

which has accrued by reason of allowances to be granted on account of services rendered by State employee veteran members as provided in section 60 of this act prior to the establishment of the retirement system, which has not already been covered by State contributions to the former 'State Employees' Retirement System.' Using the total amount of this liability remaining as a basis, he shall compute the amount of the flat annual payment, which, if paid in each succeeding fiscal year commencing with July 1, 1956, for a period of 30 years, will provide for this liability."

The actuarial calculation under Section 24(b) is based upon the amount of prior service of the public employee veteran. The accrued liability reflects probabilities of death, resignation, retirement and other factors involving all employees, including elected officials. Once computed, the accrued liability is not shifted because of the veteran's transfer to employment with another governmental subdivision or terminated because of his resignation, defeat for reelection or failure to stand for reelection. The accrued liability covers all veterans in the employment of any municipality as of the effective date of Chapter 84 of the Laws of 1954.

We advise you that each municipality must continue to pay the accrued liability computed by the actuary pursuant to N.J.S.A. 43:15A-24(b), on behalf of all veteran employees in employment as of January 2, 1955, including elected officials, over the 30-year period commencing July 1, 1956.

Very truly yours,

GROVER C. RICHMAN, JR.  
*Attorney General*

By: DAVID D. FURMAN  
*Deputy Attorney General*

OCTOBER 24, 1957

MR. JOHN WYACK, *Secretary*  
*Water Policy and Supply Council*  
520 East State Street  
Trenton, New Jersey

FORMAL OPINION, 1957—No. 20

*Re: Jersey City Longwood Valley Project - Jurisdiction and Powers of  
Water Policy and Supply Council*

DEAR MR. WYACK:

The Water Policy and Supply Council has requested the opinion of this office concerning a number of questions, hereinafter set forth, as to the jurisdiction and authority of the Council in connection with the application of the City of Jersey City for an additional water supply from its proposed Longwood Valley Project.

1. Does the Council have jurisdiction to entertain the application regardless of whether or not Jersey City has acquired rights to divert additional water from the Rockaway River (a) as against the Dundee Water Power and Land Company (hereinafter referred to as "Dundee") and Plant Management Commission of Paterson, successor to the Society for Establishing Useful Manufactures (hereinafter re-

ferred to as "S.U.M."), in view of their alleged legislative charter rights; and (b) as against other riparian owners?

In our opinion, the Council does have jurisdiction to proceed without the City's having acquired rights as against any of the parties mentioned.

The application has been made both under R.S. 58:1-17, et seq. for permission from the Council to divert water from a new or additional source, and under R.S. 58:1-33 for permission from the Council for enlargement of the applicant's existing water supply from its present source on the Rockaway River. Neither statute expresses a mandate that the applicant obtain the necessary riparian and other property rights in advance of filing its petition with the Council; nor is there any reason why such a requirement should be implied. On the contrary, R.S. 58:1-17 prohibits a public water supplier or a private water company from exercising its power to condemn lands, water or water rights for water supply purposes until it has first submitted its petition to the Council and has received the approval of that body after a public hearing. Since in most cases it would be impossible for the applicant to acquire the necessary land and water rights without exercising the power of condemnation, the statute should not be construed so as to compel an applicant to attempt to acquire the needed property by negotiation before making its application to the Council. Furthermore, the applicant should not be put to the burden of acquiring or attempting to acquire such property when it does not know whether or not the Council will approve of the project for which the property may have been purchased.

It is also of significance that the Council has always entertained jurisdiction of such applications without considering whether or not the applicant has obtained the necessary land and water rights. One such case which eventually went to court was the application of the North Jersey District Water Supply Commission in 1916 for its 50 m.g.d Wanaque Reservoir Project. After the project had been approved by the Council's predecessor, the Court of Chancery was called upon to pass upon the acquisition of the necessary rights from the Lehigh Valley Railroad Company as owner of the Morris Canal. No question was raised in that case regarding the propriety of the diversion grant in advance of the acquisition of the water rights in question *Lehigh Valley R.R. Co. v. North Jersey District Water Supply Commission*, 94 N.J. Eq. 94 (Ch. 1922). The Council's long-continued practical construction of the statute has thus received at least tacit judicial approval; and if the legislative intent were otherwise obscure, such administrative construction would in this instance, we believe, carry decisive weight in the courts *State v. Clark*, 15 N.J. 334, 341 (1954).

2. Can a municipality condemn property and water rights outside the municipality for the purpose of supplying customers beyond the municipal borders (a) under R.S. 40:62-49 without the approval of the Council; (b) under R.S. 58:6-3 with the approval of the Council?

In our opinion, the answer in both cases is in the affirmative.

R.S. 40:62-49 authorizes any municipality to "provide and supply water, or an additional supply of water, for the public and private uses of such municipality and its inhabitants" in any one of several methods, including contracts between any two or more municipalities for one to supply water for the public and private uses of the other. The section further provides (subsection (g)) that "any municipality may purchase, condemn or otherwise acquire the necessary lands, and rights or interests in lands, and water rights and rights of flowage or diversion, within or without the municipality, for the purpose of a water supply, or an additional water supply".

Similar provisions in earlier statutes have been construed to mean that a city

could condemn land and water rights to secure a supply of water, even though the city was also supplying water to another municipality. *Mundy v. Fountain*, 76 N.J.L. 701 (E. & A. 1908); *Paterson v. Jersey City*, 84 N.J.L. 454 (Sup. Ct. 1913), aff'd 87 N.J.L. 163; see also *Paterson v. West Orange Water Co.*, 84 N.J.L. 460 (Sup. Ct. 1913), aff'd 87 N.J.L. 538. In *Mundy v. Fountain*, the question arose whether the City of Perth Amboy had the power to condemn land for its water supply when it was furnishing water to South Amboy. In holding that it did, the Court said (76 N.J.L. at p. 702) :

"The counsel for the plaintiffs in error denies that this power to condemn existed. He insists that the power to condemn contained in the act of 1876, 'To enable cities to supply the inhabitants thereof with pure and wholesome water' (*Gen. Stat.*, p. 646), could not be employed by Perth Amboy because it was supplying water to South Amboy; while the power to condemn was only conferred for the purpose of supplying the inhabitants residing within the corporate limits of the condemning city. But the purpose for which the power to purchase and condemn was conferred could be enlarged by subsequent statutes, and was so enlarged by the acts.

"But aside from this it is to be observed that the contention of the plaintiffs in error if sound, would strip Perth Amboy of the power to purchase the land and water in question; for power to purchase land and water rights stands upon the same footing as the power to condemn. With the exception that there must be an inability to agree as a condition precedent to condemnation, both rights cover the same subject-matter and exist upon the same condition."

It was also held in *Slingerland v. City of Newark*, 54 N.J.L. 62 (Sup. Ct. 1891), that where a city condemning land for its water supply system, obtained more water than needed for its present public uses and therefore disposed of the surplus for an outside use, that fact did not deprive the condemnation of its public character.

We thus find nothing in the statute or in judicial pronouncement which would limit the power of condemnation to those instances where the city is supplying only its own habitants with water, and no sufficient reason appears for maintaining such a view.

Without regard to the authority under R.S. 40:62-49 to condemn, which we hold that the city enjoys, the city could be empowered to condemn property and water rights elsewhere by approval of the Council under R.S. 58:6-1. That statute provides that every municipal corporation engaged in the business of supplying water for public use in one or more municipalities of this State, upon obtaining the Council's approval of the diversion of water for any new or additional supply, "may acquire by gift, devise, purchase or condemnation of such lands, water and water rights as may be required to enable such municipal \* \* \* corporation \* \* \* to divert and use water for such new or additional water supply \* \* \* in accordance with \* \* \* the assent of the State so obtained". This law, however, does not "limit or in any way affect any power to condemn lands, water or water rights which any such municipal \* \* \* corporation \* \* \* may now have or hereafter acquire under any existing law of this State." R.S. 58:6-5. See *Grobart v. Passaic Valley Water Commission*, 135 N.J. L. 190 (E. & A. 1947).

The provisions of R.S. 58:6-1 are broad and sweeping, and would plainly empower

the Council to authorize any municipal water company to condemn property and water rights outside the municipality for the purpose of supplying customers in other municipalities.

3. Do the conclusions reached in answer to the preceding question apply to the condemnation by Jersey City of the rights vested in Dundee and in S.U.M.?

The water rights of Dundee and S.U.M. derive from legislative grants rather than from riparian ownership. It has been stated in *Van Reipen v. Jersey City*, 58 N.J.L. 262, 267 (Sup. Ct. 1895), that where a franchise has been granted by the State, it is "exclusive, except as against the State, in the absence of express provision or necessary implication to the contrary", and that: "While the government, in the exercise of its sovereignty, may sanction the acquisition of rights resting upon prior grant, on just compensation being made, no power to take will flow from mere authority to acquire by condemnation such rights as a city may deem it proper to obtain." Accordingly, the Court held in the *Van Reipen* case that Jersey City, under its general powers of condemnation for the purposes of a water supply, could not take the water rights of the Morris Canal, for which a charter had been previously granted by the State. Likewise, in *S.U.M. v. Morris Canal and Banking Co.*, 30 N.J. Eq. 145 (Ch. 1829), the general power of eminent domain given to the Morris Canal Co. was construed not to be exercisable against the water rights of S.U.M., which had likewise acquired its rights under a charter from the State.

In view of the acquisition of water rights by Dundee and S.U.M. through legislative action, we advise that the approval of the Council under R.S. 58:6-1 should be sought for the condemnation of such water rights. The Council is vested by the Legislature with broad authority over the granting of water rights and of condemnation powers as to existing water rights, throughout the State. Charter grants for private purposes may be condemned by a municipality without prior sanction of the Council. See *Bogert v. Hackensack Water Co.*, 101 N.J.L. 518 (E. & A. 1925). A detailed analysis of the legislative grants of Dundee and S.U.M. to determine their public obligations, if any, is not warranted, however, in view of the available procedure for Council approval, within its legislative authority, for the condemnation of water rights for public, as well as private, uses.

As pointed out in *City of New Brunswick v. Board of Conservation and Development*, 94 N.J.L. 46 (Sup. Ct. 1919), aff'd on opinion below, 94 N.J.L. 558, the Board (predecessor to the Water Policy and Supply Council) was the "State agency to which the Legislature had delegated the power to approve plans in such cases, the statute declaring, 'The approval of the commission shall constitute the state's assent to the diversion of water'". The function of the Council was likewise described by Justice Heher for the Supreme Court in the case of *In re Plainfield Union Water Co.*, 11 N.J. 382, 386 (1953), as follows:

"The powers vested in the old State Water Policy Commission by R.S. 58:1-1 et seq. have been transferred to the State Division of Water Policy and Supply by L. 1945, c. 22, p. 66, N.J.S.A. 13:1A-9, for exercise by the Water Policy and Supply Council set up within the Division in accordance with the provisions of the act. The Council, in virtue of its succession to the general jurisdiction of the Water Policy Commission in relation to the State's water supplies, was clothed with 'general supervision over all sources of potable and public water supplies, including surface, subsurface and percolating waters, to the end that the same may be economically and prudently developed for public use.'"

It is well established that the State itself may authorize the taking of property, upon payment of just compensation, even though such property may consist of rights previously acquired from the State or pursuant to the exercise of eminent domain. The only question in such cases is whether the Legislature has intended such a result. See *Weehawken Township v. Erie R.R. Co.*, *supra*; *Van Reipen v. Jersey City*, *supra*; *State Highway Commission v. Elizabeth*, 102 N.J. Eq. 221 (Ch. 1928), *aff'd* 103 N.J. Eq. 376; *Lehigh Valley Railroad Co. v. North Jersey District Water Supply Commission*, 94 N.J. Eq. 94, 102 (Ch. 1922).

Under R.S. 58:6-1 and 3, the Council as agent of the State gives the specific consent of the sovereign to the exercise of eminent domain by the applicant as may be necessary to enable the applicant to divert and use the water allocated to it by the Council. It is this provision for specific State action which, in our opinion, indicates a legislative intent that under R.S. 58:6-1 (even if not under R.S. 40:62-49) a municipality may be empowered to condemn rights previously granted to private corporations like S.U.M. and Dundee. Furthermore, the Council may grant its approval only upon a determination that the particular diversion is just and equitable to the parties affected thereby (R.S. 58:1-17, *et seq.*), so that the condemnee has a forum both before the Council and, if still aggrieved, on judicial review.

4. In determining, under R.S. 58:1-20, whether the plans of the applicant are "just and equitable to the other municipalities and civil divisions of the State affected thereby and to the inhabitants thereof, particular consideration being given to their present and future necessities for sources of water supply," must the Council take into consideration such factors as possible loss of tax ratables and recreational facilities resulting from the construction of the proposed reservoir, or should evidence as to what is "just and equitable" be limited to the subject of present and future water supply necessities?

We are of the opinion that the phrase "just and equitable to other municipalities \* \* \* and to the inhabitants thereof" is so broad and general that such matters as loss of tax ratables and recreational facilities should be taken into consideration by the Council.

In the first place, we note the language of the section that "particular consideration" should be given to present and future water supply necessities; the statute does not say "sole" or "exclusive" consideration shall be given to such matters, thus clearly implying that the Council's function is not so limited.

Moreover, in R.S. 58:1-21, which deals with conditions to be imposed by the Council in connection with its approval of the application, such conditions should protect "the water supply *and the interests* of the applicant or of the inhabitants of the territory supplied by it with water, or the water supply *and interests* of any municipal corporation \* \* \* or the inhabitants thereof"; and that the Council shall make a reasonable effort to meet the needs of the applicant, "with due regard to the actual or prospective needs *and interests* of all other municipal corporations and civil divisions of the State affected thereby, and the inhabitants thereof". (Underlining ours). If water supply needs were the only subject to be considered by the Council, it would have been superfluous for the Legislature so frequently to mention "the interests" of the parties concerned in addition to the subject of water supply; and of course the Legislature is presumed not to have made use of superfluous words. *Ford Motor Co. v. N. J. Dept. of Labor and Industry*, 5 N.J. 494, 502 (1950).

Every taking of land for municipal reservoir purposes will involve loss of tax ratables to a greater or lesser degree, and many water supply projects may have some

adverse effect on the recreational opportunities afforded by the water course involved. Evidence as to these and similar factors should be admitted by the Council within reasonable limits, and they, along with water supply needs, should be accorded such weight as may be appropriate in determining whether the applicant's plans are "just and equitable" and give due regard to the interests of other parties affected.

Furthermore, under R.S. 58:1-21, the Council in granting a diversion permit may impose such conditions as it may deem appropriate in the interests of public recreation. The Council does not, however, possess authority to determine what payments, if any, should be made by the grantee in lieu of taxes, or to assess any damages resulting from the permitted diversion. *Boonton v. State Water Policy Commission*, 122 N.J.L. 34 (Sup. Ct. 1939); see also *Passaic v. Clifton*, 14 N.J. 136, 142-143 (1953).

Very truly yours,

GROVER C. RICHMAN, JR.  
*Attorney General*

By: THOMAS P. COOK  
*Deputy Attorney General*

OCTOBER 25, 1957

MR. ELMER J. HERRMANN, *Clerk*  
*Essex County Board of Elections*  
Hall of Records  
Newark, New Jersey

FORMAL OPINION, 1957—No. 21

DEAR SIR:

Receipt is acknowledged of your recent inquiry, on behalf of the Essex County Board of Elections, concerning certification by the Board of Elections of the results of the Military and Civilian absentee ballots cast pursuant to R.S. 19:57.

Your letter states as follows:

"What the Board wishes to have clarified is:

"1. Shall the certification by the Board to the County Clerk be in the form of Ward and District order, as to the number of votes each candidate receives, in each district, so the district total can be added to the total reported on the Statement of Results by the respective District Election Boards, or:

"2. Shall a complete tabulation be made, by the County Board, showing the total votes received by the various candidates, County Wide?"  
R.S. 19:57-31 provides as follows:

"On the day of each election each county board of elections shall open in the presence of the commissioner of registration or his assistant or assistants the inner envelopes in which the absentee ballots, returned to it, to be voted in such election, are contained, except those containing the ballots which the board or the County Court of the county has rejected, and shall remove from said inner envelopes the absentee ballots and shall then proceed to count and canvass the votes cast on such absentee ballots, but no absentee ballot shall be counted in any primary election for the general election if the ballot of the