40A: 4-45.2 and 40A: 4-45.3b

LEGISLATIVE HISTORY CHECKLIST

NJSA 40A:4-45.2 and 40A:4-45.3b ("Caps" - Municipal - prescribe treatment for handling sale of assets)

LAWS 1981 CHAPTER 64

Bill No. S3080/S3019

Sponsor(s) Rodgers, Hamilton and Orechio

Date Introduced Feb. 9, 1981

Committee: Assembly ----------

Senate County and Municipal Government

Amended during passage Yes ~~No~~ Committee substitute for S3080/S3019 enacted

Date of Passage: Assembly March 2, 1981

Senate Feb. 23, 1981

Date of approval March 9, 1981

Following statements are attached if available:

Sponsor statement		~~Yes~~	~~No~~
Committee Statement:	Assembly	~~Yes~~	No
	Senate	~~Yes~~	No
Fiscal Note		~~Yes~~	No
Veto Message		~~Yes~~	No
Message on signing		Yes	~~No~~

Following were printed:

Reports	~~Yes~~	No
Hearings	~~Yes~~	No

Attorney General Opinions F.O. 23 (1980) & F.O. 3 (1977)--
(cited in sponsors' statement)--attached

6/25/81

CHAPTER 64 LAWS OF N. J. 1981
APPROVED 3-9-81

COMMITTEE SUBSTITUTE FOR

SENATE, Nos. 3080 and 3019

STATE OF NEW JERSEY

ADOPTED FEBRUARY 9, 1981

By Senators RODGERS and HAMILTON

AN ACT to amend and supplement "An act to place limits on expenditures by counties and municipalities and supplementing Title 40A of the New Jersey Statutes," approved August 18, 1976 (P. L. 1976, c. 68, C. 40A:4-45.1 et seq.).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 2 of P. L. 1976, c. 68 (C. 40A:4-45.2) is amended to read as follows:

Beginning with the tax year 1977 municipalities, other than those having a municipal purposes tax levy of $0.10 or less per $100.00 and counties shall be prohibited from increasing their final appropriations by more than 5% over the previous year except within the provisions set forth hereunder.

For the purpose of this section, in computing its final appropriations for the previous year, a municipality shall include, as part of its final appropriations:

a. Amounts of revenue generated by an increase in its valuations based solely on applying the preceding year's local purposes tax rate of the municipality to the assessed value of new construction or improvements;

b. Revenues derived in the previous year from new service fees, or from any increase in any previously imposed service fees, imposed by ordinance;

c. Amounts approved by referendum, pursuant to subsection i. of section 3 of P. L. 1976, c. 68 (C. 40A:4-45.3) and section 1 of P. L. 1979, c. 268 (C. 40A:4-45.3a).

In each budget year subsequent to 1981, whenever any municipality shall have transferred to any local public utility, any local public authority or any special purposes district, during the immediately preceding budget year, or at any time during the current budget year prior to the final adoption of the budget, any service or function funded during the immediately preceding budget year,

either partially or wholly from appropriations in the municipal budget, the municipality shall deduct from its final appropriations upon which its permissible expenditures are calculated pursuant to this section the amount which the municipality expended for that service or function during the last full budget year throughout which the service or function so transferred was funded from appropriations in the municipal budget.

2. (New section) Notwithstanding any provisions of P. L. 1976, c. 68 (C. 40A:4–45.1 et seq.) to the contrary, municipalities shall, in budget year 1981 and in all subsequent budget years in deriving their final appropriations for the prior year upon which the 5% annual increase permitted under section 2 of P. L. 1976, c. 68 (C. 40A:4–45.2) is calculated, not be required to treat as exceptions to the prior year's final approriations any appropriations of the proceeds of the sale of municipal assets which were contained in their budgets for the year 1980 or for any prior budget year. In all fiscal years subsequent to budget year 1981, municipalities shall, in deriving their final appropriations for the immediately preceding budget year upon which the 5% annual increase is calculated, treat the amounts of the proceeds of the sale of municipal assets appropriated in their budgets for the immediately preceding year as exceptions to the final appropriations under section 3 of P. L. 1976, c. 68 (C. 40A:4–45.3).

3. This act shall take effect immediately, and shall be retroactive, except as specifically provided therein, to August 18, 1976.

STATEMENT

This committee substitute was issued by the Senate County and Municipal Government Committee for two bills, Senate Bill 3080 and Senate Bill 3019, which would have addressed in a similar manner Attorney General's *Formal Opinion No. 23—1980.* That opinion states that revenues derived from the sale of municipal assets should be treated as exceptions from the local budget "caps," both in the year when expended and in subsequent years when computing the "cap base" upon which a municipality calculates its permissible spending limit for the year pursuant to the "cap law" (P. L. 1976, c. 68; C. 40A:4–45.1 et seq.).

The Attorney General's opinion creates severe budgetary problems for many New Jersey municipalities. The Division of Local Government Services, for the past 3 years, has permitted municipalities to treat revenues derived from the sale of municipal assets as "add-ons" which were expended outside the "cap" but which

became a permanent part of the municipality's "cap base" for subsequent years. *Formal Opinion No. 23—1980* would end that practice. Moreover, the Attorney General implied in a footnote to the opinion that the application of the opinion would be retroactive: "We understand that the Division may not have treated such sales in accordance with *Formal Opinion No. 3—1977* over the past 3 years and that to alter that position now may cause substantial disruption in such municipalities which have relied upon the Division's tolerance of their erroneous treatment of such sales. That is regrettable and we would expect that they may look to the Legislature for redress." If implemented retroactively, the opinion would force affected municipalities to "roll-back" their "cap base" to 1977 and extract any margin of growth in their spending limits which may have accumulated over 4 years as a result of applying the 5% limit to the sales of municipal assets which occurred in those years.

The Senate committee substitute would address the Attorney General's opinion by providing that for the 1981 budget year and thereafter, revenues derived from the sale of municipal assets shall be exempt from the 5% "cap," but shall not be included in the "cap base" for subsequent years. All expenditures of amounts derived from the sale of municipal assets contained in budgets for 1980 or any prior year shall be included in the "cap base" for 1981 and all subsequent years. The committee substitute addresses the retroactivity issue by making the bill's provisions retroactive to the effective date of the "cap law" (August 18, 1976).

The committee substitute, thus, conforms with the provisions of the Attorney General's opinion in this regard, but limits the effect thereof to the 1982 municipal budget year and thereafter.

The Senate committee noted that the Attorney General's opinion is based upon an effort to consistently interpret the "cap law." The implication of the Attorney General's opinion is that none of the exemptions set forth in N. J. S. A. 40:4–45.3 may be treated as "add-ons." Over the past 3 years, revenues derived from new ratables (exception a.), from new and increased service fees (part of exception h.), and sums approved by referendum (exception i.), as well as amounts derived from sales of municipal assets (part of exception h.), have all been treated as "add-ons."

If these items were not treated as "add-ons" revenues budgeted by municipalities, and municipal fee structures, would fluctuate drastically from year to year, and municipalities would be required to go to referendum each year in order to raise the same amount in their budget. The Senate committee believes that clarification of

the Legislative intent of the "cap law" is required with respect to these other three items, in order to eliminate any need for further Attorney General's opinions in this regard. The committee substitute would do so by amending section 2 of P. L. 1976, c. 68 (C. 40A:4-45.2) to state that municipalities shall include these three items in their final appropriations for the purpose of calculating permissible expenditures under that section. This would continue the current treatment of these items.

Finally, the Senate committee substitute addresses a policy question relating to the treatment of sales of municipal assets under the "cap law" which does not apply with respect to the three items discussed above. The current treatment of revenues derived from sales of municipal assets has been strongly criticized for encouraging municipalities at times to dispose of public property in a manner not conducive to the long-term financial interest of the municipality. The practice which has been most criticized is that where the municipality establishes a municipal authority and sells its municipal utility to that authority. In some cases, special fire districts or garbage districts have been established for the same purpose. In these instances, the municipality enjoys a double "cap" bonus, as a result of the revenues derived from the sale of municipal assets, and also as a result of the "freeing up" of moneys in the budget which were previously expended for fire or garbage services. This legal maneuver has been viewed as promoting the "splintering" of local government.

The Senate committee substitute includes a provision requiring that whenever a municipality transfers to a local public utility, a local authority or a special purpose district, a service or function previously funded in the municipal budget, it shall subtract from its "cap base" in the next year the amount it previously expended on that service or function.

SENATE, No. 3080

STATE OF NEW JERSEY

INTRODUCED FEBRUARY 2, 1981

By Senators RODGERS and ORECHIO

Referred to Committee on County and Municipal Government

A SUPPLEMENT to "An act to place limits on expenditures by counties and municipalities and supplementing Title 40A of the New Jersey Statutes," approved August 18, 1976 (P. L. 1976, c. 68; C. 40A:4-45.1 et seq.).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Notwithstanding any provisions of P. L. 1976, c. 68 (C. 40A:4-45.1 et seq.) to the contrary, municipalities shall, in fiscal year 1981 and in all subsequent fiscal years in deriving their final appropriations for the prior year upon which the 5% annual increase permitted under section 2 of P. L. 1976, c. 68 (C. 40A:4-45.2) is calculated, not be required to treat as exceptions to such prior year's final appropriations any appropriations of the proceeds of the sale of municipal assets which were contained in their budgets for the fiscal year 1980 or for any prior fiscal year. In all fiscal years subsequent to fiscal year 1981, municipalities shall, in deriving their final appropriations for the immediately preceding fiscal year upon which the 5% annual increase is calculated, treat the amounts of the proceeds of the sale of municipal assets appropriated in their budgets for the immediately preceding fiscal year as exceptions to the final appropriations under section 3 of P. L. 1976, c. 68 (C. 40A:4-45.3).

2. This act shall take effect immediately and shall be retroactive to August 18, 1976.

STATEMENT

During the past 3 years, many municipalities have included the proceeds of the sale of assets in their base when calculating their municipal spending limits under the local government cap law. The Attorney General's office, in Formal Opinion No. 23 dated November 17, 1980, has advised the Division of Local Government

Services that such treatment is contrary to the statute and its Formal Opinion No. 3, 1977. In the recent opinion, the Attorney General concluded that appropriations of the proceeds of the sale of municipal assets should be treated as an exception under the cap law and that those appropriations in a municipal budget for a preceding year should be deducted from final appropriations in that year to derive a base amount from which a permissible spending increase is allowed in a subsequent year.

As a result of the accumulated effect of the former treatment of this item during the past several years, the cap base in 1981 budgets would be in excess of the amount permissible by law. However, to now require the correction of those municipal cap bases in an amount to reflect the accumulated increase over the past several years would cause a severe and crippling hardship on many municipalities which even now find it difficult to manage municipal budgets within existing spending limits.

This bill will make the Attorney General's ruling prospective only commencing with the municipal budgets in 1982. Thus, when calculating the 1982 budgets, expenditures of the proceeds from the sale of assets will not be included in the cap base. However, the accumulated increase in the cap base due to the inclusion of these items in past years will remain in the cap base.

SENATE, No. 3019

STATE OF NEW JERSEY

INTRODUCED JANUARY 22, 1981

By Senators HAMILTON, WEISS, GREGORIO, MUSTO, RODGERS and ORECHIO

Referred to Committee on County and Municipal Government

A SUPPLEMENT to "An act to place limits on expenditures by counties and municipalities and supplementing Title 40A of the New Jersey Statutes," approved August 18, 1976 (P. L. 1976, c. 68, C. 40A:4-45.1 et seq.).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. The Legislature finds that the interpretation and administrative implementation of P. L. 1976, c. 68 with particular regard to the treatment of revenue from the sale of assets for purposes of calculating the base on which the allowable annual expenditure increases are determined has evolved to a point where the Legislature is compelled to prescribe the treatment of such funds for the 1981 local government budget year and thereafter and establish a policy with regard to the effect of this prescribed treatment on the calculation of the base on which allowable expenditure increases were determined for local government budget years prior to 1981.

2. For purposes of the 1981 municipal budget year and thereafter any revenue from the sale of assets may be expended notwithstanding the 5% limit on increases over the previous year's final appropriations. The expenditure of such amounts shall not be included in the base upon which the ensuing year's expenditure increase limitation is calculated.

3. All municipal budgets for years prior to 1981 are ratified, validated and confirmed to the extent of the treatment of revenue from the sale of assets, notwithstanding that such treatment may have been in conflict with the provisions of section 3 of P. L. 1976, c. 68 (C. 40A:4-45.3).

4. This act shall take effect immediately.

STATEMENT

This bill is in reaction to a recent opinion of the Attorney General (Formal Opinion No. 23 of 1980) dealing with the treatment of revenue from the sale of municipal assets for purposes of calculating the base on which the 5% cap is calculated for the year following the year in which the sale took place.

There is general confusion, or at least disagreement, as to the intent of the Legislature in providing for an exemption to the 5% cap law in the case of the sale of municipal assets. There are several cases where the expenditure of revenue from the sale of assets has been continued in the base on which the 5% cap is calculated notwithstanding the clarification of this issue by opinion of the Attorney General in 1977. This opinion has been recently restated and confirmed, and expressly provides that where the expenditure of revenue from the sale of assets has been carried in the base on which the limitation was applied, the municipalities must recalculate the base for each of those years and adjust the cap leeway accordingly. This requirement could be devastating in some cases, as recognized by footnote in the opinion, and a legislative remedy is required.

This bill ratifies all prior budgets to the extent of the treatment of the revenue from the sale of assets and provides that for the 1981 budget year and thereafter revenue from the sale of assets may be expended in addition to the 5% cap limit, but shall not be included in the base for ensuing years.

FROM THE OFFICE OF THE GOVERNOR

FOR IMMEDIATE RELEASE — FOR FURTHER INFORMATION

MARCH 9, 1981 — KATHRYN FORSYTH

Governor Brendan Byrne today signed the following bills:

A-3168, sponsored by Assemblyman Alan Karcher (D-Middlesex), which permits municipalities to anticipate 90% of the projected increase in Gross Receipts and Franchise Tax revenues in their 1981 Budgets.

The Treasury Department predicts that the Gross Receipts and Franchise Tax will generate $93 million more in revenues this year than it did last year. These additional revenues will be distributed to the 335 eligible municipalities pursuant to a statutory formula.

The bill requires the State Treasurer to certify each municipality on or before April 15, 1981 90% of the increase which the municipality can expect in these revenues. The municipality would then be able to include in its 1981 budget the anticipated revenues.

S-3080, sponsored by Senator Francis E. Rodgers (D-Hudson), which deals with the treatment of the sale of municipal assets under the municipal "cap" law.

In the past, municipalities have increased their spending limits by the amount of revenues generated when municipal assets were sold. This constituted a serious loophole in the "cap" law, since those revenues would not be generated in future years. Consistent with an Attorney General's recent ruling, this bill will prohibit that practice commencing in 1982. However, the bill validates past practices and permits the prior rule to be followed this year, since the municipal budget process for 1981 is already underway.

In addition, the bill clarifies that the spending limits may be increased by new revenues generated in the proceeding year by additional fees, increased valuations or referendums.

The bill also provides that where a municipality creates a utility, authority or special district it must reduce its spending limits by the amount of appropriations previously used to supply that service.

# # # # #

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
BANKING, INSURANCE AND PUBLIC SECURITIES SECTION
36 WEST STATE STREET
TRENTON 08625

JOHN J. DEGNAN
ATTORNEY GENERAL

JUDITH A. ASKIN
FIRST ASSISTANT ATTORNEY GENERAL

TELEPHONE —

STEPHEN SKILLMAN
ASSISTANT ATTORNEY GENERAL
DIRECTOR
DIVISION OF LAW

PETER B. PIZZELLO
DEPUTY ATTORNEY GENERAL
SECTION CHIEF

November 17, 1980

Barry Skokowski, Acting Director
Division of Local Government Services
Department of Community Affairs
363 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 23 - 1980

Dear Mr. Skokowski:

You have raised a question with us concerning the manner in which the proceeds of the sale of municipal assets are to be treated under the Local Government Cap Law. Your question is whether such proceeds are to be treated in the same manner as all other modifications under the statute, that is, as a modification to the statute's spending limitation both in the year in which such proceeds are appropriated and in the year subsequent to such appropriation. For the reasons which are set forth in Formal Opinion No. 3 - 1977, you are advised that the amount of such proceeds are to be treated in the same manner as are other modifications under the statute, that is, as a modification both in the year in which such proceeds are appropriated in a municipality's budget and in the following year in calculating the municipality's CAP base.

The manner in which appropriations which qualify as modifications should be treated under the law was exhaustively reviewed in Attorney General's Formal Opinion No. 3 - 1977. The answer to your question is readily apparent to a reader of that opinion and we need not repeat it extensively here. Suffice it to say that it was stated in that opinion at page 4 that a municipality in calculating its permissible spending increase should use a specific formula. A municipality should subtract from its final appropriations for the previous year those appropriations which qualified as modifications during that year under one or more of the provisions of N.J.S.A. 40A:4-45.3. In this manner a municipality derives a base upon which it calculates its permissible spending increase for the coming fiscal year. This spending increase is computed by multiplying the CAP base by 5%. The CAP base and the allowable increase are added together to yield the amount a municipality may expend within its spending limit.

It has therefore always been clear under Formal Opinion No. 3 - 1977 that appropriations which fall within one of the modifications set forth in N.J.S.A. 40A:4-45.3 should be treated as a modification both in the year in which such appropriations are made and in the calculation of a municipality's CAP base in the following year. Since in the present situation the proceeds of the sale of a municipality's assets have been provided as an exception to the statute's spending limitation, N.J.S.A. 40A:4-45.3(h), the proceeds of a sale should be treated as a modification to the statute's spending limit in the manner set forth in the Formal Opinion. To do otherwise, i.e., to allow the amount of such proceeds to become part of a municipality's CAP base in a subsequent year, would permanently expand the base and allow for a permanent increase in municipal expenditures in excess of an amount contemplated by the Legislature.

In conclusion, you are advised that consistent with the reasoning set forth in Formal Opinion No. 3 - 1977 the proceeds of the sale of a municipality's assets should be treated as a modification both in the year in which the proceeds are appropriated in a municipality's budget and in the calculation of the municipality's CAP base for the subsequent year.*

Very truly yours,

JOHN J. DEGNAN
Attorney General

By Daniel P. Reynolds
Deputy Attorney General

* We understand that the Division may not have treated such sales in accordance with Formal Opinion No. 3 - 1977 over the past three years and that to alter that position now may cause substantial disruption in such municipalities which have relied upon the Division's tolerance of their erroneous treatment of such sales. That is regrettable and we would expect that they may look to the Legislature for redress.

there is significantly greater public interest in the performance of the public official's duties. Accordingly, deliberations on that category of advisory requests should normally be held in open public session.

In summary, the Executive Commission on Ethical Standards may hold a closed session to discuss complaints and investigations into complaints prior to holding a formal hearing on them provided that it passes the resolution required by N.J.S.A. 10:4-13. The discussions of the Commission concerning the issuance of advisory opinions and the facts on which those opinions are to be based may not be held in closed session under the exception in the act for investigations into violations or possible violations of the law. In certain circumstances, however, these discussions may relate to material allowed to be discussed in closed session under section 10:4-12(b)(3) which allows a public body to exclude the public from that portion of a meeting at which it discusses "any material the disclosure of which constitutes an unwarranted invasion of individual privacy . . . ." Whether the discussion relates to such material, however, must be determined on a case-by-case basis.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: MICHAEL A. SANTANIELLO
Deputy Attorney General

1. Of course, where a request for an opinion received from a third party is in essence a complaint or is treated as a complaint by the Commission, it like other complaints, would fall under the exception for investigations of violations or possible violations of the law.

February 9, 1977

JOHN F. LAEZZA, *Director*
Division of Local Government Services
Department of Community Affairs
363 West State Street
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 3

Dear Director Laezza:

You have raised a series of questions concerning the interpretation of the Local Government Cap Law, N.J.S.A. 40A:4-45.1 *et seq.* (P.L. 1976, c. 68). This law was enacted as experimental legislation to limit spending by municipalities and counties without constraining them to the point where it is impossible to provide necessary governmental services (Section 1).

I

The most pressing questions that you have raised concern the statutory scheme

as a whole. First you have asked whether a county is prohibited from increasing its final appropriation by more than 5% over the previous year's appropriation or whether it is only prohibited from increasing its county tax levy by more than 5% over the previous year's tax levy subject to certain specified modifications. Section 2 of the statute provides that:

> "Beginning with the tax year 1977 municipalities other than those having a municipal purpose tax levy of $0.10 or less per $100.00 and counties shall be prohibited from increasing their final appropriations by more than 5% over the previous year except within the provisions set forth hereunder."

Section 4 of the statute provides that:

> "In the preparation of its budget, a county may not increase the county tax levies to be apportioned among its constituent municipalities in excess of 5% of the previous year's tax levy, subject to the following modifications:
> "a. The amount of revenue generated by the increase in valuations within the county based solely on applying the preceding year's county tax rate to the apportionment valuation of new construction or improvements within the county and such increase shall be levied in direct proportion to said valuation;
> "b. Capital expenditures funded by any source other than the county tax levy;
> "c. An increase based upon an ordinance declaring an emergency according to the definition provided in N.J.S. 40A:4-46 approved by at least two-thirds of the board of chosen freeholders of the county and, where pertinent, approved by the county executive;
> "d. All debt service;
> "e. Expenditures mandated after the effective date of this act pursuant to State or Federal law."

An initial reading of these two sections reveals an inherent inconsistency in which Section 2 seems to limit the final appropriation of a county for a particular year to 5% over the prior year's appropriation and Section 4 places the 5% limitation on the county tax levy to be apportioned among a county's constituent municipalities subject to certain specific modifications. However, it is a generally accepted principle of construction that when a reading of the literal terms of a statute leads to contradictory or incongruous results, a reasonable construction consistent with its underlying purpose should be preferred. *Schierstead v. Brigantine,* 29 N.J. 220, 230-31 (1959); *In re Petition of Gardiner,* 67 N.J. Super. 435, 444 (App. Div. 1961). In this case, the descriptive language in Section 2 generally outlines the purposes of the act to limit municipal and county spending, and the language, "except within the provisions set forth hereunder," suggests that Section 2 is dependent on separate sections for its force and effect. Accordingly, Section 4 provides the operative language of the statute, and specifically limits increases in county tax levies subject to a series of modifications. To the extent of any inconsistency between the descriptive language of Section 2 and the operative language of Section 4, the operative language should govern

the implementation of the spending limitation consistent with the legislative design.

This conclusion is buttressed by the fact that if the statute were to be read so as to limit expenditures by counties on the basis of their final appropriations, the modifications set forth in Section 4 would be inapplicable, since they refer only to the limits on county tax levies. This would result in defeating the legislative goal to provide enough flexibility for counties to provide necessary services (Section 1) contrary to the legislative purpose and, therefore, cannot be presumed to be what the Legislature intended. See *Albert F. Ruehl Co. v. Bd. of Trustees of Schools for Indus. Ed.*, 85 N.J. Super. 4 (Law Div. 1964). Thus, it is our opinion that the Act does not prohibit a county from increasing its final appropriation by more than 5% over the previous year's appropriation but, rather, only prohibits a county from increasing its county tax levy by more than 5% over the previous year's tax levy subject to certain modifications.

II

You have also asked whether appropriations for the transfer of funds by a municipality to a board of education pursuant to N.J.S.A. 40:48-17.1 and 17.3 are to be included within the limitation on municipal spending. N.J.S.A. 40:48-17.1 and 17.3 authorize municipalities to appropriate funds derived from unappropriated surplus revenues or unappropriated anticipated receipts to the boards of education of the local school districts serving them. This raises the question of whether local government expenditures for school district costs are to be included within the limitation on local government spending.

Within the past seventeen months the Legislature, with the approval of the Governor, has enacted laws limiting state government spending, N.J.S.A. 52:9H-5 *et seq.*, (P.L. 1976, c. 67, approved August 18, 1976), municipal and county spending, N.J.S.A. 40A:4-45.1 *et seq.*, (P.L. 1976, c. 68, approved August 18, 1976), and school district spending, N.J.S.A. 18A:7A-25 (P.L. 1975, c. 212, § 25, approved September 30, 1975). Since these statutes were passed as part of an overall legislative plan to limit government spending, the statutes must be considered together in construing the meaning of the provisions therein. See *Giles v. Gassert,* 23 N.J. 22 (1957). It cannot be presumed, moreover, that these statutes were intended to be duplicative. See *State v. Madewell,* 117 N.J. Super. 392 (App. Div. 1971), aff'd 63 N.J. 506 (1973). Since school district costs are subject to a separate statutory spending limitation, N.J.S.A. 18A:17A-25, it is reasonable to assume that the Legislature intended to exclude such costs from a second limitation on spending imposed by N.J.S.A. 40A:4-45.1 *et seq.*, (P.L. 1976, c. 68).

III

Your next inquiry concerning the general schematic framework of the statute raises the question as to how the modifications are to be treated for the purpose of calculating the "cap" or lid figure for final appropriations for municipalities and for tax levies for counties. The purpose of the modifications is to exclude from the limitation on spending amounts raised as a result of increases in valuations due to new construction or improvements, amounts raised through sources other than the local property tax and amounts deemed to be necessary to provide local governments with sufficient flexibility to provide emergency services and to participate in state or federal programs through which they can receive financial aid. Thus, the modifications are to be construed as exclusions from the act both in computing the base figure from the previous year to which the 5% is applied to arrive at the "cap" figure and in deter-

mining the expenses to be included within that amount for the current fiscal year, as demonstrated in the following equations:

Cap appropriation, which is the present year's final appropriation - modifications = 5% (previous year's final appropriation - modifications) + (previous year's final appropriation - modifications)

Cap tax levy, which is the present year's tax levy - modifications = 5% (previous year's tax levy - modifications) + (previous year's tax levy - modifications).

Otherwise, there would be no point of comparison between the two years.

In light of the previous answers, the answer to your question concerning the definition of "final appropriations" as used in Section 3 becomes clear. Please be advised that the term "final appropriations" as used in Section 3 refers to the final line item of appropriations in a municipal budget minus any appropriations for school costs covered within the limitation on spending in N.J.S.A. 18A:7A-25, but including all expenses excluded in subsections 3(a) through (i). As stated previously, the preceding year's costs excluded pursuant to the subsections are then subtracted from the preceding year's final appropriation, the 5% is computed and added to that amount to determine the amount permissible for the new year's final appropriation minus any modifications excluded pursuant to the subsections.

IV

Your next series of questions concerns the interpretation and application of the modifications included in the subsections to sections 3 and 4 of the act. First, you have asked whether the words "general tax rate of the municipality" as used in section 3(a) refer to the municipal tax rate or the aggregate municipal, county and school tax rate. Section 3(a) of the statute excludes from the limitation on municipal spending imposed by the law:

> "The amount of revenue generated by the increase in its valuations based solely on applying the preceding year's general tax rate of the municipality to the assessed value of new construction or improvements . . . :

Similarly, section 4 (a) excludes from the limitation on the county tax levies:

> "The amount of revenue generated by the increase in valuations within the county based solely on applying the preceding year's county tax rate to the apportionment valuation of new construction or improvements within the county and such increase shall be levied in direct proportion to said valuation . . ."

The purpose of these two provisions is to exclude from the limitation on local government spending expenditures equal to amounts generated by the increase in property valuations due to new construction and improvements. Thus, the act restrains local governments from increasing spending where such increases require increased local property tax rates, but does not restrain expenditures of income from these new sources. If the words "general tax rate of the municipality" as used in Section 3(a) were intended to mean the municipal tax rate plus the county tax rate plus the education tax rate, the act would provide a double exclusion for a portion of the amounts

generated from these new sources. Counties would be able to exclude from their limitation the proportion of monies generated by the increase in valuations due to new construction and improvements within the county and attributable to the county tax rate pursuant to section 4(a), and municipalities would be able to exclude from their limitation all monies generated by the increase in valuations due to new construction and improvements attributable to both the county and municipal rate within their territory pursuant to section 3(a). The result would be to permit aggregate spending in excess of the amount generated by the increase in valuations due to new construction and improvements. Since this would be inconsistent with the purposes of the act, it is reasonable to conclude that the Legislature intended municipalities to exclude from their spending ceilings only those amounts generated by increased valuations attributable to the municipal tax rate.

Moreover, this conclusion is reinforced by our opinion that school expenditures are excluded from the local government spending limitation. Since school expenditures are subject to a cap in N.J.S.A. 18A:7A-25 and are not within the limitation on local government spending, it seems reasonable that local governments should not have the advantages of spending for non-school purposes monies generated by increased valuations attributable to the school tax rate free from the limitation on spending. Thus, in construing the provisions consistent with the purposes of the act and the statutory scheme as a whole, it must be concluded that the words "general tax rate of the municipality" as used in section 3(a) refer to the municipal tax rate, or tax rate that raises revenue for municipal expenses.

V

Your next question concerns the interpretation of section 3(b), which excludes from the limitation on municipal spending:

> "Capital expenditures funded by any source other than the local property tax, and programs funded wholly or in part by Federal or State funds, in which the financial share of the municipality is not required to increase the final appropriations by more than 5% . . ."

Specifically, you have asked what types of expenditures may be excluded as "programs funded wholly or in part by Federal or State funds, in which the financial share of the municipality is not required to increase the final appropriations by more than 5% . . . .". This provision was intended to exclude from the spending limitation all expenditures for programs funded either wholly by federal or state funds or partly by local matching funds upon which receipt of federal or state funds is conditioned. Implicit in this provision is an underlying legislative policy to encourage and enable local governments to participate fully in this type of program free of the local government spending restriction. Thus, consistent with this purpose, the words, "in which the financial share of the municipality is not required to increase the final appropriations by more than 5%" appear merely to be a restatement of the overall legislative policy that federal and state aid and required local matching shares shall not be subject to the 5% local government spending limitation. Accordingly, it is our opinion that it was the probable legislative intent in the enactment of this modification to exclude from the local government spending limitation all expenditures of federal and state aid money as well as all local matching expenditures necessary to secure federal or state aid for municipal governments.

VI

Your next series of questions concerns the interpretation of section 3(c) and 4(c), which exclude from the limitation on local government spending certain types of emergency appropriations. Section 3(c) excludes from the limitation on a municipality's final appropriation:

> "... An increase based upon an ordinance declaring an emergency situation according to the definition provided in N.J.S. 40A:4-46 approved by at least two-thirds of the governing body and approved by the Local Finance Board; provided, however, any such emergency authorization shall not exceed 3% of current and utility operating appropriations made in the budget adopted for that year ...."

Similarly, section 4(c) excludes from the limitation on county tax levies:

> "... An increase based upon an ordinance declaring an emergency according to the definition provided in N.J.S. 40A:4-46 approved by at least two-thirds of the board of chosen freeholders of the county and, where pertinent, approved by the county executive ...."

Specifically, you have asked whether section 3(c) may be interpreted in a manner to allow for the declaration of an emergency by a resolution of a municipal governing body and that such a resolution need only be approved by the Director of Local Government Services as chairman of the Local Finance Board. Also, you have asked whether emergency appropriations in excess of 3% of current and utility operating appropriations in a fiscal year must be included in the limitation on municipal spending for the next succeeding fiscal year.

The express terms of these modifications dealing with emergency appropriations by counties and municipalities pose serious problems for the sound implementation of the law. The requirement for the adoption of an ordinance in Section 4(c) rather than a resolution is apparently inapplicable to counties and is in need of legislative revision. In Section 3(c) the requirement for the adoption of an ordinance rather than a resolution declaring an emergency and the requirement of approval by the Local Finance Board will cause serious delays before an emergency appropriation can be approved. Consequently, in the event of a true emergency where time is of the essence, local governments will be seriously hampered in their ability to respond. In addition, where emergency appropriations in any one fiscal year exceed the statutory ceiling of 3% of current and utility operating appropriations for that year, such appropriations must be included within the next fiscal year's spending limit. In the event this forces a municipality to exceed its following year's 5% "cap" limit, the municipality is in effect unable to provide the monetary resources necessary for such an emergency.

Although these conclusions appear to severely limit the ability of local governments to deal with emergency situations under the act, the legislative intent as to the meaning of these provisions must be ascertained from its express terms. *Lane v. Holderman*, 23 N.J. 304 (1957); *State v. Community Distributors, Inc.*, 123 N.J. Super. 589 (Law Div. 1973), aff'd 64 N.J. 479 (1974). This literal construction of the act is further reinforced by the fact that it departs from the existing statutory scheme

for emergency appropriations set forth in N.J.S.A. 40A:4-48, 49. N.J.S.A. 40A:4-48 provides that emergency appropriations not causing the aggregate of such emergency appropriations for that year to exceed 3% of the current and utility operating appropriations can be made if the governing body adopts a resolution by not less than a 2/3 vote of its full membership declaring an emergency. Where such an appropriation will cause the aggregate to exceed 3% of the current and utility operating appropriations for that year, N.J.S.A. 40A:4-49 additionally requires approval of the appropriation by the *Director* of Local Government Services. If the Legislature had intended to allow for the use of a resolution in this instance and to permit approval by the Director of Local Government Services, it could have stated its purpose in unequivocal terms. Consequently, it must be concluded that the departure from the procedure established in Title 40A was purposeful and designed to further restrict local government spending for emergencies.

You are therefore advised that under the express terms of section 3(c), only emergency appropriations passed pursuant to an *ordinance* declaring an emergency situation approved by at least 2/3 of the governing body and the Local Finance *Board* may be excluded from the limitation on municipal spending provided that such emergency appropriations in any one year do not exceed 3% of current and utility operating appropriations for that year. Those emergency appropriations approved in excess of 3% of current and utility operating appropriations for that year must be included within the limitation on municipal spending for the next succeeding fiscal year. You are also advised that since the requirement of an ordinance is clearly inapplicable to a county government under the terms of section 4(c), only emergency appropriations passed pursuant to a resolution declaring an emergency approved by at least 2/3 of the board of chosen freeholders and, where pertinent, approved by the county executive can be excluded from the limitation on county tax levies.

VII

You have also asked whether appropriations for cash deficits generated by utilities and for cash deficits in assessment programs are to be excluded from the limitation on municipal spending. Section 3(d) excludes from the spending limitation all "debt service." Section 3(e) excludes "[a]mounts required for funding a preceding year's deficit." The "debt service" exclusion was apparently intended to avoid jeopardizing the ability of local governments to satisfy bonded indebtedness under the Local Government Cap Law and to preserve their credit ratings. The section 3(e) exclusion apparently was intended by the legislature to exempt from the spending limitation amounts necessary to fund deficits from preceding years created by the failure of local governments to realize anticipated revenues.

When a municipally owned public utility operates at a deficit, the municipality is required by law to appropriate monies to finance that deficit. N.J.S.A. 40A:4-35. This type of expenditure was in all likelihood intended to be excluded under section 3(e) so that appropriations made to cover the preceding year's deficit will not occasion cuts in other governmental services in the following year. Similarly, where there are cash deficits in assessment programs due to the failure to collect special assessment monies, we are informed that municipalities must often appropriate additional funds to cover debt service on improvements that would ordinarily be financed by the special assessments. Since the municipality is in fact financing the previous year's deficit created by its failure to collect all assessments, the appropriation should be excluded from the spending limitation under section 3(e). Moreover, since the appropriation is designed to satisfy debt service, it can also be excluded under section 3(d).

VIII

Your next series of questions concern the interpretation of Sections 3(g) and 4(e) which exclude "[e]xpenditures mandated after the effective date of this act pursuant to State or Federal Law." Specifically, you have asked whether expenditures due to the increase in rates allowed by the Public Utilities Commission or caused by the decontrol of fuel oil prices by the federal government, the increase in Workmen's Compensation Insurance rates, the increase in pensions costs due to higher actuarial projections and the cost of court judgments should be excluded from the limitations on local government spending under these sections.

The purpose of the Local Government Cap Law is to limit increases in local government spending to 5% over the previous year's expenditures, except where specifically authorized, and to restrain increases in local property taxes. The exclusion for "[e]xpenditures mandated after the effective date of this act pursuant to State or Federal law" was intended to exclude expenditures for programs required by newly enacted legislation in order to avoid the harsh result of forcing local governments to cut other services to provide funds for newly created programs not included in previous budgets. It could be argued that increased expenditures for already existing mandated programs due to rate increases permitted or mandated by state or federal administrative agency decisions or otherwise will likewise cause the harsh result of forcing local governments to cut other services in order to provide for the increased expenditure while remaining within the 5% "cap," and that consequently such costs should be excluded since they are caused by "mandated" rate increases permitted after the effective date of the Local Government Cap Law. However, along that same line of reasoning, it is impossible to distinguish between situations where price or rate increases due to administrative agency action cause increased expenses for mandated programs and where ordinary, uncontrolled inflationary prices cause such increases. While both types of increased expenditures will occur after the effective date of the Local Government Cap Law, they are mandated by the preexisting state or federal legislation and are indirect consequences of maintaining the preexisting activity.

Moreover, if inflationary costs of preexisting programs were construed to be excluded, all expenditures for state or federal programs should likewise be excluded because, while the legislation may preexist the Local Government Cap Law, the expense must only occur after its effective date. Under this approach the Local Government Cap Law would limit only the small proportion of expenditures arising out of local initiatives. Since this construction would nullify the significance of the words "after the effective date of this act," an interpretation that gives meaning to all the words in the provision should be preferred. *Board of Education of Hackensack v Hackensack*, 63 N.J. Super. 560 (App. Div. 1960). Also it cannot be presumed that the Legislature intended to have the exclusion cover such a broad category of expenditures so as to nullify the expressed purpose of the law to limit the spiraling costs of local government and provide property tax relief. Thus, in order to avoid undermining the expressed legislative purpose to limit local government spending, the language of these provisions must be interpreted strictly to exclude only those expenditures for mandatory programs enacted after the effective date of the Cap Law.

While this strict construction may cause local governments serious difficulty in preparing their budgets and may force reductions in existing services to provide for inflationary costs of mandatory programs, these problems must be resolved by further legislative action. Within constitutional limitations, it is the responsibility and exclusive domain of the Legislature to determine the priority to be given the act's conflicting policies of limiting local government spending and providing necessary gov-

ernment services and to authorize any relief deemed appropriate. Indeed, the Legislature apparently anticipated the difficulties the conflicting policies would cause when it declared the act be "experimental" legislation to be reviewed at the end of three years (Section 1), and in recognition of its policy making responsibility, amendatory legislation has already been introduced.*

Based upon this reasoning, it must be concluded that a court judgment requiring local government expenditures will not necessarily be an exception to the Local Government Cap Law. The underlying basis of the judgment must be reviewed to determine whether or not the underlying obligation itself would fall within a modification to the Cap Law, and if it does not, then the mere fact that the obligation has taken the form of a judgment would not serve to exempt the expense from the limitation on government spending. Any other result would enable local governments to circumvent and frustrate the intent of the law by refraining from paying lawful obligations that would otherwise be within the cap limitation until they are reduced to court judgment.

IX

Next you have asked whether the line item appropriation "Deferred Charges to Future Taxation - Unfunded" should be excluded from the spending limitation under sections 3(d) and 4(d), excluding debt service. Capital improvements not financed through notes or bonds are financed by a local government's general revenues through an appropriation in the budget for capital deferred charges under the title "Deferred Charges to Future Taxation - Unfunded." Just as with capital improvements financed through the issuance of notes or bonds, the process for an appropriation for this purpose is initiated by the passing of an ordinance authorizing the issuance of debt for capital purposes. The local government would then have the option of borrowing on a permanent or temporary basis from an outside source or of borrowing against its own reserves.

For the purposes of this act it would be illogical to assume a legislative intent to distinguish between situations where local governments borrow through the issuance of notes and bonds to pay for capital projects and where they borrow against their own reserves to cover such costs. On the contrary, a construction excluding "debt service" in its narrow generally accepted sense but not capital deferred charges would encourage local governments to borrow through notes and bonds, paying high interest rates in order to have capital expenses excluded from their spending limitation. The legislature cannot be presumed to have intended a result contrary to good reason and inconsistent with its essential purpose of limiting governmental spending. See *State v. Provenzano*, 34 N.J. 318, 322 (1961). Moreover, the purpose of the statute should not be frustrated by an unduly narrow interpretation of the phrase, "debt service," within the context of the act. See *Cammarata v. Essex County Park Commission*, 26 N.J. 404 (1958). Accordingly, it is our opinion that the appropriation for capital deferred charges was within the legislative contemplation of the debt service exclusion. See *Dvorkin v. Dover Tp.*, 29 N.J. 303 (1959).

X

Your last question concerns the administration of the Act. Specifically, you have asked whether the Division of Local Government Services has the authority to promulgate a timetable through regulations in order to allow for the referendum process described in Section 3(i) within the budget timetable provided in the Local Budget Law, N.J.S.A. 40A:4-1 *et seq.* For the following reasons, please be advised that the

Local Government Board and the Director of the Division of Local Government Services have the authority to promulgate such regulations.

While the statute does not expressly authorize any state agency to administer and enforce the law, the Director of the Division of Local Government Services supervises the local budget process pursuant to the Local Budget Law, N.J.S.A. 40A:4-1 *et seq.*, assuring that the timetables therein are followed and certifying that the budgets comply with the law, N.J.S.A. 40A:4-78. It is, therefore, implicit in this legislative scheme that the Division of Local Government Services will also be the agency with the responsibility of enforcing the local government spending limitation. See *East Orange v. Bd. of Water Commissioners of East Orange*, 73 N.J. Super. 440, 455 (Law Div. 1962), aff'd 40 N.J. 334 (1963).

The statute also does not expressly authorize any state agency to promulgate regulations interpreting the law or allowing for its practical administration. Nevertheless, under the Administrative Procedure Act, an agency should adopt an administrative rule whenever it makes "any statement of general applicability and continuing effect that implements or interprets law or policy or describes the organization, procedure or practice requirements of any agency," N.J.S.A. 52:14B-2(e). See N.J.S.A. 52:14B-3. Not only is such authority implied as a power necessary for the administration of the act, see *Boller Beverages, Inc. v. Davis*, 38 N.J. 138, 154 (1962), K. C. Davis, 1 *Administrative Law Treatise* § 5.03 (1958), C. O. Sands, 2A *Sutherland Statutory Construction* § 55.04 (4th Ed.); but proper administrative procedure, and perhaps even basic fairness, requires that agency interpretations and procedures should be the subject of agency regulations in order to apprise the public of their obligations under them. *R.H. Macy & Co., Inc. v. Director, Division of Taxation*, 41 N.J. 3, 4 (1963); *Mazza v. Cavicchia*, 15 N.J. 498, 510-11 (1954). Moreover, under N.J.S.A. 40A:4-83, the local government board and the Division Director are authorized to promulgate rules and regulations necessary to administer the provisions of the Local Budget Law, N.J.S.A. 40A:4-1 *et seq.* Since it will now be necessary to provide for the Local Government Cap Law in supervising the local budget process, it follows that the Local Government Board and the Division Director must as well provide for the Local Government Cap Law in the Local Budget Law regulations.

Very truly yours,
WILLIAM F. HYLAND
Attorney General of New Jersey

By: ANDREA KAHN
Deputy Attorney General

* S-1657 was introduced September 16, 1976; S-1810 was introduced December 14, 1976 and A-2405 was introduced December 20, 1976.

March 17, 1977

BOARD OF EXAMINERS OF OPHTHALMIC
DISPENSERS AND OPHTHALMIC TECHNICIANS
Division of Consumer Affairs
1100 Raymond Boulevard
Newark, New Jersey

FORMAL OPINION 1977—No. 4.

Dear Members of the Board:

You have asked for an opinion as to whether the statutory prohibition on the price advertising of ophthalmic goods by ophthalmic dispensers (opticians) and technicians set forth in N.J.S.A. 52:17B-41.17* is constitutional in light of the decision of the United States Supreme Court in *Virginia State Board of Pharmacy, et al. v. Virginia Citizens Consumer Council, Inc., et al.*, 425 U.S. 748 (1976). You are hereby advised that the statutory ban on the advertising of the price of ophthalmic goods by ophthalmic dispensers and technicians is an unconstitutional infringement of the public's First Amendment right to the free flow of commercial information.

In *Virginia State Board* the Court invalidated a Virginia statute which had declared it unprofessional conduct for a licensed pharmacist to advertise the price of prescription drugs. The Virginia statute which prohibited the dissemination of information concerning the cost and availability of prescription drugs was held to be beyond the bounds of permissible state restriction of commercial speech and violative of the First and Fourteenth Amendments to the United States Constitution. The Court noted:

> "*** Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable . . . ." 425 U.S. at 765.

The Court, in addition, stated that the removal of an advertising ban on prescription drugs would have no adverse effect on the state's interest in the professional standards of the pharmacist, since "high professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists in Virginia are subject." 425 U.S. at 768.

It is therefore clear that the comparable ban on the advertising of prices of ophthalmic goods by ophthalmic dispensers and technicians is similarly violative of the First Amendment's protection of the free flow of commercial information. The ophthalmic dispenser and technician, like a pharmacist, dispense a standardized product solely on the written prescription of a physician or licensed optometrist. In this regard, ophthalmic frames and finished lenses are products which are similar to prescription drugs. There would be, in our opinion, no justification for the continuing validity of a statutory ban on the price advertising of ophthalmic goods beyond those considered by the Court in *Virginia State Board*. You have therefore advised that the