

SEPTEMBER 20, 1961

HON. H. MAT ADAMS, *Commissioner*
Department of Conservation and
Economic Development
 205 West State Street
 Trenton, New Jersey

FORMAL OPINION 1961—No. 26

DEAR COMMISSIONER ADAMS:

We have been asked to review Formal Opinion, 1958—No. 18 which treated the question of whether the State as owner of the Delaware & Raritan Canal may charge a water utility company a fee for the privilege of installing a water main on Canal property. Our opinion is that the decision previously rendered that a fee may be charged is correct.

It was originally urged that a fee could not be charged because the canal was a "public highway" and thus came within the scope of R. S. 48:19-17¹ which permits water companies to lay pipes beneath public roads, streets and alleys free from all charge upon obtaining the necessary municipal consent. Formal Opinion No. 18 decided that the canal was no longer a public highway and that R.S. 48:19-17 was thus inapplicable. Since the publication of Opinion No. 18, the suggestion has been made that while the canal may no longer be a "public highway" it is still a "public place" because of its recreational use, and, as such, subject to installation of utility facilities without charge. This contention has been advanced on the theory that R.S. 48:19-19,² which permits water companies to lay water supply mains and pipe "under the surface of any streets, roads, highways or *public places*" upon obtaining the necessary municipal consent, frees water utilities from the necessity of paying any fee or charge for the use of public lands. (Emphasis supplied.)

It is to be noted that section 19 is broader than section 17 in that it authorizes pipes to be laid under "public places" in addition to streets, roads and highways; however, section 19 is silent as to whether or not a fee may be charged by a municipality for the use of such "public places." While conceivably a distinction could be drawn that, therefore, the "No Fee" provision of R.S. 48:19-17 is not applicable to "public places" under R.S. 48:19-19, such a statutory construction is not necessary to resolve the question here posed.

The State of New Jersey has absolute jurisdiction and control over roads, streets and highways within its borders. *Hackensack Water Co. v. Ruta*, 3 N.J. 139 (1949). It has delegated control over roads, streets and alleys within the boundaries of

¹ R.S. 48:19-17: "Each such company may lay its pipes beneath such public roads, streets, and alleys as it may deem necessary for its corporate purposes, free from all charge to be made by any person or body politic whatsoever for such privilege, and may also construct and maintain hydrants on and along such streets and alleys, provided that the consent shall be obtained of the corporate authorities of the municipality through which the pipes may be laid.

"The pipes shall be laid at least three feet below the surface and shall not in anywise unnecessarily obstruct or interfere with the public travel or damage public or private property."

² R.S. 48:19-19. "Every company organized under this chapter may contract with any company organized under any law of the state for a supply of water upon such terms and for such times as may be mutually agreed upon. Such companies may lay such supply mains and pipes as may be thought necessary to furnish such supply through any property upon obtaining the consent in writing of the owner thereof, or under the surface of any streets, roads, highways or public places, provided that the companies first obtain the consent by ordinance of the municipalities through which the mains and pipes are to be laid.

"The municipal body having control of such streets, roads, highways or public places shall designate the place therein where and the manner in which the pipes or mains shall be laid."

municipalities and counties to the respective governing bodies, at least in so far as the granting of consents for the installation of public utility facilities is concerned. *See*: R.S. 48:7-12 (electric light, heat and power companies); 48:13-11, 12 (sewerage companies); 48:17-10 (telegraph and telephone companies); 48:19-17, 19 (water companies). However, by these delegations of authority, the state has not granted control over State roads or properties to municipal or county governing bodies. Control over State highways and the granting of consents or franchises as to them is vested in the State Highway Commission. R.S. 27:7-12, R.S. 27:7-44.1. Custody and jurisdiction of the Delaware and Raritan Canal is vested in the Department of Conservation and Economic Development, R.S. 13:13-2, which has been given the power:

“a. To grant to any public utility the right to cross the lands of the canal, including the canal itself, upon such conditions as in the judgment of the department may be necessary to protect the state in its use and occupancy thereof;”. R.S. 13:13-10.

R.S. 48:19-17 is concerned with the installation of water utility facilities in roads, streets and alleys and R.S. 48:19-19 with streets, roads, highways and public places which are within the control of municipal governing bodies. They do not purport to delegate control over State lands such as the Delaware and Raritan Canal title to which is in the State of New Jersey, R.S. 13:13-1. The municipal powers with which R.S. 48:19-17 and 19 are concerned, that is, the granting of consents to the installation of utility facilities do not, as we have seen, extend to the canal property. That jurisdiction is in the aforementioned Department. R.S. 48:19-17 and 19 are thus inapplicable to the installation of public utility facilities on property of Delaware and Raritan Canal.

Where the Legislature has imposed a restriction or limitation on the State's power to charge a fee for the use of highways or state property by public utilities, it has specifically done so. This is evident not only in R.S. 48:19-17 but also in R.S. 27:7-13, wherein the legislature specified charges the State may exact for the use of viaducts or bridges by public utilities. In N.J.S.A. 27:7A-7, the responsibility of the State Highway Commissioner for the cost of removal or relocation of public utility facilities in freeways and parkways is defined. There is no indication in R.S. 13:13-10 that a public utility receiving a grant to cross the canal lands should receive it free of charge. We, therefore, construe the legislative intent to be that a charge should be exacted in the absence of any contrary provision.

You are therefore advised that a water utility company can be required to pay a fee for the privilege of installing a water main on the canal property if the department determines that a charge is a condition required to protect the state in its use and occupancy of the property.

Very truly yours,

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