

In 1954 the city took the property abutting the street by eminent domain, discontinued the street and turned the area into a parking lot. The city, as owner of the lot, claimed the entire compensation. The company, however, contended that maintenance of its pipeline under the former street was a "valuable right" for which it should receive compensation. It argued that since abutters on the street retained the fee title underlying the street, it had obtained an easement through adverse use against the fee holders.

The court stated it was true that under New Hampshire law, abutters owned the fee underlying a street established by dedication. It was also uncontested that the company had used the street for a period greatly in excess of 20 years (the length of time it took to obtain an easement through adverse use). The court ruled, however, that the company's use was not "adverse" because the abutting owners could not have sued the company for trespass or damages since the laying of the pipeline was a "viatic [highway] use". The court agreed that this was the modern view, but it thought that the same view would have been taken in the 19th Century, when the pipeline was laid, because the New Hampshire court had consistently attributed to the State very broad powers over use of roads within the State, requiring only that the powers be exercise in a reasonable and non-arbitrary fashion. The earliest annotation on the subject which was available to the district court was in 56 American Reports 250 (1887) which revealed that several 19th Century courts concluded that legislatures and other governing bodies could authorize installation of pipelines in city street without compensation to abutters, as part of the public's easement thereon, in the interest of public health and welfare.

The court went on to state that the company's predecessor's franchise conferred no greater rights than were ordinarily granted to utilities and, under the common law, a utility located its facilities subject to the risk of removing and relocating them at its own expense to make way for a proper governmental use. The court pointed out that the Federal Government was not appropriating the company's right to lay its pipelines in the streets of the city, but was merely requiring it to move one such pipeline. It, therefore, concluded that the company was not entitled to compensation by the United States for removal of the pipeline and its relocation elsewhere. (United States v. Certain Land in City of Portsmouth, 247 F.Supp. 932, May 1965)

178-4 NEW YORK COURT RULES CITY MUST PAY COSTS OF RELOCATING UTILITY FACILITIES REQUIRED BY CLOSING OF STREET IN CONNECTION WITH URBAN RENEWAL PROJECT WHICH WAS A PROPRIETARY FUNCTION

In connection with an urban renewal project, the City of Binghamton acquired title to 29 acres of land and closed the street in question, necessitating the relocation of lines belonging to a telephone company. The property that was acquired was conveyed to a limited dividend corporation for development as a middle income housing project to be financed pursuant to the National Housing Act. The closing of the street was admittedly not for highway purposes.

The appellate division of a supreme court pointed out that the issue as to whether the city or telephone company paid the relocation costs depended on whether the renewal project undertaken by the city, although the property was conveyed to a private interest, constituted a governmental function or a proprietary one. It held that while the urban renewal project and the undertaking by the city to bring the project to fruition were in the public interest, the fact that the property was to be used for a public housing purpose and that the buildings were to be erected and operated under the aegis of a private corporation dictated that the city's action be regarded as proprietary in nature. The court recognized that public housing was a vital concern of government. However, since public transportation was no less a concern of government and was regarded as a proprietary function, the court could perceive no basis upon which it could say that public housing should be considered a governmental function, particularly where, as here, the ultimate benefactor was a private corporation. Under the circumstances, there was no justifiable reason why one private corporation (the telephone company) should sustain substantial damage which would inure to the benefit of another private corporation. The city was, therefore, ordered to pay the telephone company \$53,068.94. (New York Tel. Co. V. City of Binghamton, 261 N.Y.S.2d 583 July 1965)