A supreme court noted that the issue of who paid such expenses when a new highway was constructed was one of first impression in the State of New York. There were countless cases involving removal of utility facilities under existing highways, but these cases were not controlling since they referred to public streets and the "common law" right applicable to franchises in streets as limited by the "police power". However, the police power concept had been specifically rejected in situations similar to the one presented in this case. In the majority of jurisdictions dealing with a situation like the one in the instant case, it had been held that a utility company was entitled to reimbursement of its expenses because the company's easement was "property" in the constitutional sense, and an interest in land for which the owner was entitled to compensation if it was taken or injured. The court followed this rule and ordered the county to pay the costs incurred by the company. (New York State Natural Gas Corp. v. County of Albany, 262 N.Y.S.2d 661, August 1965)

181-4 NEW YORK COURT RULES CITY MUST PAY RELOCATION COSTS OF WATER COMPANY BECAUSE IT INITIATED THE STREET-WIDENING PROJECT

A supreme court had previously held that the City of New Rochelle was bound by its contract with the New Rochelle Water Company to pay the cost of relocating water mains which was necessitated by the widening of Quaker Ridge Road. (227 N.Y.S. 2d 741, 1962. See Memorandum 152-4, April 1963, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research News, No. 3, May 1963.) In that case, the court dismissed the city's contention that it was not required to pay the relocation costs since it had not instituted the change in grade of the street nor had it authorized the reconstruction. The court noted that there was nothing before it to indicate any agreement which might have been made by the city with the County of Westchester and/or with the State of New York regarding the widening of the street and, in any event, the contract provision relative to paying relocation costs was only between the company and the city.

On appeal to a supreme court, appelate division, it was held that the trial court should not have entered a summary judgment for the water company because there were factual issues which had to be considered. (238 N.Y.S.2d 169, 1963.) The judgment of the trial court was vacated and the case was remanded. The present decision was made by the trial court after the remand. That court affirmed its previous decision that the city had to reimburse the water company for the costs incurred in relocating some of its facilities.

The trial court had to interpret the contract provision which required the city to pay the relocation costs in excess of $600 "When the City shall determine to make any change in the line or grade of, or to do any other public construction authorized by the City in any street which has been accepted by the City and in which there is an established grade ***." Quaker Ridge Road was an accepted street having an established grade. The question then was whether the city had determined to make a change in the line or grade of that street, or had determined to do other public construction, within the meaning of the contract terms.

The evidence showed that the council of the City of New Rochelle adopted a resolution authorizing a petition to the board of supervisors of the County of Westchester to request the State of New York to allocate funds "from the Federal Aid Improvement Program for Secondary Roads, for the construction and widening of Quaker Ridge Road." When the city was informed that Federal funds had been allocated for this purpose, it approved the reconstruction plans which were made by the State and acquired the land needed for widening the street. The county agreed that the reconstructed street would be maintained as a county road.

The court pointed out that it was true that the city had not actually performed the construction work or prepared plans and specifications therefor. However, it approved the plans and acquired the necessary land at its own expense. That obligation might have been imposed on the county but the county required the city to assume such obligation. Unquestionably the city initiated the project when it petitioned the county to request the State to include the proposed widening and paving in the Federal-Aid Secondary Road System. Without that request by the county, the State would not have acted, and in view of the broad powers of the city to regulate the use of its streets, and particularly since the highway was to be maintained as a county road, the county would not have acted if the city had not approved the plans, and acquired the necessary land. Perhaps the Federal authorities would not have approved the project without the consent of the city in view of the provisions of the various Federal-Aid Highway Acts which required that the Federal-Aid Secondary Road System should be selected by the State highway departments and appropriate local road officials in cooperation with each other.

The court stated that even if the express language in the various resolutions, ordinances and petitions of the city pertaining to this project were disregarded, it was apparent that the city determined to make a change in the line and grade of the street in the sense that it determined to cause or effect the change, or bring it about. It was also apparent that it authorized the work necessary to complete the project and took the steps which were necessary on its part to effect the result, which was effected by the State, the county and the city acting in cooperation with each other. The court further noted that the city had instructed the water company to relocate its facilities and that if such instruction had not been given, the cost of relocation might have been paid by the State (pursuant to a provision in the Federal Aid Highway Act of 1958).

The court concluded that it was the intent of the city and the water company in entering into their contract that the company should be reimbursed by the city under the circumstances in this case, although the actual construction work was done by the State. Such a construction of the contract appeared to be reasonable and equitable to both parties. (New Rochelle Water Co. v. City of New Rochelle, 264 N.Y.S.2d 737, November 1965)