

Legal Problems Related to Transportation In the Metropolitan New York Area

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● THIS PAPER discusses certain aspects of governmental relations and their accompanying legal problems which arise out of highway development in the metropolitan New York-New Jersey area with which the author has been concerned during the last several years as General Counsel of The Port of New York Authority.

The Port Authority is the "joint or common agency" of the States of New York and New Jersey, created by interstate compact in 1921 to coordinate and develop transportation and terminal facilities within the Port of New York District.¹ The Port Authority consists of 12 non-salaried commissioners, 6 appointed by each Governor with Senatorial consent. At the present time it is operating 21 facilities representing a net capital investment of over \$900,000,000. These include airports and marine and inland terminals, as well as four bridges and two tunnels between the States—the George Washington, Goethals and Bayonne Bridges, the Outerbridge Crossing and the Lincoln and Holland Tunnels.

The problems which form the subject of this paper grow out of the fact that Port Authority facilities are located in a densely populated metropolitan region of two States which boasts of nearly 13,000,000 people residing in more than 360 communities, embracing 219 municipalities and 17 counties. The relations between the bi-State Port Authority and the many units of local, state and Federal government which operate in this area present fascinating governmental and legal questions. This paper first reviews the governmental setting in which the Port Authority operates and then presents two specific legal problems which have arisen out of highway development.

THE GOVERNMENTAL FRAMEWORK IN WHICH PORT AUTHORITY VEHICULAR CROSSINGS ARE PLANNED, CONSTRUCTED AND OPERATED

On the State Level

Legislative Authorization and Continuing Review.—The 1921 Compact looked forward to continuing statutory authorization of Port Authority activities by not only providing for subsequent legislative adoption of a comprehensive plan for the development of the Port District, but by specifying that:

The port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other.²

In point of fact, the Port Authority has procured specific authorizing legislation in connection with each bridge and tunnel it has constructed.³ The frequent introduction,

¹Port Compact, Ch. 154, Laws of N.Y., 1921 and Ch. 151, Laws of N.J., 1921, consented to by Cong. in Pub. Res. 17, 67 Cong. 1st Sess. (1921).

²Art. VII, Port Compact (Footnote 1, above).

³Outerbridge Crossing, Ch. 125, Laws of N.J., 1924, as partially repealed by Ch. 192, Laws of N.J., 1925; Ch. 230, Laws of N.Y., 1924. Goethals Bridge, Ch. 149, Laws of N.J., 1924, as partially repealed by Ch. 194, Laws of N.J., 1925; Ch. 186, Laws of N.Y., 1924. Bayonne Bridge, Ch. 97, Laws of N.J., 1925; Ch. 279, Laws of N.Y., 1926. George Washington Bridge, Ch. 41, Laws of N.J., 1925; Ch. 211, Laws of N.Y., 1925. Lincoln Tunnel, Ch. 1, Laws of N.J., 1931; Ch. 47, Laws of N.Y., 1931. Lincoln Tunnel Third Tube, Ch. 11, Laws of N.J., 1954; Ch. 180, Laws of N.Y., 1954. George Washington Bridge Second Deck, Ch. 156, Laws of N.J., 1956; Ch. 807, Laws of N.Y., 1956.

debate and passage of such authorizing legislation (as well as other bills relating to the Port Authority) have given both legislatures constant occasion to review Port Authority operations.

The Compact assured that this continuing legislative review would be exercised intelligently by specifying that the Port Authority

shall make an annual report to the legislatures of both states, setting forth in detail the operations and transactions conducted by it ***.4/

Moreover, the legislatures have described in great detail the disposition of all Port Authority revenues.⁵

Executive Review.—The most dramatic example of continuing review over Port Authority activities by the States is that represented by the gubernatorial veto power over the action of Port Authority Commissioners. The Port Authority must submit the minutes of its Board of Commissioners to the Governors of both States and each has the right to veto the minutes thus submitted to him.⁶

The importance of the veto power becomes apparent when one realizes that the Port Authority can act only by resolution of its Commissioners and that each such resolution is subject to veto. The existence of the gubernatorial veto makes certain that Port Authority policies accord with those of the elected Chief Executives of both States.

The mere possession of this power results in continuing collaboration and close liaison between the Governors and the Commissioners. Its infrequent exercise is proof that Port Authority policies are consistent with those of the Governors. The point was well made by a commissioner of the Port of London Authority, who, when speaking of a control possessed over that Authority by the Minister of Transport, said: "It has worked admirably in that it has scarcely been worked at all."

Of particular interest as far as the Port Authority vehicular crossings are concerned is the fact that the comprehensive 1931 Bridge and Tunnel Unification Statutes provide that:

The plans of the connections with state or municipal highways of any (port authority) vehicular bridge or tunnel***shall be subject to the approval of the Governor of the State in which such connections shall be located.7/

Accordingly, Port Authority plans for the connections of each of its bridges and tunnels with state and municipal highways need affirmative gubernatorial approval.

On the Local Level

Though the Port Authority as an agency of two States is not subject to municipal regulation,⁸ the States, nevertheless, in many specific instances where they believed the public interest would best be served, have required municipal consent with respect to Port Authority action. Thus, the Compact specifically provides that:

no property now or hereafter vested in or held***by any county, city, borough, village, township or other municipality, shall be taken by the port authority, without the authority or consent of such***county, city, borough, village, township or other municipality.9/

Furthermore, the 1931 Bridge and Tunnel Unification Acts¹⁰ originally provided

4/Art. VII, Port Compact (Footnote 1).

5/Ch. 5, Laws of N.J., 1931, as amended by Ch. 197, Laws of N.J., 1945; Ch. 48, Laws of N.Y., 1931, as amended by Ch. 163, Laws of N.Y., 1945.

6/Ch. 333, Sec. 2, Laws of N.J., 1927; see also Ch. 700, Sec. 2, Laws of N.Y., 1927, as amended by Ch. 215, Laws of N.Y., 1956.

7/Ch. 4, Sec. 10, Laws of N.J., 1931; Ch. 47, Sec. 10, Laws of N.Y., 1931.

8/Town of Bloomfield v. New Jersey Highway Authority, 18 N.J. 237 (1955).

9/Art. VI, Port Compact (Footnote 1).

10/Chap. 4, Laws of N.J., 1931; Chap. 47, Laws of N.Y., 1931.

that the plans for the connections of Port Authority bridges and tunnels with State and municipal highways were subject to the consent of the municipalities in which such thoroughfares are located.

These twin provisions—that prohibiting the taking of municipal property without municipal consent, and that requiring affirmative municipal approval for the plans of the connections of Port Authority bridges and tunnels with state and municipal highways—made the construction of Port Authority vehicular crossings almost wholly dependent on the Port Authority's ability to reach a voluntary agreement with the municipalities concerned. For more than 20 years, until 1953, the legislatively designated system of mutual Port Authority municipal cooperation and accommodation had worked exceedingly well.

In 1953, however, the Port Authority was unable to reach an agreement with the Township of Weehawken, New Jersey, as to the price it should pay for the acquisition of certain municipal tennis courts which lay directly in the path of the approaches to the Lincoln Tunnel's third tube. For a while this controversy threatened to prevent the construction of this vitally needed artery even though the Tunnel's existing two tubes had already reached capacity and trans-Hudson traffic was increasing at a rapid annual rate.

It appeared that the only way to break the deadlock was legislative action, and thus in 1954 the two legislatures by concurrent enactments¹¹ amended the 1931 Bridge and Tunnel Unification Acts to provide that municipal property required for Lincoln Tunnel purposes may be condemned by the Port Authority without municipal consent if the State in which the property is located authorizes such action.¹² Agreement between Weehawken¹³ and the Port Authority obviated the necessity for such State authorization in connection with the Lincoln Tunnel. But the lesson of this incident was remembered in the statutes confirming the Port Authority's power to construct the George Washington Bridge's second deck.¹⁴ On the approval of the New Jersey State House Commission, which consists of the Governor and other high ranking executive and legislative personnel,¹⁵ the Port Authority may condemn municipal property in New Jersey for George Washington Bridge purposes,¹⁶ after it has first made a bona fide attempt to acquire such property from the municipality.

The 1954 Lincoln Tunnel statutes also removed the necessity of municipal consent, while retaining the requirement of gubernatorial approval, for the plans for connections between Port Authority bridges and tunnels and State and municipal highways. However, the concurrent acts specified that either State acting alone could by appropriate legislation re-impose the necessity for such municipal consent.¹⁷ Simultaneously with the passage of these concurrent laws, New York, by unilateral act, reimposed the requirement of municipal consent for bridge and tunnel connection plans with state and municipal highways.¹⁸ Also New York has never empowered the Port Authority to condemn municipal property.

On the Federal Level

Before this discussion of the governmental framework in which the Port Authority acts is concluded, the role of the Federal government must be mentioned.

The Port Authority's creation under the Constitution's Compact Clause¹⁹ is itself a vivid illustration of the way in which the Federal system affects State activities. Incidentally, this was the first time that the Compact Clause had provided the basis for a permanent interstate agency.

¹¹/Ch. 11, Laws of N.J., 1954; Ch. 180, Laws of N.Y., 1954.

¹²/Ch. 11, Laws of N.J., 1954, Sec. 2; Ch. 180, Laws of N.Y., 1954, Sec. 2 (Amending Sec. 16 of the 1931 Acts).

¹³/New Jersey.

¹⁴/Ch. 156, Laws of N.J., 1956; Ch. 807, Laws of N.Y., 1956.

¹⁵/N.J.S.A., 52:20-1.

¹⁶/Ch. 156, Laws of N.J., 1956, Sec. 8.

¹⁷/Ch. 11, Laws of N.J., 1954, Sec. 2; Ch. 180, Laws of N.Y., 1954, Sec. 2, (Amending Sec. 10 of the 1931 Acts).

¹⁸/Ch. 180, Laws of N.Y., 1954, Sec. 4.

¹⁹/U.S. Constitution, Art. I, Sec. 10, Clause 3.

The Port Authority's four interstate bridges were constructed pursuant to the Federal Bridge Act of 1906.^{19a} This Act requires that bridge tolls be reasonable and just. In 1937 the Secretary of War, and four times thereafter the Secretary of the Army, rejected complaints alleging that Port Authority tolls were unreasonable.

Furthermore, the Federal bridge statutes require that plans for the construction of bridges over navigable waters be approved by the Secretary of the Army to assure lack of interference with water navigation. Recently, the Port Authority received the Secretary of the Army's approval of its plans for the under-decking of the George Washington Bridge.

INTER-AUTHORITY COOPERATION AND CONSTITUTIONAL HOME RULE IN NEW YORK

By 1954 it was obvious that there would not be sufficient arterial facilities to meet the needs of the Port District. In the eight years between 1946 and 1954 trans-Hudson traffic had increased 77 percent. Within New York City itself, the single-state Triborough Bridge and Tunnel Authority experienced similar traffic increases on its facilities.

Moreover, the proportion of total trans-Hudson traffic generated in areas other than Manhattan had been growing steadily during the last two decades, from about 40 percent in 1935 to almost 60 percent twenty years later.

In recognition of these facts the Port Authority together with the single-state Triborough Bridge and Tunnel Authority initiated, in 1954, a pioneering cooperative effort to plan for the region's future highway needs.

The joint study of the two authorities recommended the construction of a group of arterial facilities which would enable vehicular traffic to by-pass the congested island of Manhattan.

In 1955 a series of related statutes adopted the joint study recommendations.²⁰ This "statutory package" (a) authorized the two Authorities to cooperate in constructing a bridge across the Narrows of New York Harbor connecting Brooklyn with Staten Island, (b) empowered the single-state Triborough Authority to construct a bridge at Throgs Neck connecting the New York City Boroughs of Queens and the Bronx, and (c) confirmed the Port Authority's power to construct a second deck to the George Washington Bridge including a bus passenger facility appurtenant to the expanded bridge.

Shortly after the passage of these acts, taxpayers whose homes were needed for Narrows Bridge purposes commenced an action to restrain all "joint study" construction, contending that the statutes authorizing the construction violated the New York Constitution's Home Rule provisions. This contention was made even though the legislation resulted from a cooperative endeavor of a bi-State agency and a single-State authority whose Commissioners are appointed by New York City's Mayor.

Plaintiffs contended that the legislation dealing with the Port Authority was invalid in that it failed to contain a "home rule message;" that is, a municipal request that the state legislature pass a given measure. The Constitution requires that such messages must be received in connection with all special legislation dealing with "... the property, affairs of government of any city."^{20a} Plaintiffs also contended that the "home rule message" submitted to the New York Legislature on behalf of Triborough's statutes failed to comply with the constitutionally prescribed procedure.

It should be pointed out that although each of the Port Authority's vehicular crossings is partially located in New York City, no Port Authority legislation had ever received a so-called "home rule message." The Port Authority's position had always been that no such message was needed because its legislation was concerned with matters of state and interstate concern. However, the courts had never before passed on this question.

In the "joint study" case the Port Authority's position was sustained on the ground

^{19a}34 Stat. 84, 33 U.S.C. Secs. 491-498.

²⁰Chs. 806 through 809, inclusive, Laws of N.Y., 1955.

^{20a}N.Y. Constitution, Art. IX, Sec. 11.

that its legislation involved matters of state and interstate concern and thus needed no home rule message.²¹ The Court of Appeals held that although the Narrows Bridge will be located wholly within New York State, it

***like the second deck on the George Washington Bridge, is of an interstate character and therefore properly brought within the jurisdiction of the Port Authority. Ipso facto, it is a matter of state concern.^{22/}

Moreover, the court held that each of the four statutes involved, including the two relating to Triborough, did not need home rule messages because all the facilities constituted parts "of an interstate project...and consequently are matters of state concern."

The relief with which the Port Authority's legal staff greeted this decision can be imagined—if the case had gone the other way, almost 40 years of Port Authority legislation might have been questioned as invalid.

HIGHWAY CONSTRUCTION, TAXATION AND ZONING RESTRICTIONS IN NEW JERSEY

Conflicts between the State's concern with highway construction and local municipal interests have also come before the New Jersey courts.

In the area of local assertion of taxing power over properties acquired but not used for transportation purposes, the municipal challenge has met with a qualified success. Fortunately, the basic tax immunity of highway rights-of-way has not been questioned.

The Port Authority's construction of the Lincoln Tunnel, however, raised tax questions because of two problems common to highway construction. As an alternative to condemning portions of lots and paying compensation for damages to the remainder, the Port Authority had purchased land, including some which could not be used for tunnel purposes. In addition, certain other property the Authority expected to need proved surplus because of modifications in tunnel design. The tunnel's authorizing legislation specified that no taxes should be paid on any property "acquired or used" for tunnel purposes. In considering a claim by Union City that it could, nevertheless, tax these excess properties, a New Jersey court construed this provision in its disjunctive sense as affording exemption.²³ However, the courts's decision was over-ruled thirteen years later by the New Jersey Supreme Court when Turnpike Authority highway construction raised similar problems under an identical exemption clause.²⁴

The later case involved an assessment by Washington Township against certain tracts outside the Authority's right-of-way which had been acquired as parts of lots purchased from the owners. Recognizing that purchase of an entire tract could be more economical and, therefore, more consonant with the public interest than condemnation of a part, the New Jersey Supreme Court approved the acquisition. However, it held that the property was not being used for a public purpose, and concluded that if the property were nevertheless held exempt, as in the Lincoln Tunnel case, merely because it had been acquired for a public purpose, the tax exemption provision would violate the New Jersey Constitutional provision requiring assessments to be made "under general laws, and by uniform rules".²⁵ To the New Jersey Supreme Court, this clause prohibits exemption of property solely because of the owner's governmental status and requires that tax exemption be conferred on property of public agencies only when the property is actually devoted to a public use.

The decision's effect is to put a premium on efficiency both in the acquisition of lands for highway purposes and in the disposition of any excess which might be acquired. In itself, the decision is certainly one which can be lived with but the question was how

1/Whelan et al. v. Wagner et al., the Port Authority, Triborough Bridge and Tunnel Authority et al., 2 Misc. 2d 89 (Kings Co. 1956) aff'd 3 A.D. 2d 936 (2d Dept. 1957) aff'd 14 N.Y. 2d 575 (1958).

2/4 N.Y. 2d 575, 584 (1958).

3/Port of New York Authority v. City of Union City, 19 N.J. Misc. 421 (1941).

4/New Jersey Turnpike Authority v. Washington Township, 16 N.J. 38 (1954).

5/N.J. Const. Art VIII, Sec. I, par. 1.

far the court would extend the concept that land acquired for public use was not necessarily held for such use. In a case involving the Port Authority's Newark Truck Terminal, the Authority was successful in confining the holding of the Washington Township case to its facts.²⁶

The Truck Terminal case arose out of a peculiar set of circumstances. A provision in a labor union contract which prohibited long-haul carriers from transferring freight to local cartage companies rendered the Terminal's planned operation impossible. Meanwhile, because of the Korean War, the Air Force needed the Terminal and rented it from the Port Authority.

At this point, and relying on the Washington Township case, the City of Newark sought to tax the property. The New Jersey Supreme Court, however, distinguished the Washington Township case on the ground that whatever the Terminal's current use, it was nevertheless being held by the Port Authority "with the present design to devote it within a reasonable time" to the public use originally contemplated.²⁷ This means that property acquired for public use retains its tax exempt status unless and until the original intention has been abandoned. The author believes this holding should prove helpful in preventing destructive taxation of public property where fortuitous circumstances delay its application for its intended purpose.

The New Jersey Supreme Court has also made it clear that the Washington Township case cannot sanction local interference with highway construction. Bloomfield Township tried to prevent construction of parkway service areas within its territorial limits²⁸ urging that the Highway Authority was subject to its zoning rules which had established the proposed service area site as a residential zone. The Supreme Court, however, confirming the rule that municipal interests are subordinate to those of the State in highway construction, held that the State-enacted parkway legislation must be construed to render the local regulations inapplicable.

²⁶/Port of New York Authority v. City of Newark, 20 N.J. 386, (1956).

²⁷/An alternate ground for the Supreme Court's holding was its conclusion that even though the terminal was not being used precisely as contemplated at the time of its construction, it was being put to a public use consistent with the original legislative understanding of the purposes to be served by Port Authority projects. In this contention, we were helped by the fact that potential defense needs had been advanced by the New York New Jersey Port and Harbor Development Commission as one of the reasons for recommending that the Port Authority be created.

²⁸/Town of Bloomfield v. New Jersey Highway Authority, 18 N.J. 237 (1955).