of the Executive Board, has established or is about to establish a branch office in any city or place outside of the capital city, with the approval of the Board of Commissioners of Public Grounds and Buildings, to contract in writing for and rent such offices, rooms, and other accommodations, as shall be proper and adequate for such department, board or commission.***"* (Emphasis supplied)

The Board of Commissioners of Public Grounds and Buildings is composed of the Governor, the Auditor General and the State Treasurer (The Administrative Code, supra, §446, 71 P. S. §156).

Section 2413 of The Administrative Code, 71 P. S. §643, which defines the powers and duties of the Board of Commissioners of Public Grounds and Buildings, provides, inter alia, as follows:

> "The Board of Commissioners of Public Grounds and Buildings shall have the power, and its duty shall be:
>
> "(a) To approve or disapprove proposed leases for branch offices, rooms, and accommodations, outside the capitol city;"

It is significant that the law confers certain authority upon the *Board* of Commissioners of Public Grounds and Buildings and not on the individual members thereof. It is thus the clear intent of the law that the Board act as an entity and not through the separate and independent actions of its constituent members. It does not require the approval of branch office leases by the Governor, the Auditor General and the State Treasurer. It only calls for approval by the Board.

It is a rule of common law confirmed by consistent decisions of Pennsylvania courts that, in the absence of specific language to the contrary, a majority of a Board constitutes a quorum, and a majority of a quorum is legally authorized to transact the business of a Board, *Commonwealth ex rel. v. Fleming,* 23 Pa. Super. 404 (1903), *Frackville Borough Council Case,* 308 Pa. 579, 584 (1932). See also *U. S. v. Ballin,* 144 U. S. 1, 8 (1892). This principle has been enacted into statutory law.

Section 35 of the Statutory Construction Act, Act of May 28, 1937, P. L. 1019, 46 P. S. §535, provides, as follows:

> "Words in a law conferring a joint authority upon three or more public officers or other persons shall be construed to confer authority upon a majority of such officers or persons.
>
> "A majority of any board or commission shall constitute a quorum."

See *Oakland v. Board of Conservation,* 122 Atl. 311 (N. J. 1923).

> "Where the Legislature confers powers upon a board to be exercised by it, without expressly authorizing that the power or powers conferred may be exercised by a less number than a quorum, and there is no provision made as to the number of members necessary to act in concert to exercise the power or powers conferred on the board by the statute, then the common-law rule prevails that a majority of the board constituting a quorum may legally act. * * *"

On the basis of the foregoing authorities, it is our opinion, and you are advised as follows:

(1) The members of the Board of Commissioners of Public Grounds and Buildings are the Governor, the Auditor General and the State Treasurer.

(2) The Board of Commissioners of Public Grounds and Buildings is legally authorized to act through a quorum which consists of a majority of its members.

(3) A majority of a quorum, which in this case would be two members, may perform all the authorized legal functions of the said Board.

(4) The affirmative vote or approval of Board action by two members of the Board is legally sufficient and effective notwithstanding the fact that the third member may vote in the negative or otherwise indicate his refusal or disapproval of the majority action.

(5) The absence of the signature of such dissenting member would in no way affect the legal sufficiency of the action of the majority of the Board.

Very truly yours,

DEPARTMENT OF JUSTICE,

WILLIAM C. SENNETT,
Attorney General.

OFFICIAL OPINION No. 273

Business corporations—Secretary of the Commonwealth—Corporation Bureau—Functions relative to filing articles of incorporation and similar documents—Business Corporation Law, as amended.

The Act of January 18, 1966, P. L. (1965) 1305, amending the Business Corporation Law, the Act of May 5, 1933, P. L. 364, removed certain review powers of the Department of State with respect to documents filed with the Corporation Bureau.

The Corporation Bureau should endorse its acceptance of any document tendered for filing by a time-clock stamp and may include the manual signature of the Secretary of the Commonwealth.

Certificates issued by the Department of State should continue to contain the manual endorsement of the Secretary of the Commonwealth and may include a mechanical endorsement certifying that the document complies with the requirements as to form.

The Corporation Bureau should not review the substantive provisions of articles of merger, consolidation or dissolution, or suggest changes in the language in documents filed with it.

In all cases of doubt, the Department should resolve that doubt in favor of the prompt filing of the questioned document subject to later correction, if necessary.

Harrisburg, Pa., December 14, 1967.

Honorable Craig Truax, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: You have requested our opinion with respect to the Act of January 18, 1966, P. L. 1305 (Act No. 519), amending the Act of May 5, 1933, P. L. 364, known as the Business Corporation Law ("BCL"), 15 P. S. Sec. 1001 et seq., insofar as it affects the power and duty of the Corporation Bureau (Bureau) of the Department of State (Department) to review the contents of articles of incorporation and similar documents presented to the Bureau under the BCL for filing.

Section 10 of the BCL (15 P. S. Sec. 1010), prior to its amendment by Act No. 519, provided:

> *"The Department of State shall have the power and authority reasonably necessary to enable it to administer this act efficiently and to perform the duties imposed upon it by this act.* All articles, papers, and other documents required by this act to be filed with the Department of State shall be made in such form as shall be prescribed by the department." (Italics ours)

Very truly yours,

DEPARTMENT OF JUSTICE,

WILLIAM C. SENNETT,

Attorney General.

Pursuant to the foregoing authority, the Bureau had properly followed the practice of carefully examining all documents for filing under the BCL to ensure that their substance was in accordance with the statute and other applicable provisions of law.

The title of Act No. 519 states that the act amends the BCL by "eliminating the requirements that certain documents be approved as to legality by the Department of State. . . ." This purpose is accomplished by repeal of the sections conferring authority for approval.

Section 10, 15 P. S. 1010, renumbered Section 10(A) by Act No. 519, retains for the Department the general power and authority to reasonably administer the act and to prescribe the format of documents filed with it. It provides:

> "A. The Department of State shall have the power and authority reasonably necessary to enable it to administer this act efficiently and to perform the duties imposed upon it by this act. All articles, papers, and other documents required by this act to be filed with the Department of State shall be made in such format as to size, shape and other physical characteristics as shall be prescribed by that department."

Section 10(B) specifically enumerates the residual powers and duties of review of the Department as follows:

> "B. If the Department of State finds—
>
> (i) *that any document delivered to it for filing under this act appears to be properly executed and to relate to matters authorized or required to be filed by any section of this act;*
>
> (ii) that, in the case of articles of incorporation or of amendment thereto changing a corporate name, articles of merger or consolidation and applications for a certificate of authority or an amended such certificate changing a corporate name, *the proposed name is available;* and
>
> (iii) *that all fees and taxes or certificates relating thereto and, if required by section 1105 of this act, proof of publication have been tendered; . . .*" (Emphasis supplied)

This statutory language reserves to the Bureau a limited power of examination and review over any document delivered to it for filing to determine that the document is properly executed and relates to matters authorized or required to be filed. Subject to the conditions set forth in Section 10(A) and (B) of the BCL, the Legislature removed the approval function of the Department.

In view of the foregoing, it is our opinion, and you are accordingly advised, that:

(1) The Act of January 18, 1966, P. L. 1305 (Act No. 519), amending the Act of May 5, 1933, P. L. 364, removed certain review powers of the Department with respect to documents filed with it. It limited the reasons for which the Bureau may reject articles of incorporation and other documents presented to it for filing under the BCL to the following items:

(a) improper execution, i.e., the omission of the required signature or signatures and, if required, the proper corporate seal;

(b) the required fees and taxes or certificates relating thereto have not been tendered;

(c) the proposed corporate name is not proper or available;

(d) the absence of or failure to complete a required document; or

(e) absence of relation to matters authorized or required to be filed. For example, the proposed formation of corporations which are not within the purview of the BCL, the incorporation of which are required to be made under other specific statutes.

(2) The Bureau should endorse its acceptance of any document tendered for filing under the BCL in performance of its limited review function. This acceptance should be made by mechanical means, e.g. a time-clock stamp, and may include the manual signature of the Secretary of the Commonwealth, as has been the practice heretofore.

(3) The various certificates issued by the Department under the BCL (incorporation, amendment, merger, consolidation, domestication, dissolution of authority, amended certificate of authority, withdrawal, etc.) should continue to contain the manual endorsement of the Secretary and may include a mechanical endorsement certifying to the effect that the document complies with the requirements as to the form and relates to matters authorized to be filed under the BCL.

(4) The Bureau should not review the substantive provisions of articles of merger, consolidation or dissolution, and other documents specifying the relative rights and preferences of shareholders, including their rights to dividends, or suggest changes in the language used in documents filed with it.

(5) In all cases of doubt, the Department should resolve that doubt in favor of the prompt filing of the questioned document subject to later correction, if necessary. Due to the change in the law, there is no longer any implication from the acceptance of a filing that the Department has ruled that the documents conform to law except in the limited instances noted above. In the usual case, the filing of a questionable document will not adversely affect any public rights, and, if unlawful, cannot permanently affect any private rights in view of the remedies currently available to private parties.

The conclusions set forth herein are equally applicable to the Act of January 19, 1966, P. L. 1406, which amended the Nonprofit Corporation Law of May 5, 1933, P. L. 289, 15 P. S. 7001 *et seq.*

If the Bureau proposes to establish guidelines for the administration of its responsibilities under these corporation statutes and desires to consult with this Department regarding the specific criteria to be applied, we will be only too willing to cooperate in this regard.

Very truly yours,
DEPARTMENT OF JUSTICE,
WILLIAM C. SENNETT,
Attorney General.

OFFICIAL OPINION No. 274

General Assembly—Power to recall legislation after adjournment sine die.

The General Assembly cannot reconsider action taken with reference to the final passage of legislation after its adjournment sine die.

Harrisburg, Pa., January 3, 1968.

Honorable Raymond P. Shafer, Governor of Pennsylvania, Harrisburg, Pennsylvania.

Sir: You have requested our opinion with respect to the power of the General Assembly to recall legislation which has passed both Houses of the General Assembly and which was presented to you for appropriate action on December 21, 1967. The General Assembly adjourned sine die on December 21, 1967.

First of all, there is no constitutional or statutory authority in Pennsylvania providing for the recall of legislation. Such authority exists only by reason of the inherent power of the General Assembly as a legislative body to reconsider actions previously taken. However, such authority to reconsider actions has obvious and critical limitations:

> "An action cannot be reconsidered when for any reason it is not possible to cancel, nullify or void the action previously taken. In general, the action cannot be canceled or make ineffective when vested rights have been acquired as a result of the action, or when rights cannot be constitutionally or legally taken away, or when the subject is beyond the con-

> trol *or out of the reach of the body taking the original action* * * *" Mason's Legislative Manual, Section 451, p. 303. (Emphasis supplied)
>
> And Section 454, p. 307, states:
>
> "A measure may not be reconsidered unless it is in the possession of the body."

In this instance, the General Assembly has adjourned sine die and legislation which passed on December 21, 1967, is "beyond the control or out of the reach" of the General Assembly. The Supreme Court of Pennsylvania has clearly held in *Brown v. Brancato,* 321 P. 54, 63 (1936):

> "The legislative action of the General Assembly in virtue of the session which convened, as required by Article II, Section 4, ended with its adjournment. * * * From and after the adjournment, the power of the House complained of in this suit was done once and for all."

See also *Opinion of the Justices,* 174 A. 2d 818 (Dela. 1961), citing *Wolfe v. M'Caull,* 76 Va. 876, to the effect that:

> The Supreme Court of Appeals of Virginia held that the joint action of both Houses was insufficient to recall a bill once it had been delivered to the Governor. The Governor's return of the bill upon request was held * * * to be an action of courtesy only, and to confer no power upon the Legislature to act upon it."

It is equally clear that the inherent authority of the General Assembly to reconsider actions previously taken cannot in any way abrogate the provisions of the Constitution. Although for certain purposes the General Assembly is now a continuing body during the term for which its Representatives are elected, Article II, Section 4, of the Constitution continues to provide that the General Assembly shall meet at 12 o'clock noon, on the first Tuesday of January each year. This indicates that a current session of the Legislature may be adjourned before the beginning of the next session and also that no session can extend beyond 12 o'clock noon the first Tuesday of January of each year.

Article IV, Section 8, of the Constitution also amended by the electorate in May 1967 changed the phraseology of that part having to do with recess appointments but nevertheless continued the power of the Governor to make "recess appointments". Such interim or recess appointments can only be made after the General Assembly has adjourned sine die and prior to the convening of a new session.

To interpret the power of the General Assembly to reconsider and recall legislation after adjournment sine die would be clearly inconsistent with the provisions of Article IV, Section 15 of the Constitution of Pennsylvania. This section requires the Governor to return disapproved bills to the House in which it shall have originated within ten days unless the Legislature prevents such return by its adjournment in which case the veto message is filed in the Office of the Secretary of the Commonwealth.

> "If any bill shall not be returned by the Governor within ten days after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the General Assembly, by their adjournment, prevent its return, in which case it shall be a law, unless he shall file the same with his objections, in the office of the Secretary of the Commonwealth, and give notice thereof by public proclamation within thirty days after such adjournment." Article IV, Section 15.

Article IV, Section 15, specifically deprives the General Assembly of any power to override an executive veto after final adjournment. This demonstrates the complete and absolute loss of the Legislature's power over legislation after sine die adjournment. In this particular instance if the General Assembly upon reconvening on January 2, 1968, now has revived authority over legislation passed finally on December 21, 1967, it could be argued that such legislation automatically became law at the expiration of ten days from final passage since no executive veto has intervened. Such construction would clearly be inconsistent with Article IV, Section 15, and would render nugatory such action.

As previously stated, we cannot interpret the inherent power of the General Assembly in a manner which is inconsistent with specific sections of the Constitution of Pennsylvania.

Therefore, it is our opinion and you are advised that the General Assembly cannot reconsider action taken with reference to the final passage of legislation after its adjournment sine die.

Very truly yours,

DEPARTMENT OF JUSTICE,

WILLIAM C. SENNETT,
Attorney General.

OFFICIAL OPINION No. 275

Nuclear power—Radiation hazards—Inspection and regulation—Department of Health—Department of Labor and Industry—Atomic Energy Development and Radiation Control Act of 1966.

Supervision and control of the nuclear energy industry in Pennsylvania is vested with the Department of Health under the provisions of the Atomic Energy Development and Radiation Control Act of 1966.

The responsibility of the Department of Labor and Industry is not to promulgate or issue regulations or generally provide nuclear standards for the protection of the people of Pennsylvania but rather to enforce such regulations in its specific area of concern as may from time to time be issued by the Department of Health.

Harrisburg, Pa., January 25, 1968.

Honorable Arthur F. Sampson, Secretary of Administration and Budget Secretary, Harrisburg, Pennsylvania.

Sir: We have your request for advice as to the relative authority and power of the Department of Health and the Department of Labor and Industry in the regulation and inspection of nuclear power and radiation sources and the memorandums from the respective Secretaries outlining their positions relative thereto.

This request was prompted by a proposal submitted by the Secretary of Labor and Industry from Bricmont & Associates, Inc., for a three-phase program to provide the Department of Labor and Industry with standards and inspection procedures for the nuclear industry in the State of Pennsylvania. The proposal from Bricmont states that its objective is:

> "The end product of the total program will be a technically sound set of nuclear standards and inspection requirements enforced by a fully trained staff of nuclear inspectors providing the people of Pennsylvania maximum protection from the occurrence of any nuclear incident or accidental release of radioactive or other hazardous materials."

With respect to the regulation and inspection of nuclear power and radiation sources, the most recent statute is the Atomic Energy Development and Radiation Control Act of January 28, 1966, P. L. 1625, 73 P. S. 1001, *et seq.* (Act of 1966). The purpose of this statute is to encourage "the development and use of atomic energy for peaceful purposes, consistent with the health and safety of the public." Atomic energy is broadly defined as meaning "all forms of energy released in

nuclear reactions or transitions." Radiation source is broadly defined as meaning "an apparatus or a material emitting or capable of emitting ionizing radiation." Under this statute, an Advisory Committee on Atomic Energy Development and Radiation Control consisting of nine members is established within the Department of Health. This Advisory Committee is given the broad authority to:

> "Review and evaluate policies and programs of the Commonwealth relating to the development of atomic energy resources and to the control of ionizing radiation;
>
> "Make recommendations to the Department of Commerce and furnish such technical advice as may be required on matters relating to the development and utilization of atomic energy resources;
>
> "Make recommendations to the Department of Health, review proposed rules and regulations, and furnish such technical advice as may be required on matters relating to the regulation and control of radiation sources."

Under the Act of 1966, the Department of Commerce is designated "as the agency responsible for the promotion and development of atomic energy resources." The Department of Health is designated "as the agency of the Commonwealth which shall be responsible for the control and regulation of radiation sources," and generally "shall have the power to regulate, license, or control nuclear reactors or facilities or operations incident thereto." Furthermore, the Department of Health shall have the power and its duties shall be to:

> "1. Develop and conduct programs for evaluation of hazards associated with the use of radiation sources;
>
> "2. Develop and conduct programs for the control and regulation of radiation sources;
>
> "3. Formulate, adopt, promulgate and repeal rules and regulations relating to the control of ionizing radiation;
>
> "4. Issue such orders or modifications thereof as may be necessary in connection with proceedings under this act;
>
> "5. Advise the Governor and the Legislature with regard to the status of radiation control, and consult and cooperate with the various departments, agencies and political subdivisions of the Commonwealth, the Federal Government, other states, interstate agencies, political subdivisions, and with groups concerned with control of radiation sources;
>
> "6. Encourage, participate in, or conduct studies, investigations, training, research and demonstrations relating to control of radiation sources."

The Department of Health is also given the broad authority to provide by rule and regulation for the licensing or registration of radiation sources or devices or equipment. It may conduct such investigations of private or public property as may be necessary for the purpose of determining whether or not there is compliance with the act and "rules and regulations issued thereunder."

The Acting Secretary of Health, Thomas W. Georges, Jr., M.D., advises that the Advisory Health Board first promulgates regulations for "radiation protection in 1956." At the present time, approximately 9400 radiation installations are registered with the Department. Over 80% of the total of such installations have been inspected by Health Department personnel "many on a routine basis." At present, the Secretary reports there are 13 technical personnel in the radiological health program.

On the other hand, the Department of Labor and Industry has statutory authority to establish precautionary safety measures for employes within the Commonwealth which encompasses "every room, building, or place within this Commonwealth where and when any labor is being performed." Such authority includes the receiving and examination of plans, issuing of appropriate licenses, inspection of buildings, elevators, boilers, lighting systems, etc.[1]

Under the sweeping mandate of these statutory provisions, the Department of Labor and Industry has established regulations to protect all employes wherever and however they may be engaged within the Commonwealth.

A review of the aforesaid statutes and the history of activities in this area over the period of the past ten years leads to the conclusion that the General Assembly, by the Act of 1966, saw fit to give plenary control of the Atomic or Nuclear Energy Industrial Development Program to the Departments of Health and Commerce. It is to be noted that the Department of Labor and Industry is not specifically included in any area encompassed by the terms of the Act of 1966. This of course does not at all minimize the responsibilities and duties which the Department of Labor and Industry has by virtue of the general regulatory provisions of the General Safety Act, the Boiler Law and The Administrative Code, *supra.*

Insofar as nuclear energy and its development is concerned, the General Assembly determined that this subject would require a par-

[1] See the provisions of the General Safety Law, Act of May 18, 1937, P. L. 654, as amended, 43 P. S. 25; the Boiler Law, Act of May 2, 1929, P. L. 1513, as amended, 35 P. S. 1301, *et seq.*, and Section 2202 of the Administrative Code of April 9, 1929, P. L. 177, as amended, 71 P. S. 562.

ticular expertise and scientific development not then included within the province of any Department. Moreover, the Legislature was motivated by consideration of the public health factors involved in the area of nuclear power. It recognized that, whereas formerly the installation of elevators or belts or pulleys might have minimal effect on the general public, the installation of nuclear atomic energy facilities, unless adequately regulated and enforced, could disastrously affect the general public. The Legislature was cognizant of the meaningful studies conducted by the Council of State Governments in formulating "Suggested State Regulations for Control of Radiation." It is, of course, clear that we are in need of technical analyses and determinations of specific departmental responsibility in regard to both employe and public hazards in industries utilizing nuclear energy.

It is, therefore, our opinion, and you are accordingly advised, that:

(1) Paramount responsibility for supervision and control of the nuclear energy industry in Pennsylvania remains with the Department of Health under the provisions of the Atomic Energy Development and Radiation Control Act of 1966. The authority resides in the Department of Health to adopt such rules and regulations as are necessary to provide for the safety of both employes and the general public.

(2) The powers and duties imposed on the Department of Health by Section 301 of the Act of 1966 provide a sufficient legislative standard from which rules and regulations may be promulgated and there is no validity to the concern of the Department of Labor and Industry that such statutory delegation of authority to promulgate regulations may be defective.

(3) The Department of Health has the general responsibility for the development and conduct of programs "for valuations of hazards associated with the use of radiation sources and for the development and conduct of programs for the control and regulation of radiation sources." Therefore, it is obvious that the proposed contract between Bricmont & Associates, Inc., and the Department of Labor and Industry is clearly inconsistent with the responsibility granted to the Department of Health under the Atomic Energy Development and Radiation Control Act of 1966. Responsibility for entering into such a broad contract for the development of a program designed to provide for the protection of the people of Pennsylvania must rest with the Department of Health.

(4) The responsibility of the Department of Labor and Industry is not to promulgate or issue regulations or generally provide nuclear

standards for the protection of the "people of Pennsylvania" but rather to enforce such regulations in its specific area of concern as may from time to time be issued by the Department of Health. While the primary responsibility in this entire area rests with the Department of Health, the need for close cooperation and consultation between the Departments is emphasized by the continuing responsibility of the Department of Labor and Industry within the scope of its authority to inspect, supervise and generally enforce such pertinent regulations as from time to time may be promulgated by the Department of Health. It is also suggested that the Act of 1966 be amended so that the Department of Labor and Industry will be represented on the Advisory Committee on Atomic Energy Development and Radiation Control within the Department of Health.

Very truly yours,

DEPARTMENT OF JUSTICE,

WILLIAM C. SENNETT,
Attorney General.

OFFICIAL OPINION No. 276

Lapseable current appropriation—Encumbering of funds—Pennsylvania Industrial Development Authority.

Under the provisions of the Pennsylvania Industrial Development Authority Act, the Act of May 15, 1956, P. L. (1955) 1609, it is incumbent upon the Authority to see that sufficient funds are readily available to the extent of the amount of loans given tentative approval.

Current lapseable appropriations should be encumbered to the extent that the amounts under tentative approval exceed the amount available in the special PIDA fund for disbursement. The tentative approval, supported by the proper application and minutes of the PIDA Board meetings, constitutes legal authority to encumber the current lapseable appropriation.

Harrisburg, Pa., February 5, 1968.

Honorable Clifford L. Jones, Secretary of Commerce, Harrisburg, Pennsylvania.

Sir: You have requested our opinion with respect to the encumbering of funds, appropriated out of the General Fund, to the Department of Commerce for the Pennsylvania Industrial Development Authority.

Prior to the current fiscal year, appropriations for Industrial Development loans were designated by the legislature as a continuing appropriation. These moneys are retained for utilization in loans made pursuant to the provisions of the Pennsylvania Industrial Development Authority Act, May 15, 1956, P. L. (1955) 1609, §1 et seq., hereinafter called the "Act").

In contradistinction to the prior continuing appropriation, Act 37A of 1968 appropriates $18,600,000.00, "or so much thereof as may be necessary." This constitutes a lapseable, rather than a continuing, appropriation.

The accounting procedure of the Commonwealth requires that unencumbered balances of such appropriations, which are noncontinuing, lapse at the end of the fiscal year. The encumbered appropriations are carried forward into the succeeding fiscal year for subsequent disbursement. Instructions, promulgated by the Office of Adiminstration, and disseminated to all Comptrollers, state that all encumbered amounts must be supported in detail by valid documents.

The issue is: What action or actions and/or documents are of legal sufficiency to validly encumber the lapseable current appropriation?

Section 4 of the Act designates the Pennsylvania Industrial Development Authority as "a body corporate and politic, constituting a public corporation and government instrumentality."

Section 5 of the Act grants to the Authority "all powers necessary or appropriate to carry out and effectuate the purposes" of the Act. Subsection (n) of Section 5 delineates one of the powers as follows:

> "To make contracts of every name and nature and to execute all instruments necessary or convenient for carrying on of its business."

In order to properly decide the issue, it is essential that we review the procedure employed by the Authority in fulfilling its responsibilities under the Act.

The procedure commences with the filling of an application for loan by the prospective borrower. The application is accompanied by supporting data sufficiently detailed to meet the requirements of Section 7 of the Act, entitled "Loan Application Requirements," and such other information as required by the Authority.

Pursuant to the statutory duties imposed, the Authority then conducts examinations and investigations. In cases where the investiga-

tion results in the conclusion that the application meets the statutory requirements, is meritorious, and warrants favorable consideration, the Authority issues its tentative approval notifying the applicant to that effect. The "tentative approval" particularizes the conditions to be met by the applicant. It should be parenthetically noted that more than 90% of the cases given tentative approval culminate in the disbursement of funds in loans to applicants.

The applicant is granted 30 days in which to accept the tentative approval. In some cases the applicant may establish that certain conditions should not be made a prerequisite to the granting of the loan. If the proofs of the applicant are creditable in demonstrating that any condition is not essential, such condition is deleted.

At such time that the tentative approval is accepted by the applicant, the Authority issues a Commitment Letter. The application is subsequently given Final Approval, and the funds are disbursed as needed for the project.

The gist of the problem is the ascertainment of the point in the procedure when the current lapseable appropriation may be encumbered. Our considered opinion is that they may be validly encumbered at such time as the tentative approval is communicated to the applicant. Our reasoning follows.

The so-called tentative approval constitutes an offer by the Authority to lend funds to the applicant. It is stated in *Sum. Pa. Jur., Contracts:*

> "§143. Underlying rule.
>
> "In order that a communication may be treated as an offer to contract, it must appear from its content and from all the surrounding circumstances that its recipient was reasonably justified in treating the communication as a definite proposal to enter into an agreement on the terms stated, to become binding on both immediately on acceptance of the proposal."

Upon receipt of the tentative approval, the applicant would be reasonably justified in treating the communication as a definite proposal to enter into an agreement on the terms stated therein.

The tentative approval provides that the applicant may accept the offer within 30 days. Even where no time is specified in the offer for its acceptance, there arises the necessary implication that it will be open for acceptance within a reasonable period of time. *Sum. Pa. Jur., Contracts,* §158; 31 *P. L. E., Sales of Personality,* §12, page 426.

The tentative approval reflects that the Authority expects to induce action and/or forbearance of a definite and substantial character on the part of the applicants. Such action or forbearance would be binding upon the Authority. *Restatement of the Law of Contracts,* §90; See *12 Am. Jur.,* 605, Contracts, §112.

It is axiomatic that when an intention to contract is manifestly expressed or necessarily implied, as is the case with the tentative approval, the offeror must be in a position to proceed with the contract upon acceptance thereof by the offeree.

The efficacy of the tentative approval is not diminished by the fact that this offer is conditioned upon the acceptance of certain terms contained therein.

Restatement of the Law of Contracts, Volume I, provides:

"§29. HOW AN OFFER MAY BE ACCEPTED.

"An offer may invite an acceptance to be made by merely an affirmative answer, or by performing or refraining from performing a specified act, or may contain a choice of terms from which the offeree is given the power to make a selection in his acceptance.

Sum. Pa. Jur., Contracts, states:

"§140. Underlying concepts.

"Before any contract can come into existence, the parties thereto must in some way manifest their mutual intent to become bound to each other for its performance according to its terms. Such assent is usually manifested through the medium of an offer by one of the parties and its acceptance by the other. See 12 Am Jur 524, Contracts §26. If A offers to enter into a contract with B, so long as that offer remains operative and is not terminated in some way, A, by virtue of his offer, is continuously manifesting his assent to the proposal, and when B accepts, B thereby manifests his assent to the same proposal. Hence whenever an acceptance is made in such a way as to make it operative before the offer is withdrawn, lapsed, or otherwise terminated, the element of mutual assent is satisfied."

In the absence of unforeseen impediments, the tentative approval results in fruition. Less than 10% of the tentative approvals fail to result in loans being made to the applicant. The fact that there may be a gestation period of 30 days between the tentative approval and acceptance by the applicant is of no consequence. The Authority, by its tentative approval, necessarily implies that its fiscal position is such that it possesses sufficient liquidity to proceed with the loan.

It is incumbent upon the Authority to see that sufficient funds are readily available to the extent of the amounts given tentative approval. Indeed the Authority would be remiss in its duty to effectively administer the Act if it did not encumber funds sufficient to meet the proposed loans. Such failure to encumber would be deleterious to the entire PIDA program and the expressed purposes as enunciated in the Act by the legislature.

Accordingly, you are advised that the current lapseable appropriation should be encumbered to the extent that the amounts under tentative approval exceed the amount available in the special PIDA fund for disbursement. The tentative approval, supported by the proper application and minutes of the PIDA Board meetings, constitutes legal authority to encumber the current lapseable appropriation.

Very truly yours,

DEPARTMENT OF JUSTICE,

WILLIAM C. SENNETT,
Attorney General.

OFFICIAL OPINION No. 277

Contracts—Construction—Plants and major interceptors—Land and Water Conservation and Reclamation Act—Department of Property and Supplies —Department of Mines and Mineral Industries—Jurisdiction.

Under the provisions of Section 16(1)(II) of the Land and Water Conservation and Reclamation Act the Department of Property and Supplies is authorized to construct plants, major interceptors and other facilities on behalf of the Department of Mines and Mineral Industries. All bids and contracts shall be based upon specifications prepared by Department of Mines and Mineral Industries. Construction of the facilities shall be under joint supervision of both Departments.

Harrisburg, Pa., February 15, 1968.

Honorable H. B. Charmbury, Secretary of Mines and Mineral Industries, Harrisburg, Pennsylvania.

Sir: We have your request for advice regarding the respective authority and duty of the Department of Mines and Mineral Industries and the Department of Property and Supplies in connection with the construction of plants, including major interceptors and other

facilities appurtenant thereto pursuant to the authority of the Land and Water Conservation and Reclamation Act, Act No. 443, approved January 19, 1968.

Section 16 (1) (II) of the Land and Water Conservation and Reclamation Act defines the pertinent authority of your Department as follows:

> "The Department of Mines and Mineral Industries shall have the power and authority to construct and operate a plant or plants for the control and treatment of water pollution resulting from mine drainage. The extent of this control and treatment may be dependent upon the ultimate use of the water: Provided, That the above provisions of this paragraph shall not be deemed in any way to repeal or supersede any portion of the Act of June 22, 1937 (P. L. 1987), as amended, known as 'The Clean Streams Law', and no control or treatment hereunder shall be in any way less than that required under the Act of June 22, 1937 (P. L. 1937), as amended, known as 'The Clean Streams Law'. The construction of a plant or plants may include major interceptors and other facilities appurtenant to the plant."

The duty and authority of the Department of Property and Supplies in connection with the erection of structures and other improvements on behalf of the Commonwealth of Pennsylvania or any Department thereof is defined in Section 2408 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. Section 638. It provides as follows:

> "Whenever the General Assembly shall have appropriated money to the Department of Property and Supplies, *or to any other department,* or to any administrative board or commission, for the erection of new buildings, or sewage or filtration plants, *other service systems,* or athletic fields, *or other structures,* or for alterations or additions or repairs to existing buildings, or to such plants, systems, fields, or structures, to cost more than twelve thousand dollars ($12,000), the following procedure shall apply, unless the work is to be done by State employes, or by inmates or patients of a State institution or State institutions, *or unless the department, board, or commission to which the General Assembly has appropriated money for the foregoing purposes is, by this act or by the act making the appropriation, authorized to erect, alter, or enlarge buildings independently of the Department of Property and Supplies, or under a different procedure."* (Emphasis supplied.)

Act No. 443 does not specifically authorize the Department of Mines and Mineral Industries to act independently of the Department of Property and Supplies or under a different procedure than that prescribed by the above quoted section of The Administrative Code. Furthermore, it does not specify any procedures or standards as to bidding and awarding of contracts. However, the authority conferred upon the Department of Property and Supplies must be exercised pursuant to the direction and reasonable control by your Department which has the necessary expertise in this specialized field.

Plans, specifications and complete details regarding the proposed construction shall be prepared and supplied to the Department of Property and Supplies by the engineering staff of the Department of Mines and Mineral Industries. Such specifications shall be duly certified by you with certification by the Comptroller of your Department as to the availability of funds. Upon receipt thereof it will become the duty of the Department of Property and Supplies to follow its regular procedures for the preparation of specifications, the engagement with the approval of the Department of Mines and Mineral Industries of such architectural or structural engineers as are deemed necessary, preparation of invitations to bid, advertisements, and award of contracts. Supervision of the construction and all phases of the erection or completion of the plants shall be performed jointly by representatives of both Departments.

It is therefore our opinion and you are advised that the Department of Property and Supplies is authorized to construct the plants, including major interceptors and other facilities on behalf of the Department of Mines and Mineral Industries under provisions of Section 16 (I) (II) of the Land and Water Conservation and Reclamation Act, Act No. 443, approved January 19, 1968. All bids and contracts shall be entered into upon the basis of specifications prepared by the Department of Mines and Mineral Industries. The construction of the facilities shall be under the joint supervision of the engineering staffs of both Departments.

Very truly yours,

DEPARTMENT OF JUSTICE,

WILLIAM C. SENNETT,
Attorney General.

OFFICIAL OPINION No. 278

Local housing and redevelopment authorities—Right to sponsor housing financed with mortgages insured by the Federal Housing Administration.

In compliance with Section 221 of the National Housing Act local housing authorities and redevelopment authorities are eligible under Pennsylvania law to be sponsors for below market interest rate mortgages for rental housing.

Harrisburg, Pa., February 27, 1968.

Honorable Joseph W. Barr, Jr., Secretary of Community Affairs, Harrisburg, Pennsylvania.

Sir: You have requested our advice with respect to the right of local housing and redevelopment authorities organized under Pennsylvania law to sponsor housing financed with mortgages insured by the Federal Housing Administration under Section 221 of the National Housing Act under present Pennsylvania law.

The United States Department of Housing and Urban Development has prescribed certain conditions under which the said agencies may undertake such sponsorship. It appears that the said Pennsylvania authorities comply fully with the applicable Federal laws and regulations and are qualified to act as sponsors if the Pennsylvania law authorizing their creation permits the same.

The State "Housing Authorities Law," Act of 1937, May 28, P. L. 955; 35 P. S. §1541 et seq., and the "Urban Redevelopment Law," Act of 1945, May 24, P. L. 991; 35 P. S. §1701 et seq., define the authority of housing and redevelopment authorities.

The "Housing Authorities Law" provides as follows: "The public purpose for which such (housing) authorities should operate shall be— . . . (2) the providing of safe and sanitary accommodations for persons of low income through new construction or reconstruction, restoration, reconditioning, remodeling or repair of existing structures, so as to prevent recurrence of the economically and socially disastrous conditions hereinbefore described . . ." (35 P. S. §1542). Housing authorities have the power under 35 P. S. §1550 to cooperate with and act as agent of the Federal Government in connection with the acquisition and management of any housing project, to purchase any interest in real or personal property, and to procure insurance or guarantees from the Federal Government of the payment of any debts incurred by a housing authority.

In addition, pursuant to the "Housing Authorities Law," an Authority shall have power "to mortgage all or any part of its real or personal property then owned or thereafter acquired" (35 P. S. §1559). It is not necessary for a Housing Authority to provide low-rent housing within a slum area (*Blumenschein v. Pittsburgh Housing Authority*, 379 Pa. 566 (1954), nor is it necessary that a housing project area involve contiguous properties (read *White v. City of Philadelphia*, 22 D & C 2d 13, 18 (1959) in connection with the 1965 amendment to 35 P. S. §1542).

The "Urban Redevelopment Law" provides the same or similar power to Redevelopment Authorities. See *Belovsky v. Redevelopment Authority of Philadelphia*, 357 Pa. 329 (1947), wherein it was stated: "The Urban Redevelopment Law closely parallels the provisions of the Housing Authority Law of May 28, 1937, P. L. 955, . . . The fundamental purpose of both these acts was the same, namely, the clearance of slum areas, although the Housing Authorities Law aimed more particularly at the elimination of undesirable dwelling houses whereas the Urban Redevelopment Law is not so restricted." See also *Schenck v. Pittsburgh et al.*, 364 Pa. 31 (1950).

It is therefore our opinion that in compliance with Federal laws and regulations local Housing Authorities and Redevelopment Authorities are eligible under State law to be sponsors for below market interest rate mortgages for rental housing.

Very truly yours,

DEPARTMENT OF JUSTICE,

WILLIAM C. SENNETT,
Attorney General.

OFFICIAL OPINION No. 279

Governor—Authority to revise estimates of current expenditures—General Assembly—Lapse of portions of uncommitted appropriations.

The appropriation of money by the General Assembly does not create an irrevocable and unamendable commitment and the Legislature may reduce or annul the same.

The Governor of the Commonwealth of Pennsylvania is authorized to revise estimates of current expenditures so as to make additional funds available to the General Assembly for current appropriation.

Harrisburg, Pa., March 4, 1968.

Honorable Raymond P. Shafer, Governor of Pennsylvania, Harrisburg, Pennsylvania.

Sir: We have your request for advice as to the respective authority of the Governor and the General Assembly where funds appropriated for specifically designated purposes are legally determined to be in excess of the amount currently required for such purpose or where the said purpose is determined to be not presently necessary or essential.

Your inquiry refers specifically to the following categories of funds: (1) Those continuing appropriations that were authorized from previous years but remain uncommitted and unspent; (2) Portions of prior years continuing appropriations that are not scheduled to be expended during the current fiscal year; (3) Portions of those appropriations that the General Assembly appropriated in the 1967-68 budget which will not be expended during the present fiscal year; and (4) Portions of appropriations continued in the 1968-69 budget that will not be spent during the fiscal year ending June 30, 1969.

The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. Section 224, vests in you as Governor budgetary control over current expenditures of administrative departments. That section provides as follows:

> "Estimates of Current Expenditures by Departments, Boards, and Commissions.—Each administrative department, board, and commission, except the departments of which the Auditor General, Secretary of Internal Affairs and the State Treasurer are respectively the heads, shall, from time to time, as requested by the Governor, prepare and submit to the Governor, for approval or disapproval, an estimate of the amount of money required for each activity or function to be carried on by such department, board or commission, during the ensuing month, quarter, or such other period as the Governor shall prescribe. If such estimate does not meet with the approval of the Governor, it shall be revised in accordance with the Governor's desires and resubmitted for approval.
>
> "After the approval of any such estimate, it shall be unlawful for the department, board, or commission to expend any appropriation or part thereof, except in accordance with such estimate, unless the same be revised with the approval of the Governor."

The clear intent of the foregoing provision is to establish a method whereby funds appropriated for certain purposes which are beyond the needs of a current fiscal period or which will not or are not intended to be spent during that period may be made available for the revenue requirements of the current fiscal period. The effect of the exercise of your prerogative in this area will reduce the amounts available for expenditure by the several departments of State Government and make available as reserve or surplus funds which may be used currently.

This eliminates the freezing of public funds beyond the reach of the executive and legislative branches of State Government so that the same may be used for the performance of vital governmental functions. It also avoids a situation that would violate all reasonable concepts of fiscal integrity and responsibility by eliminating the anomalous requirement of the enactment of new tax laws to provide revenue while unneeded and unused funds remain dormant in the State Treasury.

The foregoing conclusion is consistent with the spirit of the Pennsylvania Constitution which contemplates that ordinary revenue shall be used for current and not future needs.

The appropriation of excess funds resulting from the revision of estimates of expenditures was approved by Attorney General Thomas D. McBride in Official Opinion No. 126, dated June 23, 1958, p. 254, wherein he concluded at p. 256:

> "If you exercise your prerogative and revise the estimates of current expenditures for the remaining portion of the current biennium, the amounts available for those departments will be reduced accordingly. These funds, generally called 'lapses', will then become available as reserve or surplus and may be used for current expenses. The General Assembly may, as it has done in the past, restore these funds which have been lapsed."

That opinion supports the proposition that the appropriation of money by the General Assembly does not create an irrevocable and unamendable commitment. The Legislature may reduce or annul the same, particularly when a more urgent and immediate need for the revenue arises.

The only restriction upon your right to revise the estimates of current expenditures for the remaining portion of the current fiscal period and to make additional funds available for appropriation by the General Assembly is that such appropriations should be made only to provide for the ordinary expenses of State Government.

It is therefore our opinion and you are advised that you as Governor are authorized to revise estimates of expenditures authorized to be made currently and in the future so as to make additional funds available to the General Assembly for current appropriation. Upon the ascertainment of the funds available under the categories above enumerated and your certification thereof to the General Assembly that body would be authorized to appropriate such excess funds for essential governmental functions. The effect of the Legislature's action upon your said certification would be to lapse such parts of appropriations to the extent that the same are reduced thereby.

Very truly yours,

DEPARTMENT OF JUSTICE,

WILLIAM C. SENNETT,
Attorney General.

OFFICIAL OPINION No. 280

Appropriations—Statutory construction—Prospective application—State subsidy of costs of concentrated code enforcement and demolition of unsafe structures.

Appropriations made for grants to municipalities for code enforcement and demolition programs pursuant to Act 19A of 1968 and Act 265 of 1967 may not be applied retroactively for projects initiated prior to the effective date thereof.

Harrisburg, Pa., June 10, 1968.

Honorable Joseph W. Barr, Jr., Secretary of Community Affairs, Harrisburg, Pennsylvania.

Sir: You have requested our opinion as to whether appropriations made for grants to municipalities for code enforcement and demolition programs pursuant to Act 19A of 1968 and Act 265 of 1967 may be applied retroactively for projects initiated prior to the effective date thereof. The language of both acts reveals an intention for prospective application.

Act 265 of 1967 amended the "Housing and Redevelopment Assistance Law," Act of 1949, May 20, P. L. 1633, as amended, 35 P. S. Section 1661, et seq., to authorize the Department of Community Affairs "to make capital grants to municipalities * * * for the preven-

tion and elimination of blight"[1]. This language empowers the Department of Community Affairs to provide assistance for concentrated enforcement of building and other codes, and for the demolition of unsafe structures. Act No. 265, approved November 24, 1967, contains no language indicating retroactive application.

Act No. 19A, approved January 26, 1968, appropriated $13.6 million to the Department of Community Affairs for use through the "Housing and Redevelopment Assistance Law," supra. Section 2 of Act 19A declared that $3.75 million may be utilized by the Department of Community Affairs "for the purpose of making Commonwealth payments to each city, borough, town, and township of an amount equal to the amount paid by such political subdivision for participation in Federal demolition and code enforcement programs * * *" Section 3 states that the act shall become effective immediately.

You have asked the following specific questions:

> 1. May expenditures made by a political subdivision for demolition or code enforcement prior to January 26, 1968 be subsidized by money appropriated under Section 2 of Act 19A?

This question must be answered in the negative.

The Statutory Construction Act of May 28, 1937, P. L. 1019, art. IV, Section 56, 46 P. S. Section 556 provides:

> "No law shall be construed to be retroactive unless clearly and manifestly so intended by the Legislature."

Since the power to utilize Section 2 funds for Federal demolition and code enforcement programs was created on January 26, 1968, there being no language of retroactivity, any use of such funds to subsidize expenditures made before that date would contravene the above provision of the Act of 1937. The clear intent of the act is as an incentive to future action, not as a reward for past action.

> 2. May obligations incurred prior to January 26, 1968 for expenditures in demolition and code enforcement programs be subsidized by funds appropriated in Section 2 of Act 19A?

This inquiry may be answered affirmatively only in connection with work performed and liabilities incurred subsequent to January 26, 1968.

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[1] Act of 1967, Nov. 24, P. L. —, No. 265, Section 4, 35 P. S. Section 1664 (c).

The case of *Creighan v. Pittsburgh,* 389 Pa. 569, 132 A. 2d 867 (1957) dealt with the Act of September 27, 1951, P. L. 1473. That Act provides compensation to municipal firemen who are temporarily disabled and was found applicable to a claimant for a disability which occurred prior to the effective date of the Act, but which was existing on the effective date of the Act. The compensation could only be allowed from the effective date of the Act of 1951 according to the court's interpretation of the Statutory Construction Act of May 28, 1937, P. L. 1019, Section 56, prohibiting retroactive application of any act unless manifestly intended. The court stated at page 575:

> "A recognition of appellee's claim does not require that we place a retroactive construction on the Act, but simply that we apply the Act to a condition which existed on the date when the Act became effective even though such condition resulted from events which occurred prior to its effective date."

A demolition or code enforcement program begins with an approved application followed by the execution of contractual obligations. No retroactive application of Act 19A would result from a subsidy of expenditures made pursuant to the contractual events which occurred prior to its effective date so long as the actual project work is performed and expenditures are made subsequent to the effective date of the Act, thereby forming an analogy with the *Creighan* case, supra. Payment by a political subdivision for participation in Federal demolition and code enforcement programs, and not the initiation of said programs, elicits a State response under Section 2 of Act 19A thus making State subsidy non-retroactive where actual performance and expenditures by the political subdivision occur subsequent to January 26, 1968.

> 3. May the Department of Community Affairs make grants for code enforcement and demolition under Act 265, supra, for expenditures made, or for costs incurred, prior to November 27, 1967?

Any State grants made for work performed and liabilities incurred prior to the effective date of Act No. 265 of November 27, 1967 for code enforcement and demolition programs based on the authority of said Act would be a retroactive application and thereby contravene State law.

In conclusion, State subsidy of payments made by political subdivisions for participation in Federal code enforcement and demolition programs pursuant to Section 2 of Act 19A of 1968 may be made in

programs initiated before January 26, 1968, but not on project work performed or funds expended before that date. State grants for code enforcement and demolition projects pursuant to Act 265 may only be made on expenditures made and work performed subsequent to November 27, 1967, even though a project may have been commenced prior to that date.

Very truly yours,

DEPARTMENT OF JUSTICE,

WILLIAM C. SENNETT,
Attorney General.

OFFICIAL OPINION No. 281

Open pit mining—Incidental removal of coal—Factors for determination—Bituminous Coal Open Pit Mining Conservation Act.

Any person proposing to engage in an operation involving the removal of bituminous coal has the responsibility to apply to the Department of Mines and Mineral Industries for a license or a ruling that no license is required before commencing the operation.

Any operator comes within the provisions of the Bituminous Coal Open Pit Mining Conservation Act until such time as the particular operator proves to the satisfaction of the Department of Mines and Mineral Industries that the removal of the bituminous coal is incidental and essential to some other operation.

Harrisburg, Pa., June 18, 1968.

Honorable H. B. Charmbury, Secretary of Mines and Mineral Industries, Harrisburg, Pennsylvania.

Sir: You have requested our opinion clarifying certain conclusions of our opinion of May 23, 1966 in relation to the Bituminous Coal Open Pit Mining Conservation Act (Act of May 31, 1945, P. L. 1198, as amended; 52 P. S. 1396.1 et seq.).

In our opinion we advised that:

> "* * * persons engaged in recovering limestone, clay, or other materials of value from the earth, who as an incident of such operations necessarily remove bituminous coal for the purpose of obtaining materials other than bituminous coal, are not subject to the Bituminous Coal Open Pit Mining Conservation Act."

We further stated that:

> "We do not by this opinion decide any other issue nor do we determine that merely because an operator alleges that the removal of coal is incidental to his operation that he is exempt from the provision of this act. *You must be satisfied that it is so.*" (Emphasis added).

You inquire specifically as to the circumstances under which removal of bituminous coal may be defined as incidental to some other operation.

Section 3 of the Bituminous Coal Open Pit Mining Conservation Act, as amended, provides the following definitions:

> "Open Pit Mining shall mean the mining or recovery of bituminous coal by removing the strata or material which overlies or is above the coal deposit or seam in its natural condition."

This language construed literally would include any recovery of bituminous coal by removing any material overlying the coal. Section 3 further provides that:

> "Operator shall mean a person, firm, corporation, or partnership engaged in open pit mining, as a principal as distinguished from an agent or independent contractor, and, who is or becomes the owner of such coal as a result of such mining".

This definition is also very broad and calls for the application of the act to any person engaged in the activities defined above. The definition does not provide any exceptions or limitations to this application:

Section 3.1 of the Act, as amended, (52 P. S. 1396.3a) provides that:

> "After January 1, 1964 it shall be unlawful for any person to proceed to mine coal commonly known as bituminous by the open pit mining method as an operator within this Commonwealth without first obtaining a license as an open pit mining operator from the Department of Mines and Mineral Industries * * *"

Section 51 of the Statutory Construction Act (Act of May 28, 1937, P. L. 1019, 46 P. S., Section 551) requires:

> "When the words of a law are not explicit, the intention of the Legislature may be ascertained by considering, among other matters—(1) the occasion and necessity for the law; * * * (3) the mischief to be remedied; (4) the object to be attained * * * (6) the consequences of a particular interpretation * * *"

Section 52 of the Statutory Construction Act (46 P. S. Section 552) further provides:

> "In ascertaining the intention of the Legislature in the enactment of a law, the courts may be guided by the following presumptions among others; (1) That the Legislature does not intend a result that is absurd, impossible of execution or unreasonable;"

Our prior opinion concluded that these rules of construction should be applied to the Bituminous Coal Open Pit Mining Conservation Act so as to carry out the purposes of the act while at the same time preventing such a restricted application of the act as would lead to absurd results.

However, any person proposing to engage in an operation involving the removal of bituminous coal has the responsibility to apply to the Department of Mines and Mineral Industries for a license or a ruling that no license is required before commencing the operation. This approach is necessitated by the fact that the determination of the applicability of the act must be made by an evaluation of the facts in light of the purposes of the act rather than by express exceptions contained within the act.

In all cases the burden is on the operator to show that such removal is only incidental to some other operation. In determining whether the removal is only incidental the following factors should be taken into consideration by the Department:

(1) the primary purpose of the proposed operation,
(2) the quantity of the coal to be removed,
(3) whether there is an economic, financial or other direct advantage to the operator in removing the coal.
(4) the length of time necessary to remove the coal.

It is our opinion, and you are advised that any operator within the Commonwealth who mines or removes bituminous coal by the open pit method comes within the provisions of the Bituminous Coal Open Pit Mining Conservation Act until such time as the particular operator proves to the satisfaction of the Department of Mines and Mineral Industries that the removal of the bituminous coal is incidental and essential to some other operation in light of the standards set forth in this opinion.

Very truly yours,

DEPARTMENT OF JUSTICE,

WILLIAM C. SENNETT,
Attorney General.

OFFICIAL OPINION No. 282

General Assembly—Reorganization plan—Manner of approval or disapproval.

A reorganization plan in order to become effective need not be approved by a majority vote of the duly elected members of each House because the failure to disapprove allows the plan to become effective. A majority vote of the duly elected members of either House is required to disapprove a reorganization plan.

Harrisburg, Pa., June 24, 1968.

Honorable Raymond P. Shafer, Governor of Pennsylvania, Harrisburg, Pennsylvania.

Sir: You have requested my advice with reference to the interpretation of the above legislation. Specifically you have inquired as to the manner in which the General Assembly may approve or disapprove a reorganization plan submitted under the Reorganization Act of 1955.

Section 7 of the above Act, 71 P. S., Sec. 750-7 provides in subsection (b):

> "Each reorganization plan shall take effect if it is approved by a majority vote of the duly elected membership of each House during such 30 day period.

or (c):

> "May be disapproved by either House during that period by a majority vote of the duly elected membership of each House."

Section 7 further provides:

> "Upon the expiration of the 30 day period after the delivery of the plan to the two Houses of the General Assembly and the *failure to act as provided in subsections (b) or (c) of this section, each reorganization plan shall become effective.*"

Therefore, each reorganization plan may be approved by a majority of the duly elected members of each House. It likewise would require a majority vote of the duly elected members of either House to disapprove a reorganization plan.

In the event that said reorganization plan failed to receive a majority vote of each House in favor of its approval, then the reorganization plan would nevertheless become effective unless disapproved

by a majority vote of either House. A reorganization plan in order to become effective need not be approved by a majority vote of the duly elected members of each House because the failure to disapprove, as set forth in subsection (c) allows the plan to become effective even though each House has not taken the specific affirmative action allowed by subsection (b).

Therefore, under current conditions existing in the House of Representatives with 203 duly elected members, the failure of the resolution to receive 102 affirmative votes would not defeat a reorganization plan.

Very truly yours,

DEPARTMENT OF JUSTICE,

WILLIAM C. SENNETT,

Attorney General.

OFFICIAL OPINION No. 283

Corporations—Motor carriers and brokers—Applicability of the Business Corporation Law, as amended.

Motor carriers and brokers are authorized to utilize the incorporation and other provisions of the Business Corporation Law, the Act of May 5, 1933, P. L. 364, as amended by Act No. 216 of 1968.

Harrisburg, Pa., December 3, 1968.

Honorable Joseph J. Kelley, Jr., Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: We have your request for advice as to the extent, if any, that Act No. 216 of 1968, which amends the Business Corporation Law of May 5, 1933, P. L. 364 (BCL), affects motor carriers or brokers.

The law in effect prior to the adoption of this amendment authorized incorporation of motor carriers or brokers under the BCL in the following language:

> "Section 4.B. This Act does not apply to: . . . (2) any domestic coporation for profit which, by the laws of this Commonwealth, is subject to the supervision of the Pennsylvania Public Utility Commission or the Water and Power Resources Board, except—*(1) a corporation incorporated to act as a motor carrier or broker or both as defined in the Pennsylvania Public Utility Law . . .*". (Emphasis supplied)

The amendment made by Act No. 216 repealed the underlined inclusion of motor carriers or brokers in the BCL but did not remove them from its provisions. Instead, the amendment expanded the scope of the act to include additional public utilities, such as railroad, water supply, natural or artificial gas or gas transportation, telegraph, electric or hydroelectric companies. In so doing, the amendment substituted new conditions for exclusion of such public utilities from the provisions of the Act.

Exclusion from the provisions of the Act is made contingent upon compliance with the following conditions:

(a) The corporation's operations must be subject to the supervision of the Pennsylvania Public Utility Commission, *and*

(b) The corporation, proposed or existing, may be incorporated by or under any other act for a purpose including certain utility purposes; *and*

(c) The corporation has elected *not* to accept the provisions of the BCL.

Any public utility meeting the criteria of (a) and (b) must also file an election not to come within the BCL in order to be excluded from the provisions thereof. On the other hand, any company filing articles of incorporation under the provisions of the BCL is deemed to have accepted its provisions (See Section 4C(1)).

Accordingly, it is our opinion, and you are advised, that motor carriers or brokers are still authorized to utilize the incorporation and other provisions of the Business Corporation Law upon compliance therewith.

Very truly yours,

DEPARTMENT OF JUSTICE,

WILLIAM C. SENNETT,
Attorney General.

OFFICIAL OPINION No. 284

Incompatible offices—Member of Milk Control Commission and office of Justice of the Peace.

The offices of Milk Commissioner and that of a Justice of the Peace are incompatible.

Harrisburg, Pa., December 12, 1968.

Honorable Grace M. Sloan, Auditor General, Harrisburg, Pennsylvania.

Madam: You have requested our opinion as to whether a person may be a member of the Milk Control Commission and at the same time fill the office of a Justice of the Peace. You have further inquired that in the event such offices are incompatible, may the holder thereof receive the compensation and emoluments of office for the period of his service.

The Act of April 28, 1937 P. L. 417, as amended, Section 202, 31 P. S. 700j–202 make it quite clear that the two offices are incompatible. The section provides as follows:

> "§700j–202. Qualifications and salaries.
>
> "Each member of the commission at the time of his appointment and qualification shall be a citizen of the United States.
>
> "No member of the commission, during his period of service as such, shall hold any other office under the laws of this Commonwealth or of the United States.
>
> "The chairman of the commission shall receive a salary of seven thousand two hundred fifty dollars ($7,250) per annum. The other members of the commission shall receive salaries at the rate of six thousand seven hundred fifty dollars ($6,750) per annum. 1937, April 28, P. L. 417, art. II, §202, 1947, June 30, P. L. 1173, §1.

It is immediately apparent from a reading of the above section that the two offices here involved are incompatible. It is equally evident that a party may not be a de jure Justice of the Peace and at the same time a de jure member of the Milk Control Commission.

The Pennsylvania courts have ruled that where offices are incompatible a qualification for the latter office operates as a forfeiture of the former. However, in the situation which you have detailed the officer has continued to exercise the duties of both offices. In such case the performance of the duties of the second office constitutes him a de facto officer.

A de facto officer is one who is in possession of an office and discharging its duties under cover of authority, which means authority derived from an election or appointment however irregular or informal; Commonwealth ex rel Palermo v. City of Pittsburgh 339 Pa. 172 (1940). The performance of duties for the Commission, therefore, by

this individual operates to clothe the individual with the title of a de facto officer.

A person in possession of an office and discharging its duties under the cover of authority, i.e., authority derived from an election or appointment however irregular or informal so that the incumbent be not a mere volunteer, is a de facto officer and his acts are good so far as they respect the public; Still v. Bucks County Board of Health, 11 Bucks, 178.

This officer, therefore, performing all the duties of an office under cover of authority is a de facto officer and having in good faith performed all of the functions of his office is entitled to the fees and emoluments pertaining thereto. However, in view of our opinion he must do everything possible to eliminate the existing incompatibility.

You are, therefore, accordingly advised that the offices of Milk Commissioner and that of a Justice of the Peace are incompatible. The individual holding the said offices should be advised immediately that he has an option to select one or the other of the offices and that such selection must be made immediately. While he is entitled to receive the compensation and emoluments of his office as a Commissioner up to and including the date of this opinion, such entitlement shall cease as of this date, unless the individual resigns from his office as Justice of the Peace.

Very truly yours,

DEPARTMENT OF JUSTICE,

WILLIAM C. SENNETT,

Attorney General.

OFFICIAL OPINION No. 285

Contracts—Competitive bidding—Specialized equipment and expert knowledge—Purification and demineralization of contaminated mine water.

A contract may be negotiated with Westinghouse Electric Corporation for the designing and supplying of the specialized equipment required to operate a plant for the purification and demineralization of contaminated mine water without competitive bidding.

Harrisburg, Pa., March 21, 1969.

Honorable H. Beecher Charmbury, Secretary of Mines and Mineral Industries, Harrisburg Pennsylvania.

Sir: You have requested our opinion with respect to your authority to enter into a certain contract in implementation of a program in-

itiated by your department pursuant to the authority of the Land and Water Conservation and Reclamation Act, Act No. 443, approved January 19, 1968.

The cited Act [Section 2 (3)] states as a legislative finding that "the prevention, control and elimination of stream pollution from mine drainage * * * are urgent matters requiring action by the Commonwealth of Pennsylvania not only for conservation purposes but for the protection of the health and welfare of the citizens of the Commonwealth. Said Act further authorizes your department [Section 16a (1-1)] to construct and operate a plant or plants for the control and treatment of water pollution resulting from mine drainage.

You state that pursuant to the aforesaid authority your department instituted a program to develop a process whereby polluted mine water might be purified or demineralized and a super-pure water produced. This overall program was to be consummated in three phases or stages; the first being the conducting of laboratory tests on a model scale to determine the feasibility and efficacy of a proposed program to purify contaminated mine water; the second to make investigations for the purpose of locating water of such high pollution as to justify the construction of a plant of this type to purify the same. These two phases have been accomplished through contracts entered into with Westinghouse Electric Corporation.

The third phase involves the erection of an actual full scale plant and the designing and supplying of the highly specialized equipment required for its operation. In connection with the consummation of the third phase, it will be necessary to enter into a contract for the construction of a physical plant in which the said equipment could be housed and operated.

The first two phases of this program have been completed. The third phase thereof and the incidental construction of the plant are yet to be accomplished.

With regard to the third phase, you inquire specifically as follows: first whether Westinghouse may be granted a contract on a negotiated rather than a bid basis for the design, supplying and installation of the equipment and the trial operation of the plant to determine that it can produce the required water of such quality standards as required and represented by Westinghouse; secondly, whether any conflict of interest would exist by reason of the performance of phases one, two and three by Westinghouse and thirdly, whether the con-

tract for the construction of the physical plant is required to be awarded through competitive bidding.

On the basis of the information supplied to us, it is clearly apparent that the subject matter under discussion is of an unusual nature involving technical knowledge and expertise. The completion of the project requires further research and the designing and supplying of highly specialized equipment which can only be provided through an agreement with a party having unique and special expertise. Such equipment cannot be referred to by trade name or number nor by clearly defined specifications but rather by reference only to an accomplished result. There further appears to be no doubt that Westinghouse is the only known party qualified to carry out this type of program for the purification and demineralization of mine drainage.

This case presents a situation similar to that of an artist who contracts to produce a certain result involving the use of materials and the production of the result contracted for.

The proposed agreement clearly exemplifies the type of professional or skilled labor which is contemplated by Section 507 of the Administrative Code of 1929, 72 P. S. 187, which authorizes the entry into contracts without the requirement of competitive bidding for the employment of professional or skilled labor in instances where the Department of Property and Supplies does not have an applicable contract. It is particularly applicable to the instant case where only one known party is qualified to render the required service. Such contracts require the approval of the Governor. You are accordingly advised that the proposed contract requiring highly specialized and expert knowledge may properly be entered into with Westinghouse Electric Corporation without competitive bidding.

The preliminary studies made as the groundwork for the overall program and the culmination thereof in the design, production and installation of a plant to perform and complete the project can only be performed by the party having the required expert knowledge. The proposed program to purify contaminated mine water constitutes one project. The fact that the same may be divided into three phases does not have the effect of converting the same into three separate and distinct contracts. As a matter of fact the three phases could and should have been incorporated into one contract providing for the performance of every aspect of the proposed objective.

Adverse interest is defined by the State Adverse Interest Act of July 19, 1957, P. L. 1017, 71 P. S. 776, as existing where a state consultant having recommended to the state agency which he serves either the making of a contract or a course of action of which the making of a contract is an express or implied part is a party to the said contract. In the case under discussion, Westinghouse Electric Corporation was the original contracting party who as an independent contractor undertook to perform certain professional and technical services for the Commonwealth incidental to and as part of the accomplishment of an overall program. Its employment was not for the purpose of consulting with or advising the Commonwealth as to the means of producing a certain result. On the contrary it was employed to apply its expert knowledge to the development, establishment and finalizing of an entire program including all of the above described phases thereof. Therefore, the application of such expert knowledge throughout the various phases of the project cannot constitute adverse interest.

The absence of an adverse interest is emphasized by the fact that Westinghouse's exclusive expertise in this field and its agreement to guarantee the successful result of the program with the condition that final payment thereon shall not be made until the Department of Mines and Mineral Industries is satisfied therewith.

The proposed contract for the construction of the building or the physical plant in which the equipment provided by Westinghouse is to be housed and the decontamination process conducted does not involve any knowledge or qualification not usually possessed by qualified contractors and builders. Such contract does not fall into any special category and the preparation and awarding thereof must be made in accordance with the requirements of the general law confirming the same. Accordingly, the award for such contract must be made in accordance with Section 2408 of the Administrative Code, 71 P. S. 638, which directs the method whereby such contracts are awarded including the requirement for competitive bidding.

To reiterate, it is our opinion and you are advised that under the law your department is authorized to negotiate a contract with Westinghouse Electric Corporation for the designing and supplying of the specialized equipment required to operate a plant for the purification and demineralization of contaminated mine water without competitive bidding. Inasmuch as said contract will be entered into in connection with one phase of an overall three phase program, the same presents no basis upon which adverse interest could be said to exist.

You are further advised that all requirements of the Administrative Code with respect to the awarding of contracts including competitive bidding must be complied in connection with awarding of the contract for the construction of the physical plant in which the equipment used in connection with the program is to be used and operated.

Very truly yours,

DEPARTMENT OF JUSTICE,

WILLIAM C. SENNETT,
Attorney General.

OFFICIAL OPINION No. 286

State employes—Group life insurance—Members of General Assembly—Basis for determination of amount of insurance available.

The amount of life insurance available for any insured Commonwealth employe is based upon the individual's yearly gross compensation. The gross compensation of members of the General Assembly is determined by adding to the yearly salary the additional statutory allowance for expenses incurred by a State legislator.

Harrisburg, Pa., March 27, 1969.

Honorable Perrin C. Hamilton, Secretary of Property and Supplies, Harrisburg, Pennsylvania.

Sir: You have requested my opinion interpreting the Act of September 26, 1961, P. L. 1661, as amended by Act No. 229 of 1968, 71 P. S. 780.1 et seq. which established a group life insurance program for Commonwealth employes as implemented by a contract between the Life Insurance Company of North America and the Commonwealth of Pennsylvania.

Members of the General Assembly are covered by the aforesaid act by reason of their inclusion within the definition of "employe." You inquire specifically as to the base for the determination of the amount of such insurance available to Members of the General Assembly.

Section 1 of the Act in defining the basis for the determination of insurance for covered employes including Members of the General Assembly provides inter alia as follows:

> "the amount of life insurance for any insured individual shall be based upon the individual's *yearly gross compensation* from the Commonwealth in accordance with the following schedule * * *
>
> For the purposes of this section, yearly gross compensation shall not include any mileage reimbursement or overtime pay, and in the case of hourly workers shall be computed on the basis of schedule required work hours."

This exact language was incorporated into the contract with the Life Insurance Company of North America.

The answer to your inquiry depends upon a determination of the "gross compensation" payable to Members of the General Assembly. In resolving this issue it is significant to note that the Legislature did not base the amount of eligibility for the insurance provided upon "income" or "salary" but on the contrary chose to use the term "yearly gross compensation" as the criterion. It is of further significance that mileage reimbursement and overtime pay which are not properly includable within the term "salary" were expressly excluded from the amount of "yearly gross compensation." This clearly indicates a legislative intention to give a broad and comprehensive meaning to the language used.

In coming to the foregoing conclusion, we are governed by certain fundamental principles of statutory construction. Every law should be construed if possible to give effect to all its provisions. The Legislature cannot be deemed to have intended that the language used in the statute to be superfluous and without import. *Commonwealth v. Mack Bros. Motor Car Co.,* 359 Pa. 646 (1948). No words should be deleted or disregarded in the construction of a statute, *Keating v. White,* 145 Pa. Superior 495 (1940). *Lynch v. Owen J. Roberts School District,* 430 Pa. 461 (1968).

Legislative precedent emphasizes the interpretation placed upon the Legislature upon the various terms under discussion. From time to time, it has established the amount of "salary" payable to its Members. Most recently the said basic "salary" was established at $7200 per annum in addition to mileage allowances. (Act of July 9, 1965, P. L. 195 and 196, Section 1, 46 P. S. Section 5 and Section 6.) After fixing the amount of salary it further provided:

> "no other compensation shall be allowed whatsoever, except each member of the General Assembly shall receive an allowance for clerical assistance and other expenses incurred during his term in connection with the duties of his office in the sum of $4800 annually . . ."

Thus the Legislature clearly differentiated between the terms "salary" and "compensation." It logically follows that the exception from "other compensation" payable to Members of the General Assembly of an allowance for clerical assistance and other expenses in the amount of $4800 item is included within the category of "other compensation."

The regulations of the Internal Revenue Service lend persuasive weight to our conclusion that the term "gross compensation" includes salary and other specific payments required to be made by law. Internal Revenue Service Regulation No. 1.162-2 paragraph 1350.1293 provides as follows:

> "reimbursements and allowances for expenses incurred by a state legislator *should be included in gross income.* He may deduct traveling expenses, including the entire amount expended for meals and lodging, only when on business trips which require him to be away from home and his principal place of business."

It is therefore our opinion and you are advised that the "gross compensation" of Members of the General Assembly is determined by adding to the "salary" of $7200 the additional statutory allowance of $4800 or $12,000. Insurance available to Members of the General Assembly under the Act of September 26, 1961, P. L. 1661, as amended by Act No. 229 of 1968, 71 P. S. 780.1 et. seq. is therefore to be calculated on this basis.

Very truly yours,

DEPARTMENT OF JUSTICE,

WILLIAM C. SENNETT,
Attorney General.

OFFICIAL OPINION No. 287

Auditor General—Authority to approve purchases by the Liquor Control Board.

The inventory requirements necessary to stock Pennsylvania State Liquor Stores is a matter exclusively within the discretion of the Pennsylvania Liquor Control Board and the Auditor General has no authority to approve or disapprove the exercise of that discretion.

Harrisburg, Pa., April 9, 1969.

Honorable William Z. Scott, Chairman, Pennsylvania Liquor Control Board, Harrisburg, Pennsylvania.

Sir: You have requested our advice as to the extent of the authority of the Auditor General in connection with the approval of purchases by your Board.

Your inquiry is prompted by the action of the Auditor General in refusing to approve a purchase order for certain liquors on the ground that in her opinion the same is in excess of the Board's needs.

The position of the Auditor General is based upon Section 207 of the Liquor Code. the Act of April 12, 1951, P. L. 90, 47 P. S. 2-207. That Section provides as follows:

> "General Powers of Board. Under this act, the board shall have the power and its duty shall be:
>
> (a) To buy, import or have in its possession for sale, and sell liquor and alcohol in the manner set forth in this act: Provided however, That all purchases shall be made subject to the approval of the Auditor General or his designated deputy."

The resolution of the question presented by you depends upon a determination of the nature and scope of the authority conferred upon the Auditor General by the quoted provision of the Code. In making this determination it is important to define the term "approved" consistently with the reasonable and practical exercise of the Auditor General's function and authority. The prerogative to approve purchases does not delegate to that officer unlimited power which may be exercised without discretion or judgment. That judgment must be limited so that it does not impinge upon the necessary and statutory authority of the Board to establish, operate, stock and do all other things which in its judgment is necessary to provide and operate an efficient state stores system. It follows that the word "approval" must be read in connection with and as modified by the specific provisions of the Code which define the powers of the Liquor Control Board.

It is thus clear that the word "approval" is susceptible of different meanings dependent upon the subject matter and context concerning which the term is employed and the purpose to be accomplished. The term can mean confirm, ratify or sanction; but on the other hand many times the word when used in a statute requiring that a certain

action meet with some designated approval may merely contemplate the doing of a purely ministerial act. See *Baynes v. Bank of Caruthersville,* Mo. App. 118 S. W. 2d, 1051 at page 1053 and *Powers v. Isley,* 183 P. 2d 880, 66 Ariz. 94.

The Legislature manifested its complete confidence in the competence of the personnel comprising the Board as indicated by the extensive powers conferred upon it.

The Liquor Code grants to the Board comprehensive, exclusive and monopolistic authority to regulate the Liquor industry of the Commonwealth. Included among these powers are the control of the manufacture, possession, sale, consumption, importation, use, storage, transportation, delivery, fixing of wholesale and retail prices, the determination of location and stocking of liquor stores, the issuance, suspension and revocation of licenses; prescribing the nature, form and capacity of containers, and the performance of all such acts as are deemed necessary or advisable for the purpose of effectuating the Liquor Code and Regulations adopted thereunder.

The broad scope of the authority conferred upon the Liquor Control Board confirms the intention of the Legislature that management decisions are the sole prerogative of the Board. Such a conclusion is also consistent with the expertise required for sound management decisions which is peculiarly within the knowledge of Board personnel.

The Supreme Court of Pennsylvania emphasized the extent of the authority and discretion invested in the Liquor Control Board in *Merchants' Warehouse Company v. Hitler,* et al, 335 Pa. 465. It stated at page 471:

> "The Board is an administrative body established by statute, with a great variety of powers and duties. A reasonable construction must be given to the legislation on the subject, having regard to the purposes to be accomplished by it . . ."
>
> ". . . A reasonable discretion must be exercised and necessarily involves freedom of choice between possible courses. *An administrative Board cannot function in a straight jacket* . . ." (Emphasis supplied)

The substitution of the Auditor General's discretion as to the inventory needs required to satisfy consumers' taste and demands would seriously dilute if not completely nullify the power of the Board to perform its statutory functions.

It is accordingly our opinion that the discretion to determine the inventory needs in order to stock the Pennsylvania liquor stores is the exclusive prerogative of the Liquor Control Board and the Auditor General is without authority to control or modify the exercise thereof.

Our conclusion is confirmed by the fact that certain statutory authority of the Auditor General existing at the time of the enactment of the Liquor Code has been greatly modified if not completely abrogated by certain amendments to our State Constitution. For example, Article III, Section 12 of the Constitution requiring the Auditor General and the State Treasurer to approve certain purchases was repealed in November, 1967.

Furthermore, the electorate of the Commonwealth adopted the recommendation of the Constitutional Convention that an officer required to audit transactions may not exercise any authority in connection with the approval thereof. Article VIII, Section 10, specifically directs that:

> ". . . Any Commonwealth officer whose approval is necessary for any transaction relative to the financial affairs of the Commonwealth shall not be charged with the function of auditing that transaction after its occurrence."

The foregoing being a positive prohibition is self-executing and thus became effective by the approval of the electorate on April 23, 1968.

As the purchasing of liquor is the primary duty of the Liquor Control Board and the auditing function the primary duty of the Auditor General, the foregoing section nullifies and repeals any previous authority conferred by existing statutes for Auditor General's approval of purchases.

You are therefore advised that the determination as to the inventory requirements necessary to stock Pennsylvania State Liquor Stores is a matter exclusively within the discretion of the Pennsylvania Liquor Control Board and that the Auditor General has no authority to approve or disapprove the exercise of that discretion.

Very truly yours,

DEPARTMENT OF JUSTICE,

WILLIAM C. SENNETT,
Attorney General.

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