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ACQUISITION AND PROTECTION OF WATER SUPPLIES BY MUNICIPALITIES†

Wilbert L. Ziegler*

AMONG the prime functions of a municipal government is the furnishing of a potable supply of water for its inhabitants. In view of the increasing demand for water and the shortage of available supply, a number of problems have been or will be encountered by municipalities in fulfilling that function, apart from the problem of financing.

Generally speaking two major legal methods have been employed by municipalities to secure a supply of water for their corporate territory, and each method raises peculiar legal problems. The first method, by far the most popular, is the establishment of a municipal waterworks either within or without the corporate limits. In establishing its own facilities the municipality is confronted with the problem of adequate powers. It must have power to overcome limitations imposed by the common law and antagonisms presented by the private landowner. Besides power to establish, the municipality needs adequate power to protect its water supply against destruction and pollution as well as power to protect new sites for future use. When protection by means of police power regulation is attempted, problems immediately arise concerning the propriety of individual regulations under the state and federal constitutions. These problems, although present when the municipality acts within its boundaries, always increase when it tries to establish or protect its supply outside municipal limits.

The second major method available to the municipality for securing adequate water supplies is through cooperation with others in the formation of a water district. A municipality desiring to cooperate in a water district is faced with the problem of securing adequate representation both in the formation and in the management of the district. This problem, as well as those

†This study represents a portion of the project of the Legislative Research Center dealing with water law problems. Other studies are published in *Water Resources and the Law* (The University of Michigan Law School) (1958).—Ed.

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facing the district, through which the municipality will be operating, must be considered by a municipal unit before embarking on any joint endeavor.

I. MUNICIPAL WATER SUPPLY WITHIN THE CORPORATE LIMITS

Whether a municipality, in the absence of express power from the legislature, may provide a water supply for its inhabitants is a question for which the courts have not agreed on an answer.¹ Most state legislatures, however, realizing the importance of a potable water supply have enacted enabling legislation permitting a municipality to act within its corporate limits to provide for a supply of water.² The great number of municipal waterworks throughout the country attest to the adequacy of these legislative grants of power.

In many small towns and villages, however, the construction or purchase of a waterworks, being a costly endeavor, has been unsatisfactory as a method of acquiring a water supply. To solve this problem, some jurisdictions have delegated to their municipalities power to contract for a water supply.³ This shifts to the contracting supplier the burden of providing a source of water, establishing and maintaining a waterworks system, and distributing the water throughout the territory.⁴ An established sup-

¹ 161 L.R.A. 33, 34 (1903) sets forth cases which may be cited to support either side of the issue. See also 56 AM. JUR., Waterworks §§24, 54 (1947); *City of Gadsden v. Mitchell*, 145 Ala. 137, 40 S. 557 (1906); *Trenton v. New Jersey*, 262 U.S. 182 (1922).

² E.g.: Power to acquire existing waterworks: Md. Code Ann. (1957) art. 43, §418; Ark. Stat. Ann. (1956 repl.) §§19-2317, 19-4201; Idaho Code Ann. (1957) §50-2815; Power to construct waterworks: 20 N.Y. Consol. Laws (McKinney, Supp. 1958) §20(2); Miss. Code Ann. (1942) §3374-112; N.H. Rev. Stat. Ann. (1955) §38:3; Colo. Rev. Stat. (1953) §139-32-1(35); Power of eminent domain to obtain a water supply: Ark. Stat. Ann. (1947) §§35-401, 35-902; Md. Code Ann. (1957) art. 43, §418; Miss. Code Ann. (1942) §3374-128; Mass. Laws Ann. (1952) c. 40, §14; Pa. Stat. Ann. (Purdon, 1949) tit. 32, §639; Ky. Rev. Stat. (1956) §94.680. Legislative authority to delegate these powers to the municipality "is no longer questioned." *East Grand Forks v. Luck*, 97 Minn. 373 at 374, 107 N.W. 393 (1906); *Normal School v. Charleston*, 271 Ill. 602, 111 N.E. 573 (1916); *Bank of Commerce v. Huddleston*, 172 Ark. 999, 291 S.W. 422 (1927).

³ Md. Code Ann. (1957) art. 43, §423; Ky. Rev. Stat. (1956) §§96.120 to 96.150; Ark. Stat. Ann. (1956 repl.) §19.2319; Ill. Rev. Stat. (1957) c. 24, §23-36.1; Mich. Stat. Ann. (1936) §5.1419.

⁴ The court in *White v. Meadville*, 177 Pa. 643 at 653, 35 A. 695 (1896), states: "A municipality, in its beginnings, is perhaps not financially strong, or its debt may approach the constitutional limit so closely that it cannot borrow; nevertheless, the low state of its financial condition does not render less urgent the necessity of a water supply; it can obtain it in but one way, by contract with those who have the money and are willing to invest their private capital in the construction of waterworks. . . ."

plier usually can furnish water at a rate cheaper than can the municipality which initially has no facilities. In addition to the monetary benefits presented, contracting on behalf of its inhabitants allows the municipality to present a package deal to an interested supplier who might be disinterested if required to contract individually with each member of the community.

Legislative enactments empowering a municipality to construct and operate a waterworks or to contract for a water supply have existed in most states for many years unchanged and unchallenged. These powers coupled with the police power of the municipality are adequate to enable the municipal unit to provide and protect a supply of water within the municipal boundaries for itself and its inhabitants.⁵ The failure of any particular jurisdiction to possess legislation granting these powers to the municipalities is not due to the unwillingness of the legislature or to interference by the courts, but rather to the absence of need for the legislation and the corresponding lack of concern and interest on the part of municipal bodies within the state.

II. MUNICIPAL WATER SUPPLY OUTSIDE THE CORPORATE LIMITS

A. *General Observations.* The universal rule relating to the exercise of powers or activities by a municipality outside its territorial limits has become firmly entrenched in the common law and receives worshipful lip service from all American courts. This rule provides that a municipality may not exercise powers beyond its territorial limits in the absence of an expressed or implied delegation of authority by the state constitution or state legislature.⁶ Without a constitutional or statutory provision, this rule, if applied relentlessly by the courts, would preclude a municipality from acquiring extraterritorial land or water rights, exercising eminent domain therefor, or exercising extraterritorial police power.

B. *Purchase and Holding of Land.* A municipality going beyond its borders for a source of water must possess and hold property outside its boundaries. Only after this power is established can the questions concerning extraterritorial eminent

⁵ 7 McQUILLIN, *MUNICIPAL CORPORATIONS*, 3d ed., §24.265 (1949).

⁶ 37 AM. JUR., *Mun. Corp.* §122 (1941), and cases cited therein.

domain or police power arise. Forty states provide municipalities with power to purchase and hold property beyond their boundaries for the purpose of obtaining potable water.⁷ No distinction is made in the statutes between incorporated or unincorporated extraterritorial lands. A majority of the states designate no limitations as to the location of the water facilities, but a few jurisdictions limit the exercise of the power to an area within a specified number of miles from the corporate boundaries.⁸ These distance limitations were added, no doubt, to eliminate conflicts between the municipal units as well as to maintain a certain amount of equity in the distribution of the water resources among various areas of the state.

In the absence of an expressed grant of power through the constitution, statute, or municipal charter⁹ to acquire extraterritorial property, the question of extraterritorial power must be resolved by the courts. In spite of the general rule against the exercise of extraterritorial powers by a municipality, the majority of courts, relying on various modes of legal reasoning,¹⁰ have

⁷ An extensive note in 1957 *UNIV. ILL. L. FORUM* 100 at 101, lists these states as Alabama, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. For specific statutory language, see, e.g., Colo. Rev. Stat. (1953) §139-32-1(35); Iowa Code Ann. (1946) §397.1; Ky. Rev. Stat. (1956) §96.350; Miss. Code Ann. (1942) §3374-112; 20 N.Y. Consol. Laws (McKinney, Supp. 1958) §20(2). An Indiana act [Ind. Stat. Ann. (Burns, 1950 repl.; Supp. 1957) §§48-5301 to 48-5374] effectively grants extraterritorial powers by permitting the city to organize for itself a waterworks district, the boundaries and powers of which extend to a radius of five miles beyond the city limits.

⁸ Limitations placed on the geographical area in which a municipality may lawfully acquire a water supply outside its boundaries vary from two to seventy-five miles from the corporate limits. Cf. note, 1957 *UNIV. ILL. L. FORUM* 100 at 101.

⁹ Typical of charter provisions are those found in Connecticut charters. In that state no constitutional or general legislation exists granting to municipalities the power to go beyond their borders for a water supply; consequently, issues involving the exercise of such powers have arisen in the instance of charter provisions only. The courts have recognized as valid grants of this power by charter or by special legislation. *West Hartford v. Board of Water Commissioners*, 44 Conn. 360 (1877); *Dunham v. New Britain*, 55 Conn. 378, 11 A. 354 (1877).

¹⁰ In some instances, the courts have implied the power from the necessity of the occasion. *Coldwater v. Tucker*, 36 Mich. 474 (1877); *Somerville v. Waltham*, 170 Mass. 160, 48 N.E. 1092 (1898); *Langley v. Augusta*, 118 Ga. 590, 45 S.E. 486 (1903). See also *Harden v. Superior Court*, 44 Cal. (2d) 630, 284 P. (2d) 9 (1955). In other cases, the courts have distinguished between an exercise of governmental authority, which is forbidden beyond the corporate bounds, and the mere purchase of land outside the municipality. *Becker v. La Crosse*, 99 Wis. 414, 75 N.W. 84 (1898); *Schneider v. Menasha*, 118 Wis. 298, 95 N.W. 94 (1903); *Smith v. Kuttawa*, 222 Ky. 569, 1 S.W. (2d) 979 (1928).

allowed the municipalities to acquire lands and property rights beyond their boundaries for legitimate municipal purposes.¹¹ Of the states which possess no express statutory or constitutional grant of power to acquire extraterritorial property for a water supply,¹² Georgia, Massachusetts and New Hampshire have court determinations relevant to the discussion. In Georgia, the court, in *Hall v. Calhoun*, decided that where a city had the power to establish and construct a waterworks, without limitation as to location, it could go beyond its borders to obtain a supply of water.¹³ The courts of Massachusetts and New Hampshire, although not faced with a water supply issue, have held that for legitimate municipal purposes, a city may acquire land beyond its borders.¹⁴ There is every reason to believe that a court impressed with the realization that "a city is not a self-sufficing unit"¹⁵ will permit the municipality to acquire and hold property beyond its corporate limits for municipal purposes, including property for a water supply, even though the municipality has no constitutional or statutory grant of power.¹⁶

C. *Extraterritorial Condemnation.* Although a municipality may be permitted by the courts or empowered by the legislature to purchase and hold extraterritorial lands for a water supply, it may lack the power of extraterritorial eminent domain. The power of eminent domain is not included necessarily in the power

11 "... [I]t is believed that the rule, supported by the weight of authority as well as by the better reasoning, is that a municipal corporation, where not expressly prohibited, may purchase real estate outside of its corporate limits, for legitimate municipal purposes. . . ." 10 McQUILLIN, MUNICIPAL CORPORATIONS, 3d ed., §28.05 (1950); *Smith v. Kuttawa*, 222 Ky. 569, 1 S.W. (2d) 979 (1928); *Fournier v. Berlin*, 92 N.H. 142, 26 A. (2d) 366 (1942); *Lester v. Jackson*, 69 Miss. 887, 11 S. 114 (1892); *Mathers v. Moss*, 202 Ark. 554, 151 S.W. (2d) 660 (1941); *Ft. Payne Co. v. Ft. Payne*, 216 Ala. 679, 114 S. 63 (1927), but cf. *Donable's Admr. v. Harrisburg*, 104 Va. 533, 52 S.E. 174 (1905).

12 The states which possess no express statutory or constitutional grant of power to acquire extraterritorial property for a water supply include Connecticut, Delaware, Georgia, Maine, New Hampshire, Vermont, Massachusetts, and Rhode Island.

13 140 Ga. 611, 79 S.E. 533 (1913). The court refused to follow an earlier decision, *Loyd v. Columbus*, 90 Ga. 20, 15 S.E. 818 (1892), which prohibited a municipality from providing for extraterritorial disposition of its sewage.

14 *Somerville v. Waltham*, 170 Mass. 160, 48 N.E. 1092 (1898); *Fournier v. Berlin*, 92 N.H. 142, 26 A. (2d) 366 (1942). Both cases determined that a municipality could acquire a gravel pit located outside its territorial limits. The pit involved in the Massachusetts case was situated in another municipality.

15 Anderson, "The Extraterritorial Powers of Cities," 10 MINN. L. REV. 475 (1926).

16 *Wehrle v. Board of Water & Power Commissioners of Los Angeles*, 211 Cal. 70, 293 P. 67 (1930); *E. Hartford Fire Dist. v. Glastonbury Power Co.*, 92 Conn. 217, 102 A. 592 (1917); *Natcher v. Bowling Green*, 264 Ky. 584, 95 S.W. (2d) 255 (1936).

to purchase and hold land. It is distinct and must be expressly or impliedly delegated to the municipality.¹⁷ Many states have provided expressly that a municipality may exercise eminent domain beyond its corporate limits in order to acquire a water supply or the facilities therefor.¹⁸ Like the power to purchase lands, the power of extraterritorial condemnation is not limited to incorporated or unincorporated lands, but is restricted by some states to a designated geographical area immediately outside the corporate limits.¹⁹

In a jurisdiction which has no provision granting to the municipality power to condemn outside lands for a water supply, the courts must decide the question of whether, in a particular instance, a municipality may exercise this power. This question has been presented to the courts in two factual settings. The first involves a municipality which has express power to hold property beyond its limits but no express power to condemn therefor; the second arises when express power to hold and condemn land within the city limits for a water supply is granted but there is no express power to condemn beyond the corporate boundaries.²⁰ In the first situation, the Michigan Supreme Court in the case of *Allegan v. Iosco Land Co.*²¹ held that a constitutional provision permitting any city or village to "acquire, own

17 1 NICHOLS, EMINENT DOMAIN §3.221(3) (1950), citing the federal and thirty-one state jurisdictions, states: "The establishment of a municipal corporation by the legislature, and the grant of a charter to the corporation so established containing provisions for the exercise of the usual governmental powers by such a body within its territorial limits, does not in itself convey the power to take land by eminent domain in order to carry such powers into effect, and in the absence of express or necessarily implied authority from the legislature neither a municipal corporation nor its officers and boards can exercise the power of eminent domain."

18 E.g., Idaho Code Ann. (1957) §50-2815; Ill. Rev. Stat. (1957) c. 24, §74-2; Iowa Code Ann. (1946) §397.8(1); Minn. Stat. Ann. (1947) §457.02; 20 N.Y. Consol. Laws (McKinney, Supp. 1958) §20(2).

19 E.g., Ky. Rev. Stat. (1956) §94.680, which limits condemnation power to territory within the county where the city is located. The legislature may lawfully delegate extraterritorial eminent domain power to municipalities. *Allegan v. Iosco Land Co.*, 254 Mich. 560, 236 N.W. 863 (1931); 1 NICHOLS, EMINENT DOMAIN §3.221(3) (1950), and cases cited therein; 18 AM. JUR., Eminent Domain §26 (1938).

20 Where a municipality is not permitted to own or operate a city water supply even within its limits, the question of eminent domain is moot.

21 254 Mich. 560, 236 N.W. 863 (1931). The court, however, permitted the city to condemn beyond its boundaries for a water supply under its home rule charter which authorized extraterritorial acquisition of a public utility by condemnation. For statutes expressly delegating to Michigan municipalities the power of eminent domain to be exercised for a water supply beyond their corporate limits, see Mich. Stat. Ann (1936) §8.71, (1949) §5.1893, (Supp. 1957) §5.2079(3).

and operate, either within or without its corporate limits, public utilities for supplying water . . ."²² did not confer power to condemn public utilities.²³ On the other hand, in the case of *Helm v. Grayville*,²⁴ the Illinois Supreme Court held that where a city by statute had the power to purchase, lease, or acquire by gift land for a ferry outside its corporate limits, the city likewise could exercise the power of eminent domain for this purpose. Although this case did not involve the acquisition of a water supply, it manifests a judicial attitude, which, in opposition to the Michigan court,²⁵ would permit a city having the power to purchase land for a public water utility also to exercise eminent domain. The principle of the Illinois decision appears, by weight of numbers, to be the majority rule;²⁶ however, in view of the scarcity of judicial opinions on the issue, it cannot be alleged with certainty that if a city is granted power to purchase land beyond its limits for a water supply, it will be permitted by the courts to exercise eminent domain for this purpose.

Several cases have treated the issue of whether power of extraterritorial condemnation by a city can be implied from an express grant of this power within the city. Once again the Michigan Supreme Court has given a strict interpretation to a provision granting power to villages. The Michigan court held that where a village had condemnation power within its limits to obtain a water supply, but no power expressly granted to acquire water outside the village, the village could not condemn land without its boundaries for this purpose.²⁷ This rule, however, has not received approval in other jurisdictions. Decisions

²² MICH. CONST., Art. VIII, §23.

²³ Cf. *Detroit v. Circuit Judge*, 237 Mich. 446, 212 N.W. 207 (1927), relating to acquisition of a park beyond the corporate limits of the city of Detroit by means of condemnation.

²⁴ 224 Ill. 274, 79 N.E. 689 (1906).

²⁵ In the area of municipal powers the Michigan Supreme Court has been most conservative. See *Houghton v. Huron Copper Mining Co.*, 57 Mich. 547, 24 N.W. 820 (1885); *People v. Hulbert*, 131 Mich. 156, 91 N.W. 211 (1902).

²⁶ *Warner v. Gunnison*, 2 Colo. App. 430 (1892); *Colorado Springs v. Public Utilities Comm.*, 126 Colo. 265, 248 P. (2d) 311 (1952); *Sewer Improvement Dist. #1 of Sheridan v. Jones, Admx.*, 199 Ark. 534, 134 S.W. (2d) 551 (1939); *Central Power Co. v. Nebraska City*, (8th Cir. 1940) 112 F. (2d) 471. Cf. *Spokane v. Williams*, 157 Wash. 120, 288 P. 258 (1930).

²⁷ *Houghton v. Huron Copper Mining Co.*, 57 Mich. 547, 24 N.W. 820 (1885). The rule has been formulated thus: "When the power to exercise eminent domain for certain purposes is expressly granted to a municipal corporation, land outside its territorial limits cannot be condemned without special authority. . . ." 1 NICHOLS, EMINENT DOMAIN §3.221(3) (1950). Cf. 18 AM. JUR., Eminent Domain §27 (1938).

in Colorado,²⁸ Illinois,²⁹ and Washington,³⁰ although not involving water supplies, clearly indicate that the Michigan rule of strict interpretation is in the minority. In West Virginia³¹ and Wyoming,³² the courts have held that where a city has condemnation power to obtain a water supply, and there are no express limitations on the territory in which the water may be obtained, the city may condemn land beyond its corporate limits.

Without the power of eminent domain, a municipality, because of local animosity or inability to reach a monetary agreement, may effectively be deprived of a water supply outside its jurisdiction even though it has the power to purchase and hold outside property. A court determination denying the municipality extraterritorial eminent domain power can be avoided by a legislative enactment granting to municipal units the power of condemnation for a water supply beyond their boundaries.

D. *Water Rights Without Condemnation.* The power to acquire property is essential for the municipality going beyond its limits for a supply of water, but acquisition by purchase or condemnation is expensive. A municipality must look not only to its power to acquire property but also to the cost of the development. In this regard, it is necessary to examine what water rights beyond its boundaries a municipality may acquire without cost as incident to its acquisition of outside lands.³³ When a municipality ventures beyond its limits to establish a reservoir to capture diffused surface waters, or to dam a stream or lake causing inundation of lands, the municipality will be forced to acquire, by purchase, condemnation or otherwise, the lands which are to be covered by water. However, the problem remains whether the municipality must compensate anyone for the water it takes from beyond its corporate limits.

The two legal doctrines which have prevailed in the field of

²⁸ *Colorado Central Power Co. v. Englewood*, (10th Cir. 1937) 89 F. (2d) 233; *Public Serv. Co. v. Loveland*, 79 Colo. 216, 245 P. 493 (1926), concerning the taking of a power plant.

²⁹ *Maywood Co. v. Maywood*, 140 Ill. 216, 29 N.E. 704 (1892), concerning extraterritorial sewage disposal.

³⁰ *Puyallup v. Lacey*, 43 Wash. 110, 86 P. 215 (1906), concerning the straightening of a stream, one bank of which was beyond the corporate limits.

³¹ *White v. Romney*, 69 W. Va. 606, 73 S.E. 323 (1911).

³² *Edwards v. Cheyenne*, 19 Wyo. 110, 114 P. 677 (1911).

³³ For a detailed presentation of the common law doctrines of water use law, including a consideration of the water rights of municipalities, see Ziegler, "Water Use Under Common Law Doctrine," *WATER RESOURCES AND THE LAW* (1958).

water use are the doctrines of absolute use and reasonable use. By the theory of absolute use, a landowner is entitled to possession and complete control of all waters coming to his land. Under the reasonable use concept, a landowner is permitted to make a use of the waters to which he has access which is reasonable in relation to other uses being made of the same supply of water. The doctrine of absolute use would assure to the municipality control of a water supply by mere ownership of land; the doctrine of reasonable use may render the same assurance in application, or it may not, depending upon whether the use by the municipality is considered reasonable.

The doctrine of reasonableness has always been applied to the use of water from natural streams or lakes on which more than one person's land abuts, although the courts have designated certain uses as unreasonable *per se*.³⁴ Under the reasonable use concept, the courts have not been sympathetic to the needs of the municipalities which have come beyond their bounds to tap a natural stream or lake for water. When a municipality's activity results in injury to a lawful use made by another riparian landowner, a city will be prohibited from continuing its use unless it condemns the water right of the complainant. Or the city may be ordered by the court to pay damages for the injury caused.³⁵ This method employed by the courts eliminates a condemnation action by the municipality, yet accomplishes the same end. Basically, there are two principles of water use law underlying the courts' decisions against the municipalities. First, use of water from a natural stream or lake on land not abutting the waters is an unlawful use;³⁶ secondly, a city with its many inhabitants was never contemplated at common law to be a "riparian landowner" entitled to make a reasonable use of water flowing by his land.³⁷

In determining the relative rights of landowners to make use of the ground waters flowing beneath their land, the courts traditionally have applied the doctrine of absolute use.³⁸ This theory,

³⁴ E.g., *Stein v. Burden*, 24 Ala. 130 (1854).

³⁵ *Ibid.*; *Elkhart v. Christiana Hydraulics*, 223 Ind. 242, 59 N.E. (2d) 353 (1945); *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N.W. 781 (1903).

³⁶ *Roberts v. Martin*, 72 W. Va. 92, 77 S.E. 535 (1913).

³⁷ *Pernell v. Henderson*, 220 N.C. 79, 16 S.E. (2d) 449 (1941).

³⁸ *New River Co. v. Johnson*, 2 El. & El. 435, 121 Eng. Rep. 164 (1860); *Houston & T.C.R. Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904); *Fire District v. Graniteville Spring Water Co.*, 103 Vt. 89, 152 A. 42 (1930).

if extended to a municipality pumping water from its extraterritorial land, would allow the municipal unit to use all the ground water it required regardless of any resultant injury to other users. However, as the practice of diverting waters from one ground water basin to another increased, the courts refused to follow an absolute use principle and applied the doctrine of reasonable use.³⁹ An application of this doctrine generally will result in a municipal corporation being denied the right to divert ground waters for use in the municipality some distance away, if injury to other lawful ground water users results.⁴⁰

There is little or no indication of what result will be reached by the courts if a municipality, in constructing a reservoir to collect diffused surface waters flowing over its lands, interferes with another landowner's use of these waters. The owner of land is considered to have absolute control over the diffused waters on his land;⁴¹ however, it is likely that, as in the case of ground water, the courts will apply some form of reasonable use doctrine when a municipality's diverting of diffused water away from the area of its source results in injury to another user.

In any instance of a municipal corporation diverting water from outside its limits into the city for use by its inhabitants, where no injury results to another user, it is highly probable that, in most states, the courts will not interfere with the city's diverting.⁴² Where, at the suit of any particular complainant, a municipal unit is held not to be entitled to divert water for a water supply, the municipality is not deprived thereby of its water source. The decision of the court against the municipality merely requires purchase or condemnation of the water rights of the complainant which the court held were violated by the actions of the municipality.

³⁹ *Katz v. Walkinshaw*, 141 Cal. 116, 70 P. 663 (1902); *Forbell v. City of New York*, 164 N.Y. 522, 58 N.E. 644 (1900); *Meeker v. East Orange*, 77 N.J.L. 623, 74 A. 379 (1909); *Koch v. Wick*, (Fla. 1956) 87 S. (2d) 47.

⁴⁰ *Forbell v. City of New York*, 164 N.Y. 522, 58 N.E. 644 (1900); *Canada v. Shawnee*, 179 Okla. 53, 64 P. (2d) 694 (1937).

⁴¹ *Livingston v. McDonald*, 21 Iowa 160 (1866); *Gibbs v. Williams*, 25 Kan. 149 (1881); *Turner v. Big Lake Oil Co.*, 128 Tex. 155, 96 S.W. (2d) 221 (1936); *Messinger v. Woodcock*, 159 Ore. 435, 80 P. (2d) 895 (1938). *Contra*: *Bassett v. Salisbury Mfg. Co.*, 43 N.H. 569 (1862); *Swett v. Cutts*, 50 N.H. 439 (1870). The New Hampshire cases apply the rule of reasonable use.

⁴² *Crawford v. Hathaway*, 67 Neb. 325, 93 N.W. 781 (1903); *Stratton v. Mt. Hermon Boys' School*, 216 Mass. 83, 103 N.E. 87 (1913); *McDonough v. Russell-Miller Milling Co.*, 38 N.D. 465, 165 N.W. 504 (1917); *Harris v. Norfolk & Western Ry. Co.*, 153 N.C. 542, 69 S.E. 623 (1910).

In western prior appropriation states,⁴³ a municipality, like any individual, is entitled to appropriate, in accordance with the statutory procedure, available water and to acquire thereby a right to take a determined quantity.⁴⁴ This right is subject only to the rights of users prior in time. No distinction is made as to the location of the municipal unit in relation to the water source or as to the quantity of water appropriated. If there is no water available because of prior appropriations, the municipality must rely on its power to purchase or condemn the prior rights.

E. Extraterritorial Police Power. As previously discussed,⁴⁵ the municipal corporation in acquiring an extraterritorial water supply may be required to purchase or condemn water rights in addition to lands if the diverting interferes with other persons' uses of the water. There are, however, other rights belonging to landowners adjacent to a natural supply of water which, when exercised, probably will not be bothered by the municipality, but will interfere with the municipal use by damaging the purity of the water. These uses include swimming, boating, bathing, and fishing in natural streams and lakes as well as reasonable use of the land located about the waters.⁴⁶ If a municipality has no extraterritorial police power, it is unable to prevent acts which may tend to pollute the waters unless it condemns the landowner's rights to the use. Although a municipality may possess police power within its boundaries sufficient to protect its water, the necessity for preserving the purity of a potable water supply does not terminate at the municipal limits.

There are traditional legal methods available to the city to protect its outside water supply. The city may exclude persons from its reservoir⁴⁷ or sue to enjoin trespass thereon. But, as a

⁴³ Seventeen western states have by constitutional provision or statutory enactment adopted the doctrine of prior appropriation for their surface streams and lakes. Many of these states likewise apply this doctrine to their ground water supplies. Diffused surface water uses are still regulated by the common law in these states insofar as the common law is applicable to local conditions.

⁴⁴ For examples of prior appropriation statutes, see Cal. Water Code (Deering, 1954) §1200 et seq.

⁴⁵ Part II-D supra.

⁴⁶ These rights are incident to the ownership of land located along the banks of a stream or lake.

⁴⁷ E.g., *Phillips v. City of Golden*, 91 Colo. 331, 14 P. (2d) 1013 (1932). In this case the court, in denying petitioner's claim for damages from the city growing out of injury to his cattle when driven from city property, affirmed the proposition that the city has a right to drive the cattle from its watershed.

practical matter, these remedies against individual trespassers are ineffectual since it is most difficult for the municipality to show actual damages, and the sanctions imposed for trespass in the absence of provable damages are *de minimis*. As a riparian owner, the city has the right to enjoy the water passing by its land in an undefiled state;⁴⁸ however, other landowners similarly situated have a right to use the water and their land adjacent in a reasonable manner.⁴⁹ Boating, swimming, bathing, and fishing are reasonable uses of the water;⁵⁰ cattle raising, plowing, and fertilizing appear to be reasonable uses of the adjacent land.⁵¹ Since these are reasonable uses, the municipality is in a difficult position trying to prevent them through court injunction. Only by a valid exercise of the police power can these rights to the use of water and the land adjacent be regulated or curtailed without an exercise of eminent domain.

The courts have agreed, with only a few exceptions, that a municipality may not exercise police power beyond its jurisdictional limits unless this power has been delegated specifically by the legislature or by the state constitution.⁵² In certain cases, the courts have permitted a municipality, without express delegated power, to regulate enterprises located outside the municipality as a condition to permitting that enterprise to do business within the corporate limits.⁵³ However, a municipal ordinance designed to prohibit or limit certain activities beyond the municipal boundaries to safeguard the purity of a municipal water supply is a mandatory, unconditional prohibition and cannot be justified

⁴⁸ See 56 AM. JUR., Waters §405 (1947), and cases from thirty jurisdictions cited in support thereof.

⁴⁹ *Id.*, §406.

⁵⁰ *Hilt v. Weber*, 252 Mich. 198, 233 N.W. 159 (1930); *Butler v. Atty. Gen.*, 195 Mass. 79, 80 N.E. 688 (1907); *State v. Morse*, 84 Vt. 387, 80 A. 189 (1911); 56 AM. JUR., Waters §275 (1947). But see *Harvey Realty Co. v. Wallingford*, 111 Conn. 352, 150 A. 60 (1930), where bathing and swimming by a great number of people is not considered as being within the riparian right. See dictum in *People v. Hulbert*, 131 Mich. 156, 91 N.W. 211 (1902); *Battle Creek v. Resort Assn.*, 181 Mich. 241, 148 N.W. 441 (1914).

⁵¹ See *George v. Village of Chester*, 111 N.Y.S. 722 (1908).

⁵² 6 McQUILLIN, MUNICIPAL CORPORATIONS, 3d ed., §24.57 (1949).

⁵³ *In re Blois*, 179 Cal. 291, 176 P. 449 (1918); *State v. Nelson*, 66 Minn. 166, 68 N.W. 1066 (1896); *Hall Bros. v. Cleveland*, (Ohio App. 1953) 115 N.E. (2d) 697; *Sterett & Oberle Packing Co. v. Portland*, 79 Ore. 260, 154 P. 410 (1916); *Korth v. Portland*, 123 Ore. 180, 261 P. 895 (1927); *Norfolk v. Flynn*, 101 Va. 473 (1903). *Contra*: *Oakland v. Brock*, 8 Cal. (2d) 639, 67 P. (2d) 344 (1937); *Rockford v. Hey*, 366 Ill. 526, 9 N.E. (2d) 317 (1937); *Higgins v. Galesburg*, 401 Ill. 87, 81 N.E. (2d) 520 (1948); *Dean Milk Co. v. Aurora*, 404 Ill. 331, 88 N.E. (2d) 827 (1949).

under those cases dealing with licensing or inspection of outside milk plants or slaughterhouses.⁵⁴

There are only two cases in which the courts have indicated that a municipality may exercise unconditional extraterritorial police power without an express grant of power from the legislature. In *Lexington v. Jones*,⁵⁵ it appeared that the city of Lexington provided for the fining of anyone who tapped into the city sewer line located outside the city without paying the sewerage fee. The Kentucky Court of Appeals upheld this practice stating that it constituted a valid exercise of the police power of the city.⁵⁶ In Missouri, the high court, in the case of *Chambers v. St. Louis*,⁵⁷ decided that the city of St. Louis may hold land outside its corporate limits without special legislative sanction. By way of dictum, the court, referring to the lands stated that the city may exercise "such police powers as would be required in order to make them answer the purposes for which they were designed."⁵⁸ These two cases, when compared to the great number of cases to the contrary, are insignificant, and as precedent cannot justify a municipality's exercise of extraterritorial police power to preserve its water supply in the absence of a delegation of power by the legislature or the constitution.

Many legislatures have been aware of the problem of municipalities having a supply of water beyond their territorial limits

⁵⁴ In *Sterett & Oberle Packing Co. v. Portland*, 79 Ore. 260, 154 P. 410 (1916), the court pointed out that an ordinance providing for the maintenance of certain health standards for outside slaughterhouses was valid only as it prohibited the sale of meats within the city and not as it attempted to enforce regulation of production outside the city limits. This same distinction is made by the court in *State v. Davis*, 1 Tenn. C.C.A. 550 (1911).

⁵⁵ 289 Ky. 719, 160 S.W. (2d) 19 (1942).

⁵⁶ In a concluding paragraph of the case, the court points out Ky. Rev. Stat. §§3058-5, 3058-23 [now Ky. Rev. Stat. (1956) §§84.170, 84.010]. The first of these sections gives cities power to regulate by ordinance the use of culverts and sewers; the second allows a city to impose fines for violations of any city ordinance. Neither section refers expressly to actions beyond the city limits. It is not apparent from a reading of the decision what importance the court placed on these two sections as constituting a legislative grant of power to the city to regulate by its police power the connections with its sewer lines located beyond its corporate limits.

⁵⁷ 29 Mo. 543 (1860).

⁵⁸ *Id.* at 575. In *Pueblo v. Flanders*, 122 Colo. 571, 225 P. (2d) 832 (1950), a taxpayer attempted to enjoin the city of Pueblo from furnishing gratuitously fire service to inhabitants outside the city. The court in denying the injunction distinguished between an exercise of governmental power to regulate persons beyond the limits of the city and an exercise of the power to assist persons beyond the boundaries of the city. The court held that the latter was not within the rule prohibiting a city from exercising its governmental powers beyond the corporate limits.

which must be protected, and in more than one half of the states the legislatures have granted municipalities sufficient police power to safeguard the purity of these waters.⁵⁹ With the exception of the Washington Supreme Court,⁶⁰ courts deciding the issue have sustained legislative delegations of extraterritorial police power to municipalities.⁶¹

III. VALIDITY OF REGULATIONS DESIGNED TO PROTECT MUNICIPAL WATER SUPPLY

The foregoing discussion indicates that, except in Washington,⁶² a grant of police power to a municipality by the legislature to protect the municipality's water supply will be upheld as to waters located within or without the corporate limits. A more controversial attitude surrounds the issue of the validity of particular ordinances passed pursuant to a legislative grant of authority, and it is to a consideration of these ordinances that the discussion now turns.

The legal challenge to the validity of an exercise of the police power to preserve the purity of a water supply and the legal principles utilized in a solution of the problem will be the same whether the power is exercised within or without the municipality, or whether a municipal ordinance, state law, county regulation, or district ordinance is involved. In view of this fact, it seems proper to consider without distinction all decisions in which the validity of a water purity statute or ordinance has

⁵⁹ Note, 1957 UNIV. ILL. L. FORUM 99 at 101, lists these states as Alabama, Arkansas, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Virginia, West Virginia, and Wyoming. Kentucky recently enacted a similar provision, Ky. Rev. Stat. (1956) §96.355.

⁶⁰ *Brown v. City of Cle Elum*, 145 Wash. 588, 261 P. 112 (1927). WASH. CONST., Art. XI, §11, reads: "Any county, city, town or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." This provision is viewed as a delegation of plenary power to local divisions of government but limited to the objects designated. *Seattle v. Proctor*, 183 Wash. 293, 48 P. (2d) 238 (1935). Ohio has a constitutional provision, OHIO CONST., Art. XVIII, §3, nearly identical in language to the Washington section; however, the Ohio statute [Ohio Rev. Code (Page, 1953) §743.25] granting police power to the municipalities in Ohio to preserve their outside water supplies has never been questioned as being unconstitutional.

⁶¹ E.g., *Van Hook v. Selma*, 70 Ala. 361 (1881); *Treadgill v. State*, (Tex. Crim. App. 1954) 275 S.W. (2d) 658.

⁶² *Brown v. City of Cle Elum*, 145 Wash. 588, 261 P. 112 (1927).

been questioned. This broad view will facilitate an evaluation of the effectiveness of a city's police power over its source of potable water.

State statutes prohibiting the discharge of polluting matter into any body of water from which a public drinking supply is taken uniformly have been declared valid exercises of the police power,⁶³ even though there was no showing that the particular discharge of polluting matter adversely affected the quality of the water at the intake for the public supply.⁶⁴ Because of the great difficulty of showing that any particular dumping of polluting materials into the water affected the quality at the city's source of supply, it is of notable importance that the courts have held the statutes valid without proof of actual damage to the waters. Logically, there appears no reason why a municipal ordinance prohibiting the discharge of polluting matter into the municipality's water supply should not be upheld as a valid exercise of the police power in the same manner as state statutes prohibiting similar actions have been sustained.

Differing only in degree from those statutes and ordinances which prohibit the depositing of contaminating matters into potable water sources are the enactments forbidding activities in or on waters used for a water supply. These activities include, among others, swimming, bathing, boating and fishing. Regulations of the activities of the general public in or on a water supply, as a rule, have been upheld by the courts.⁶⁵ Where regulations have interfered with private riparian rights to swim, bathe, boat, or fish, however, there is a clear split of authority as to the validity of the regulations. Some courts have upheld restrictions on private water rights for the purpose of maintain-

⁶³ *State v. Wheeler*, 44 N.J.L. 88 (1882); *State v. Griffin*, 69 N.H. 1, 39 A. 260 (1896). Cf. *State v. Chemical Co. of America*, 90 N.J. Eq. 425, 107 A. 164 (1919); *City of Lawrence v. Commissioners of Public Works*, 318 Mass. 520, 62 N.E. (2d) 850 (1945); *Sprague v. Door*, 185 Mass. 10, 69 N.E. 344 (1904); *Miles City v. State Board of Health*, 39 Mont. 405, 102 P. 696 (1909); *Durham v. Cotton Mills*, 141 N.C. 615, 54 S.E. 453 (1906); *Topeka Water Supply Co. v. Potwin Place*, 43 Kan. 404, 23 P. 578 (1890). But see *People v. Elk River M. & L. Co.*, 107 Cal. 221, 40 P. 531 (1895), in which the court expresses sympathy with the riparian loggers as opposed to the needs of the municipality for a pure supply of water.

⁶⁴ *Durham v. Cotton Mills*, 141 N.C. 615, 54 S.E. 453 (1906); *State v. Wheeler*, 44 N.J.L. 88 (1882); *Miles City v. State Board of Health*, 39 Mont. 405, 102 P. 696 (1909).

⁶⁵ *Birmingham v. Lake*, 243 Ala. 367, 10 S. (2d) 24 (1942); *Shreveport v. Conrad*, 212 La. 738, 33 S. (2d) 503 (1947); *Commonwealth v. Hyde*, 230 Mass. 6, 118 N.E. 643 (1918).

ing the purity of the water for public use.⁶⁶ On the other hand, courts in Michigan,⁶⁷ Wisconsin,⁶⁸ and Florida⁶⁹ have held invalid ordinances interfering with private rights to swim, bathe, or boat in waters used for a public supply.⁷⁰ The conflict of cases is clear. A court faced for the first time with the issue of whether regulation of private rights to protect a public water supply is constitutional can find case authority to support either an affirmative or a negative determination.

Besides control of pollution discharge or boating and swimming, it is often necessary, in order to assure pure water, to regulate the ways in which lands located within the watershed of a stream or lake may be used. The purity of a body of water is not determined solely by what may be thrown into it by persons along the shore or diffused into it by swimmers or bathers. Streams and lakes are fed by their respective watersheds with runoff and seepage water. This water will vary in degree of purity depending upon what materials may be present on or within the soil of the watershed.

Generally, regulations aimed at eliminating pollution caused by activities on the lands surrounding the water source, if reasonably calculated to effectuate the purpose of preserving water purity, will be upheld by the courts.⁷¹ A minority view was voiced in the case of *George v. Village of Chester*.⁷² In that case the court held that a village, after condemning a part of a lake for a water supply, could not enforce a state public health ordinance against the defendant so as to prohibit him from farming his land located along the lake. This regulation, in the mind of the court, would constitute the taking of private property without

⁶⁶ *State v. Morse*, 84 Vt. 387, 80 A. 189 (1911); *State v. Heller*, 123 Conn. 492, 196 A. 337 (1937); *State v. Finney*, 65 Idaho 630, 150 P. (2d) 130 (1944).

⁶⁷ *People v. Hulbert*, 131 Mich. 156, 91 N.W. 211 (1902). But cf. *Battle Creek v. Resort Assn.*, 181 Mich. 241, 148 N.W. 441 (1914).

⁶⁸ *Bino v. Hurley*, 273 Wis. 10, 76 N.W. (2d) 571 (1956).

⁶⁹ *Pounds v. Darling*, 75 Fla. 125, 77 S. 666 (1918).

⁷⁰ Cf. *In re Clinton Water District*, 36 Wash. (2d) 282, 218 P. (2d) 309 (1950), where the court required the city in a condemnation suit to compensate the landowners for the value of their riparian rights which would be taken away by the operation of a public health statute applicable when the city used the waters for a public supply.

⁷¹ *Salt Lake City v. Young*, 45 Utah 349, 145 P. 1047 (1915); *Ophir v. Ault*, 67 Utah 214, 247 P. 290 (1926); *New York v. Kelsey*, 143 N.Y.S. 41 (1913); *West Frankfort v. Fullop*, 6 Ill. (2d) 609, 129 N.E. (2d) 682 (1955); *Durango v. Chapman*, 27 Colo. 169, 60 P. 635 (1900); *State v. Perley*, 249 U.S. 510 (1919), affg. 173 N.C. 783, 92 S.E. 504 (1917).

⁷² 111 N.Y.S. 722 (1908).

compensation.⁷³ In *Bountiful City v. De Luca*⁷⁴ the Utah Supreme Court refused to enforce a city ordinance so as to exclude a sheep herder from pasturing his flock along the city's water source. The court limited the ordinance to apply only if the defendant did not use reasonable care to prevent pollution from the grazing of his sheep. In the Washington decision of *In re Clinton Water District*,⁷⁵ the court required the city to compensate riparians for the decrease in the value of their lands which would result from the application of state public health laws when the city began using the water for its municipal supply.

In both the *George* and the *Bountiful City* cases, the court appears to be bothered by the fact that if the ordinances in question were upheld or strictly applied, the defendants would be deprived of the only feasible use of their particular pieces of land. In effect, the ordinances would do more than regulate the use of land; they would deprive the owner of his land by depriving him of the only practical use of it under the circumstances. There is little doubt that the courts deciding the *George* and *Bountiful City* cases would lend a more friendly ear to regulation which excluded one type of use, but, as a practical matter, permitted any of several other types of uses to be made of the property. The *Clinton Water District* decision may be distinguished on its facts as being an action of condemnation and not a determination involving the validity of a state or municipal regulation against pollution of a public water supply; however, in principle the case denies to the city power to prohibit pollution of its public water supply through use of the state police power. A city contemplating condemnation for a water supply would do well to give close consideration to the case and to the possibility that, in an eminent domain proceeding, it will be forced

⁷³ In the *George* decision, the public health regulation which the village tried to enforce against the defendant provided that the municipal corporation in whose favor the regulation was invoked was required to pay for any damages resulting from its enforcement. Although the court seemed to hold that the regulation without compensation would be invalid, it might be argued that the court was influenced by the terms of the regulation and therefore required the village to compensate the defendant if it intended to maintain the land use restrictions. See *Martin v. Gleason*, 139 Mass. 183, 29 N.E. 664 (1885); *Rockville Water & Aqueduct Co. v. Koelsch*, 90 Conn. 171, 96 A. 947 (1916). Both cases involved statutes which provided for an award of damages to the defendant where his activity was prevented because it caused damage to the public water supply.

⁷⁴ 77 Utah 107, 292 P. 194 (1930).

⁷⁵ 36 Wash. (2d) 282, 218 P. (2d) 309 (1950).

to compensate private individuals located on the watershed for any depreciation in value of their lands due to the prospective enforcement of existing ordinances or statutes against contamination of public water supplies.⁷⁶

In summarizing the state of the law relative to the exercise of police power to protect a city's water supply, the distinction between a regulation of the general rights of the public and a regulation of individual property rights must be drawn. Generally, a regulation of the public's rights will be maintained, if at all reasonable, since no private property is being appropriated. With reference to legislation which interferes with or eliminates private rights, in view of the clear-cut division of authority, it seems fair to conclude that the decision of the court will depend, not upon abstract principles of law or precedent, but upon the feelings and beliefs of the individual members of the court. In jurisdictions where private rights to the use of water have been firmly entrenched and dutifully respected, it will not be at all surprising if the courts require a municipality to make use of its power of eminent domain rather than its police power to safeguard the purity of its water supply.

IV. WATER DISTRICTS AND MUNICIPAL PARTICIPATION

A. *General Observations.* The foregoing parts of this paper have concerned the legal questions encountered by a municipality attempting on its own to obtain for itself and its inhabitants a supply of water either within or without its corporate limits. There is, however, a definite trend, as evidenced by state legislative activity, toward cooperation by municipalities as a unit with other persons or other governmental units in obtaining a joint supply of water. This may be agreement between municipalities to secure a joint source of supply, or an organized water district in which the municipality participates as a member.

There are several features of a joint endeavor to obtain a water supply which make it attractive to a municipality. First, since the monetary investment necessary to establish an operating water system is great, particularly where water is difficult to acquire, it is often advantageous to pool financial resources,

⁷⁶ The regulations of land use for the purpose of protecting the purity of water supplies are very similar to zoning regulations. It is notable that the courts have drawn no distinction between existing non-conforming uses and future uses as has been done in the instance of zoning.

thereby cutting the cost to the individual municipal corporation.⁷⁷ In this connection, if a municipality acts alone in establishing a reservoir, or other water facility, it will receive no compensation for any indirect benefits, such as stream flow regulation, afforded to other governmental units or private individuals. Cooperative endeavors provide for a share of the cost as well as of the benefit to be apportioned among the participating members. Secondly, a cooperative endeavor engenders a cooperative spirit between the municipality and its neighbors. This spirit is most beneficial to a city, town, or village looking beyond its corporate boundaries for a water supply or water transportation facilities. Thirdly, a joint venture, particularly a water district, may permit the exercise of greater powers to acquire water than usually are possessed by a single municipality. Fourthly, a joint endeavor often will allow the use of revenue raising measures separate from the revenue means available to individual municipalities, thereby providing a method to avoid the debt or tax limitations imposed on the individual municipality.⁷⁸

Legislative enactments providing for the formation of water supply districts are numerous. For the purposes of this paper, it is necessary to mention only certain kinds of water districts. Districts which are formed and operated independently of any participation by the city, town, or village governing body do not warrant special consideration, although the area within a municipality sometimes may be included in the district.⁷⁹ Even though not participating in an official manner the municipality may encourage action by its citizenry through these districts as a means of bringing water into the area. Nevertheless, from the viewpoint of a municipal government seeking a water supply for its inhabitants, a district act which completely ignores the municipal unit is of little value.

Another type of water supply district is that in which the

⁷⁷ The condemnation of conflicting water rights, the housing of waterworks facilities, and the excavation for pipelines are but a few of the instances in which the cost for jointly operating municipalities will be only slightly more than that for a municipality acting alone.

⁷⁸ See 38 AM. JUR., Mun. Corp. §435 (1941); 94 A.L.R. 818 (1935).

⁷⁹ For examples of water district acts in which the municipal governments are denied any participation, see Okla. Stat. (1951) tit. 82, §§701 to 764; N.M. Stat. Ann. (1953) §§75-18-1 to 75-18-39; Tenn. Code Ann. (1955; Supp. 1958) §§6-2601 to 6-2627; Idaho Code Ann. (1947; Supp. 1957) §§42-3201 to 42-3227; Mo. Stat. Ann. (Vernon, 1949) §§247.230 to 247.670.

municipality plays a part in the formation and/or operation of the district. In these districts the municipality, through its governing body, works along with other municipalities and individual citizens in bringing potable water into the district area. A final category of districts includes those which are organized and managed solely by joint cooperation of two or more municipalities through the governing bodies of the municipal units. Enactments of the legislatures enabling the formation of water supply districts which allow or require action by municipal governments are the ones which will assist the municipality to answer the growing demand for water by its inhabitants. This is the type of water district act which deserves careful consideration in a study of the methods available to the municipal unit to secure a water supply.

B. Districts Allowing Partial Participation by Municipal Governments. There are two methods commonly employed in water district acts for permitting a degree of participation in district affairs to the municipal governments encompassed within the area of the district. Participation may be provided, first, in the procedure for forming the district or, second, in the provisions for management of the operations of the district. The first is characterized by a procedural provision permitting the municipality on behalf of its inhabitants to sign the petition,⁸⁰ initiate the proceeding,⁸¹ or appear at the hearing⁸² for the formation of the district. Although district acts vary considerably in their procedure for establishment, there are several which allow only this form of participation by the municipal officials and fail to give further recognition in any other provision to the representatives of the interests of the municipal unit. A municipality which is seeking active management in the affairs of its water district needs greater recognition than is afforded by a district act allowing municipal participation only at the formation level.

When compared with district acts giving no consideration to the municipal government, an act allowing the municipality to sign a petition, initiate a proceeding, or appear at the hearing for or against the establishment of a district provide certain

⁸⁰ Ohio Rev. Code Ann. (Page, 1953) §6101.05; S.D. Laws 1957, c. 492, §5; W. Va. Code (1955) §1409(38b).

⁸¹ Mich. Stat. Ann. (1958) §5.2769(83); Ohio Rev. Code Ann. (Page, 1953) §6119.02; N.D. Laws (1957) c. 383, §2.

⁸² E.g., County Water Districts Act, 11 N.Y. Consol. Laws (McKinney, Supp. 1958) §255.

worthwhile benefits for the city, town, or village having a duty to acquire and maintain a water supply for its inhabitants. The municipal unit supplying water or having the general duty of safeguarding the interests of the people in an adequate supply of potable water will be aware of the need for additional supplies at a much earlier time than the individual water user. Municipal action on a petition for the establishment of a district will activate, alert, and encourage an otherwise unaware or lethargic population and thereby avoid a possible water crisis in the future. Representation of its inhabitants by the municipal corporation in signing a petition also will eliminate the difficulty of securing signatures within the municipality thereby facilitating the organization of a district. Probably, the most important benefit to a municipality from being allowed to initiate by petition proceedings for the formation of a water district is the opportunity afforded thereby to determine or influence the decision of what is included in the petition and thereby in the charter of the district. The Ohio Regional Water and Sewer Districts Act,⁸³ for example, provides that the petition shall set forth the purpose and boundaries of the proposed district and the manner of selection, number, term, and compensation of the governing body of the district.⁸⁴ It is very possible that under this act a municipality could secure adequate representation on the board of directors by having the right to sign the petition on behalf of its inhabitants.

The second method commonly employed to allow municipal participation in the affairs of the district is for the municipality to be represented on the board of directors of the water supply district. District acts in West Virginia,⁸⁵ Minnesota,⁸⁶ and Montana⁸⁷ provide for representation of the municipality as a unit. The West Virginia act provides that cities of 3,000 to 18,000 population within the district have one representative on the board and cities over 18,000 population have two representatives. If the number of city representatives totals three or more, no additional members at large are included. City representatives are appointed by resolution of the municipal

⁸³ Ohio Rev. Code Ann. (Page, 1953) §§6119.01 to 6119.42.

⁸⁴ *Id.*, §6119.02.

⁸⁵ Public Service Districts for Water & Sewage Services Act, W. Va. Code (1955) §1409(38c).

⁸⁶ Watershed Act, Minn. Stat. Ann. (Supp. 1957) §112.37.

⁸⁷ County Water Districts Act, Mont. Rev. Code Ann. (Supp. 1957) §16-4506.

governmental body. In Minnesota, under the Watershed Act, managers of the board suggested in the petition are selected by the Water Resources Board as "representative of the local units of government affected."⁸⁸ Montana, in the County Water Districts Act, requires five directors to be elected at large and permits each mayor of the municipalities included in the district to appoint one additional representative of the municipality to the board.

From the viewpoint of a municipality desiring to work through a local district to obtain a water supply, representation on the board of directors is very important. Once the municipal government has been designated as the medium for treating the water supply problems of its people, it should not be supplanted in this duty when a local water district is formed.

C. Districts Composed Solely of Governmental Units. 1. *General.* In eastern states where much of life's activity is centered in and about the cities, towns, and villages, the duty of supplying potable water generally has been assigned to the municipal governments rather than to local water districts organized and managed by the individual inhabitants of the area. In the eastern states, where once water supplies were considered unlimited, the task of acquiring additional water for municipal uses is becoming more difficult. For these reasons, groups of municipalities, rather than their inhabitants, are turning toward cooperative endeavors such as water districts to provide the water required for their municipal works. As a result there has been a recent growth in the number of legislative acts enabling the formation of districts organized solely on the basis of municipal corporations and managed solely through the governing bodies of the various member municipalities.⁸⁹ Typical of this growth is the enactment by the Michigan legislature of three district acts for municipalities in a period of three years.⁹⁰

⁸⁸ Note 86 *supra*.

⁸⁹ Concern for the insufficiency of available water in the eastern half of the United States has brought about a growing demand for legislation not only in the area of municipal water supply development but also in the area of water use law affecting by legislation the common law doctrine of riparian rights.

⁹⁰ Charter Water Authorities Act in 1957, Mich. Stat. Ann. (1958) §§5.2533(31) to 5.2533(59); Sewage Disposal and Water Supply Districts Act in 1956, Mich. Stat. Ann. (1958) §§5.2769(81) to 5.2769(92); Sewage Disposal and Water Supply System Authorities Act in 1955, Mich. Stat. Ann. (1958) §§5.2769(51) to 5.2769(64). See also: Municipal Water Supply Authorities legislation of 1952, Mich. Stat. Ann. (1958) §§5.2533(1) to 5.2533(12); The Metropolitan District Act in 1929, Mich. Stat. Ann. (1958) §§5.2131 to 5.2145.

2. *Joint water supply agreement.* The least complex form of legislation providing for cooperation among municipalities is that which provides for what may be termed a "joint water supply agreement." Typical of this form of legislation is a Pennsylvania statute providing that two or more boroughs may unite in the construction or acquisition and maintenance of a water supply works.⁹¹ Connecticut,⁹² Michigan,⁹³ and New York,⁹⁴ in addition to joint action, permit the cities to appoint a board to handle the affairs of their joint acquisitions. The term "district" is misleading since there actually is no new governmental subdivision or district created. The arrangement is based solely on contracts between municipalities and the only relation of a joint water supply arrangement to a water district is the provision, if any, for the appointment of a joint board to handle the water supply facilities.

The benefit derived from a joint water supply agreement is primarily that of mutual financial assistance since municipalities are given no additional powers under the enabling legislation to facilitate the acquisition of a water supply other than the power to cooperate and contract with one another and the power to hold property jointly. The statutes are most important, however, in eliminating any question which might be raised concerning the power of a particular city to enter into such an agreement with another municipal government.

3. *Municipal water districts.* The joint water supply agreement has certain definite advantages for the cooperating municipal membership; nevertheless it is not nearly as popular or useful as a metropolitan water district. A metropolitan water district is a separate political subdivision of the state formed by the governing bodies of two or more existing governmental units⁹⁵ for the purpose of obtaining a water supply. The only territory

⁹¹ Pa. Stat. Ann. (Purdon, 1957) tit. 53, §47435. See also Ill. Rev. Stat. (1957) c. 24, §75-1; N.C. Gen. Stat. Ann. (Supp. 1957) §§160-191.6 to 160-191.10.

⁹² Conn. Gen. Stat. (Supp. 1955) §§344d to 346d, as amended by Pub. Act. No. 13, §35 (1957).

⁹³ Mich. Stat. Ann. (1958) §§5.2532(1) to 5.2532(5).

⁹⁴ 23 N.Y. Consol. Laws (McKinney, 1954) §§110-117.

⁹⁵ Several of the water district acts discussed in this section envisage the formation of districts composed not only of cities, towns, and villages but also of counties, townships, and even special districts. In some states, the district acts are sufficiently broad to permit the association of more than one district forming a new and larger district unit. In other states, the language of the acts would exclude participation by water districts. For example, see the North Carolina Water and Sewer Authorities Act, N.C. Gen. Stat. Ann. (Supp. 1957) §§162A-2(e) and 162A-3 which permit a district to be formed by two or more

of the district is that contained within the corporate limits of the constituent members. Legislation permitting water districts to be formed on the basis of governmental units has been enacted in Connecticut,⁹⁶ Delaware,⁹⁷ Maryland,⁹⁸ Michigan,⁹⁹ New Mexico,¹⁰⁰ North Carolina,¹⁰¹ Pennsylvania,¹⁰² Utah,¹⁰³ Virginia,¹⁰⁴ Washington,¹⁰⁵ and Wisconsin.¹⁰⁶ A metropolitan water district, in four states,¹⁰⁷ is formed by resolution or ordinance of the governing body of each included governmental unit approving the establishment of a district and adopting a charter or articles of incorporation. In five states¹⁰⁸ a metropolitan water district is formed on the basis of a vote in favor of the district and its charter by a majority of the inhabitants of each governmental unit concerned. The Virginia act requires an election within any particular unit only if ten percent of the voters demand it.¹⁰⁹ Michigan has two acts requiring a vote of the people and two permitting organization by the governing bodies of the political units.¹¹⁰

political subdivisions which include cities, towns, incorporated villages, counties, sanitation districts, and other political subdivisions or public corporations of the state. Compare the New Mexico Water Supply Associations Act, N.M. Stat. Ann. (Supp. 1957) §14-40-75, which includes only incorporated cities, towns and villages. In this paper, the term "governmental units" rather than "municipal units" is used so as to include all of the possible member governments instead of cities, towns, and villages only.

⁹⁶ Metropolitan District Act, Conn. Gen. Stat. (Supp. 1955) §§347d-353d, as amended by Pub. Act No. 13, §36 (1957).

⁹⁷ Water and/or Sewer Authorities Act, Del. Code Ann. (Supp. 1956) tit. 16, §§1401-1421.

⁹⁸ Water and/or Sewer Authorities Act, Md. Code Ann. (1957) art. 43, §§445-466.

⁹⁹ Metropolitan District Act, Charter Water Authorities Act, Municipal Water Supply Authorities legislation, Sewage Disposal and Water Supply System Authorities Act, note 90 *supra*.

¹⁰⁰ Water Supply Associations Act, N.M. Stat. Ann. (Supp. 1957) §§14-40-75 to 14-40-90.

¹⁰¹ Water and Sewer Authorities Act, N.C. Gen. Stat. Ann. (Supp. 1957) §§162A-1 to 162A-19.

¹⁰² Municipality Authorities Act of 1945, Pa. Stat. Ann. (Purdon, 1957) tit. 53, §§301-322.

¹⁰³ Metropolitan Water Districts Act, Utah Code Ann. (1953; Supp. 1957) §§73-8-1 to 73-8-55.

¹⁰⁴ Water and Sewer Authorities Act, Va. Code. (1956 repl.; Supp. 1958) §§15-764.1 to 15-764.32.

¹⁰⁵ Metropolitan Municipal Corporations Act, Wash. Laws (1957) c. 213.

¹⁰⁶ Municipal Water Districts Act, Wis. Stat. (1957) §198.22.

¹⁰⁷ Maryland, New Mexico, North Carolina, and Pennsylvania.

¹⁰⁸ Connecticut, Delaware, Utah, Washington, and Wisconsin.

¹⁰⁹ Note 104 *supra*, at §15-764.6.

¹¹⁰ Note 90 *supra*. Metropolitan District Act and the Charter Water Authorities Act require approval by the electorate of each governmental component; Sewage Disposal and Water Supply System Authorities Act and the Municipal Water Supply Authorities legislation permit organization by the governmental bodies without an election.

Although in the establishment of a metropolitan water district, practical considerations will dictate that the component governmental units be located in the same general area, the existing legislation usually does not require that the units forming the district be adjacent to one another. It is possible, therefore, for municipalities separated by farming areas, for instance, to work together through a district even though the intervening farmers are in no way interested in a water supply district. On the other hand, most of the district acts provide for cooperation by governmental units rather than by cities, towns, and villages only.¹¹¹ In this way, a municipality which is distant from any other city, town, or village, nevertheless may cooperate with the county or township in which the municipality is situated.

All states which have passed enabling legislation for the establishment of water supply districts composed solely of governmental units have provided that the district board of directors be composed of representatives from the various member units. A majority of the statutes provide expressly that the chief executive or governing body of the political unit appoint its representative. The other statutes allow the manner of selection and appointment of directors to be determined by the component municipalities in the charter or articles of incorporation. In the district acts which set forth the manner of representation on the board, it is customary for each component unit, in addition to its one representative, to be granted extra representatives on the basis of property evaluation or water consumption within the particular unit.¹¹² By granting additional votes to larger governmental units, it is possible to provide a relatively equitable representation of all members' interests.¹¹³ Some of the statutes are silent as to the withdrawal from the district by a municipality; however, others set forth a procedure for withdrawal similar to that provided for joining the district.

To the municipal government which has the duty of furnish-

¹¹¹ Note 95 *supra*.

¹¹² In Michigan Charter Water Authorities Act, note 90 *supra*, at §5.2533(36), and in the Utah act, note 103 *supra*, at §73-8-20, as amended, the voting strength of individual representatives is increased by one vote on the basis of property evaluation within their respective governmental units. In Washington, note 105 *supra*, at §12, a detailed listing of representation is set forth. Wisconsin, note 106 *supra*, at §198.22(4a), grants additional votes to representatives of the governmental bodies on the basis of water consumption within the particular governmental unit.

¹¹³ The North Carolina act requires one director to be appointed by the state governor, note 101 *supra*, at §162A-5.

ing water to its inhabitants, a district formed by the governmental units and a board of directors appointed by the constituent municipal governing bodies and responsible directly thereto is a most satisfactory method of establishing and operating the water district. In this way the district becomes the medium whereby the municipality, by appointing skilled and competent representatives, may further its aim and fulfill its duty of acquiring water for its people.

D. District Powers and Financing. In each of the district acts providing for partial or total participation by the municipal unit, the general powers granted to the district are sufficiently extensive to accomplish the purposes of the organization. All of the acts permit the acquisition of property by the district, and certain acts delegate expressly to the district power to acquire by purchase or eminent domain property beyond the district boundaries.¹¹⁴ In states where district acts do not grant extraterritorial powers, court interpretation of the act must be relied upon to furnish these powers. Thus, the district, and the municipality acting through the district, face the same legal problems and questions regarding extraterritorial powers as does the individual municipality when it seeks to go beyond its corporate limits for a water supply.

In establishing the water district acts, no legislature has seen fit to delegate to the districts created general police power for the protection of their waters or facilities. The district is handicapped within and without its limits since it has no police power whatsoever. The district must rely on general statutes of the state to protect its waters and facilities. Besides state legislation it is possible that, in the interest of the health, safety, and general welfare of its own population, a municipality which is a member of the district and in whose borders the district facilities are located could use its own police power to protect the district's water and equipment from harm.

Since a most important aspect of the water district is its potential financing benefits to the municipalities associating therewith, a city contemplating the formation of, or association with, a water district will be much concerned with the financing structure and powers of the district. It would be beyond the scope of this paper to discuss the many details of the financial structure of

¹¹⁴ E.g., Wis. Stat. (1957) §198.12(1).

the various water district acts and since problems of financing and taxation are peculiar to the individual states it would serve very little purpose. There are, however, certain features of the revenue provisions which are common to many of the acts.

In establishing the district acts, the legislatures almost always have provided two standard financing devices for the district. These revenue measures include (1) the power to fix and collect charges for services and (2) the power to issue bonds.¹¹⁵ Service charges may be fixed without the approval of the electorate; however, some statutes require the rates to be reasonable,¹¹⁶ uniform,¹¹⁷ or equitable.¹¹⁸ Other statutes provide expressly that the rates charged are to be determined solely by the district board of directors.¹¹⁹ The power to issue bonds for major improvements generally is vested in the discretion of the board of directors, but a few jurisdictions require that the question of bond financing be submitted to the electorate.¹²⁰

In addition to granting power to charge for services and issue bonds, many of the statutes grant taxing power to the district.¹²¹ In some the power to tax is relatively unlimited; in others it can be used only for certain designated purposes.¹²² A few statutes grant the power to levy special assessments¹²³ while two others grant to the district power to charge tapping fees.¹²⁴ The Washington Metropolitan Municipal Corporations Act provides for the levy of a charge each year against the municipalities that comprise the district to furnish "supplemental income" for the district to pay the expenses which cannot be met by the other

¹¹⁵ E.g., Va. Code (Supp. 1958) §15-764.12(g).

¹¹⁶ Ohio Rev. Code Ann. (Page, 1953) §6101.24; Md. Code Ann. (1957) art. 43, §450(K); Del. Code Ann. (Supp. 1956) tit. 16, §1406(11).

¹¹⁷ Md. Code Ann., note 116 supra; Del. Code Ann., note 116 supra.

¹¹⁸ Utah Code Ann. (1953) §73-8-21(8).

¹¹⁹ Pa. Stat. Ann. (Purdon, 1957) tit. 53, §306(h); N.C. Gen. Stat. Ann. (Supp. 1957) §162A-6(i).

¹²⁰ Utah Code Ann. (1953) §73-8-22. Michigan Charter Water Authorities Act, note 90 supra, at §5.2533(44a), requires an election on the issue of bonds if demanded by two percent of the voters within the district. Wash. Laws (1957) c. 213, §45, requires an election whenever the district officers desire to issue general obligation bonds for capital improvements. Cf. §46 concerning revenue bonds for purposes other than capital improvements.

¹²¹ Michigan Charter Water Authorities Act, note 90 supra, at §§5.2533(46) and (48); Ohio Rev. Code Ann. (Page, 1953) §6119.06(M); Utah Code Ann. (Supp. 1957) §73-8-18(i).

¹²² The Michigan provisions, note 121 supra, permit taxing to pay interest on bonded indebtedness and for administrative expenses.

¹²³ Note 105 supra, at §50; Michigan Metropolitan District Act, note 90 supra, at §5.2134(e); Ohio Rev. Code Ann. (Page, 1953) §§6101.48, 6119.06(M).

¹²⁴ Note 98 supra, at §450(q); note 97 supra, at §1406(17).

sources of revenue.¹²⁵ This revenue device is a further recognition of the municipal government as the basis of the district rather than individual landowners.

E. *Summary.* Water supply district legislation enacted to facilitate cooperative effort in acquiring potable water and permitting either partial or total participation by the city as a governmental unit is not new or revolutionary. There are sufficient complete acts with substantial similarity to furnish adequate precedent and assistance to a legislature which is considering the adoption of such an act or to a city pressing for this legislation.

A city which has the municipal function of supplying its inhabitants with water should examine available district legislation carefully before acting to make certain that the city will be adequately represented in the affairs of the district. Where the prime interest of the city is to acquire additional water to be furnished to its inhabitants through its existing facilities, the city's interests will not be represented or protected by a board of directors elected at large from the district area. On the other hand, complete representation of the municipality may not be possible since lack of sufficient interest or official responsibility on the part of adjacent units of government may force the municipality to operate within a district composed of individual landowners instead of official governmental units. Once a municipality is assured of adequate representation in the operation of the district, it must consider the benefits accruing from associating with individuals or groups outside its corporate limits as opposed to acting alone. Present district acts do not provide any powers facilitating the acquisition of a water supply in addition to those already possessed by most individual municipal corporations. However, the powers granted to the district to provide for the financing of a cooperative water supply system more often than not will prove attractive and beneficial to the participating municipality.

V. WATER CONSERVATION FOR FUTURE MUNICIPAL NEEDS

A. *General Observations.* As the population increases and the economy expands, a greater amount of land once classified as rural or undeveloped is being subdivided for residential purposes or utilized for industrial location. These developments add to the over-all demand for water supply, and, at the same time, by

¹²⁵ Note 105 *supra*, at §41.

their unregulated location, eliminate or destroy possible sites for the conservation of water supplies to answer their demand. The trend toward urbanization is pushing water supply sites farther and farther away from the reach of the central municipality, and large tracts of land once spotted with municipalities are growing rapidly into vast metropolitan areas.

The problem created by this expanding development, from the viewpoint of public health, safety, and general welfare, is that future sites for water development and conservation are being destroyed. Since the water areas are numbered and the quantity of water is limited, the unthinking destruction of water conservation areas increases the danger of water shortage and brings nearer the day of water rationing.

Haphazard land development has been recognized for many years as undesirable and detrimental to the public interest. In addition to eminent domain, land use planning and comprehensive zoning regulations have been employed to restrict the careless utilization of land. Although generally concerned only with the location of streets and parks, the size and location of structures, and the restriction of certain businesses and occupations, comprehensive planning and zoning action represents the most feasible method, short of eminent domain, available for conserving and protecting sources of water and areas for water development in the future.

B. *Land Use Planning.* Legislation providing for the initiation of land use planning by a governmental unit contemplates the systematic working out of a proposed developmental scheme for a particular area, culminating usually in the production of a master or comprehensive plan.¹²⁶ This plan then serves as a guide for the legislative body of the local governmental unit in enacting zoning legislation as well as in placing public buildings, parks, streets, etc. Actually, the most important value of land use planning is that it guides the actions of the local legislators; nevertheless, planning statutes have a bearing on the problem of conserving desirable water development sites.

Planning statutes provide for the appointment by the municipality of a planning commission empowered to develop a master plan for the municipal area including territory outside the mu-

¹²⁶ Cf. *Village of Lynbrook v. Cadoo*, 252 N.Y. 308, 169 N.E. 394 (1929); *Call Bond & Mortgage Co. v. Sioux City*, 219 Iowa 572, 259 N.W. 33 (1935).

municipal limits which bears a relation to planning within the municipality.¹²⁷ This plan reflects the proposed general development in terms of residential, commercial, and industrial use, and also sets out specific areas for the future location of streets, public parks, public buildings, and improvements.¹²⁸ The language of the statutes is sufficiently broad to include planning for the location of water reservoir sites and water supply areas.¹²⁹ Once adopted by the municipal legislature, this plan becomes the official guide for future location of public buildings and improvements.¹³⁰ By adopting the plan, the municipality has given official notice of its intention to take specific areas by purchase or condemnation in the future. The effect of this notice is to cloud, in an unofficial manner, the title of the land to be taken and to discourage thereby the development of the land.¹³¹ Accordingly, the area likely will not be greatly developed until the municipality acquires it for the designated public purpose. This indirect method of reservation, however, is effective only as to lands that ultimately will be taken for public use. Development in the general watershed area not designated for condemnation will be unaffected by the adoption of a master plan.

C. *Land Reservation by Statutory Procedure.* The adoption of a master plan may provide in an extra-legal way for the preservation of desirable sites for future public improvements; how-

¹²⁷ E.g., Mich. Stat. Ann. (1958) §5.2996; Pa. Stat. Ann. (Purdon, 1957) tit. 53, §30653 (second class cities); N.H. Rev. Stat. Ann. (1955) §36:13; Ky. Rev. Stat. (1956) §100.044(1) (first class cities); Mass. Laws Ann. (1952) c. 41, §81D; Cal. Govt. Code Ann. (Deering, 1958) §65-460.

¹²⁸ E.g., Mich. Stat. Ann. (1958) §5.2996; Pa. Stat. Ann. (Purdon, 1957) tit. 53, §30653 (second class cities); N.H. Rev. Stat. (1955) §36:13; Ky. Rev. Stat. (1956) §100.046 (first class cities); Mass. Laws Ann. (1952) c. 41, §81D.

¹²⁹ Note 127 *supra*. Some statutes provide expressly for designation of the general location and extent of facilities for water supply. E.g., Mich. Stat. Ann. (1958) §5.2996; N.H. Rev. Stat. Ann. (1955) §36:13; Ky. Rev. Stat. (1956) §100.046 (first class cities).

¹³⁰ E.g., statutes requiring approval of location of public improvements and buildings by the planning commission after an official plan has been adopted: Mich. Stat. Ann. (1958) §§5.2999, 5.3000; Ky. Rev. Stat. (1956) §§100.059 (first class cities), 100.680 (third, fourth, fifth, and sixth class cities); Cal. Govt. Code Ann. (Deering, 1958) §§65549-65553. Some statutes limit municipal action only as to the location of public streets and highways. E.g., Mass. Laws Ann. (1952) c. 41, §81G. Even without statutes expressly requiring the municipality to follow a master plan, the efforts and conclusions of the municipal planning commission represented in the plan coupled with official adoption of the plan by the local governing body renders the plan a clear indicator of the future actions of the municipality. In planning the private development of land, it would be most unwise to ignore the directions of the master plan solely on the basis that the plan need not be followed by the municipal governing body.

¹³¹ See Cram, "Master Planning Creates Clouds on Titles," 35 MICH. SR. B. J. 9 (April 1956).

ever, most states have provided a statutory method for the official reservation of lands for certain public purposes. For the most part, the statutes apply only to the reservation of lands for future use as streets and highways; nevertheless, they deserve consideration as possible methods which may be used in future legislative enactments to secure the reservation of lands for water development and conservation.

A majority of the states, having provided for the establishment of a municipal planning commission,¹³² permit the municipality to pass an ordinance prohibiting the granting of a building permit for any structure to be located on the land charted for use in the future as a public street or highway.¹³³ Provision is made, however, for granting permits for the location of structures in areas marked for public taking if the property will not yield a reasonable return to the owner unless such permit is granted, or if "the grant of such permit is required by considerations of justice and equity."¹³⁴

The Michigan act, in addition to the preservation of future street sites, allows the municipality to deny a permit for building in "any park, playground or other public grounds."¹³⁵ New Jersey, in addition to street sites, permits the municipality to prohibit buildings in a "drainage right of way."¹³⁶ It is possible under the Michigan act to argue that sites for the future storage and development of a water supply may be protected under the language "public grounds."¹³⁷ These statutes, however, are uncommon, since in the majority of states the provisions are limited to a denial of building permits for construction in street sites.

The statutes give no clear delegation of power to the municipi-

¹³² It should be noted that the municipal planning commissions generally have the duty not only to formulate a master plan but also to develop charts and plats detailed as to the exact location of public improvements. Statutes allowing the denial of permits for building on certain lands refer to the lands charted on a detailed plat and not to those lands designated for future use on the general master plan only.

¹³³ E.g., Md. Code Ann. (1957) art. 66B, §§31, 32; 20 N.Y. Consol. Laws (McKinney, 1951) §35; N.H. Rev. Stat. Ann. (1955) §36:30.

¹³⁴ N.H. Rev. Stat. Ann. (1955) §36:31. A provision similar in content to the New Hampshire statute appears as part of all statutes allowing permits to be denied for building on lands charted for future municipal acquisition.

¹³⁵ Mich. Stat. Ann. (1958) §5.3007(4).

¹³⁶ N.J. Stat. Ann. (Supp. 1957) §40:55-1.38. Drainage right-of-way means the "lands required for the installation of storm water sewers or drainage ditches or required along a natural stream or watercourse for preserving the channel and providing for the flow of water therein to safeguard the public against flood damage. . . ." Id. at §40:55-1.31.

¹³⁷ Note 135 supra.

palities to control building in proposed streets or public grounds outside the municipal limits.¹³⁸ In some states where the master plan may include areas outside the municipality bearing a relation to the municipal planning, it is possible to argue, under the particular language of the statutes, that the adopting of a detailed plat of proposed streets based on the master plan gives to the municipality power to plat land for streets outside its limits and regulate building on such land.¹³⁹

With the growing need to conserve and protect areas suited for the development and storage of water supplies, new legislation enabling local units of government to conserve these areas will become imperative. Denying permits for building seems to be a practical and useful solution. However, in view of the constitutional prohibition against the taking of property for a public purpose without compensation, it must be recognized that there are limitations on the power of the municipality to prohibit building in areas designated for public use. Substantial or total depreciation in the value or use of a person's lands by reason of the denial of a building permit will render the denial unconstitutional, thereby necessitating the granting of a permit.¹⁴⁰

In two jurisdictions at least, Kentucky¹⁴¹ and Pennsylvania,¹⁴² a statutory scheme has been devised to enable a municipality to reserve lands for future street use without violating the constitutional rights of the landowner. The municipality, having designated on its official plats the location of future streets and highways, is entitled to have these locations reserved upon the payment of compensation as determined by a board of appraisers. Reservation of the lands for future streets does not in any way

¹³⁸ But cf. Ind. Stat. Ann. (Burns, 1951 repl.) §53-754 which allows the municipality to deny an "improvement location permit" for building in certain areas outside municipal limits if the unincorporated area outside the boundaries is not subject to existing county planning.

¹³⁹ Cf. Mich. Stat. Ann. (1958) §§5.2996, 5.3007(1), 5.3007(4).

¹⁴⁰ With the exception of cases in New York, there is a scarcity of cases on the question of the constitutionality of the denial of permits in particular instances. See *Rand v. City of New York*, 155 N.Y.S. (2d) 753 (1956), concerning substantial interference with landowner's use of his property; *Roer Constr. Corp. v. New Rochelle*, 136 N.Y.S. (2d) 414 (1954), where the entire property of a landowner was charted for highway purposes. In both cases, the court held that the denial of a building permit to the landowners constituted a taking of property without just compensation and was unconstitutional. Cf. note 166 *infra*.

¹⁴¹ Ky. Rev. Stat. (1956) §§100.790 to 100.830 (relates to third, fourth, fifth, and sixth class cities).

¹⁴² Pa. Stat. Ann. (Purdon, 1957) tit. 53, §§22777-22779 (relates to second class cities).

impair or limit the lawful use of the land by the owner, including the construction of buildings thereon. However, when the land is finally taken for the public use, no compensation is granted for the taking or injury of any structure built during the reservation period.¹⁴³

The compensatory scheme has certain advantages over the system of reserving lands through a denial of building permits. By compensating the owner, any and all lands desired by the municipality may be placed on reserve. A building permit may be denied without compensating the owner only if there is no substantial injury to the landowner. Further, under the compensation plan, structures erected on the land during the period of reservation do not add to the cost of condemnation since their value is not recoverable.¹⁴⁴ If regulation is carried out through denial of building permits, any variance which was necessitated under the terms of the statutes increases the cost of condemnation when the municipality finally takes the land.¹⁴⁵

The compensatory system of land reservation, of course, is not without difficulties. First, compensating the owner for reservation of his land presents a financial burden for the municipality which traditionally has insufficient funds to manage properly municipal affairs. Secondly, the statutory provisions, by permitting continued lawful use of the reserved land by the owner, open the door to possible destruction of the land for the public use intended. This danger is not very great when the intended use is for street construction, but it will increase if this statutory scheme is applied as a method to reserve lands for purposes of the conservation of natural resources.

D. *Zoning*. 1. *Legislative delegation of zoning power*. Before a municipality can consider the feasibility of zoning in order to conserve and protect a water source area, it must possess the delegated power to zone for this purpose. Zoning constitutes an exercise of the police power of the state,¹⁴⁶ which power is not

¹⁴³ The Kentucky provision allows reservation of land located as far as five miles from the municipal corporate limits. [Ky. Rev. Stat. (1956) §§100.790, 100.720]. The Pennsylvania act covers only land located within the municipal limits.

¹⁴⁴ Ky. Rev. Stat. (1956) §100.830; Pa. Stat. Ann. (Purdon, 1957) tit. 53, §22779.

¹⁴⁵ In re Southern Boulevard, Borough of Bronx, City of New York, 262 App. Div. 263, 28 N.Y.S. (2d) 386 (1941); Platt v. City of New York, 92 N.Y.S. (2d) 138, revd. on other grounds, 276 App. Div. 873, 93 N.Y.S. (2d) 738 (1949). Cf. Matter of City of New York, 196 N.Y. 255, 89 N.E. 814 (1909).

¹⁴⁶ Leary v. Adams, 226 Ala. 472, 147 S. 391 (1933); State v. Valz, 117 Fla. 311, 157

inherent within the general powers of the municipal government. Zoning power must be delegated by state constitution or statute, or municipal charter.¹⁴⁷ Without an expressed delegation of power, the municipality cannot enact zoning regulations or restrictions.

State legislatures have seen fit to grant zoning power to municipalities, realizing the need and importance of this function to orderly land development. The power has been limited to lands located within the municipal limits. Extraterritorial zoning power generally has not been granted, although, as has been noted, delegations of power enabling the municipality to preserve the purity of its existing extraterritorial water supplies are now quite common.¹⁴⁸

Power to enact zoning restrictions within the municipal limits must be construed in accordance with the terms of the legislative delegation of power. Municipal power to zone is limited and controlled by the provisions of the legislative grant.¹⁴⁹ Statutes delegating zoning power generally contain two separate provisions which are relevant here: (1) a list of objects and activities which may be regulated, and (2) a list of purposes for which regulations may be imposed. As to the first, municipalities traditionally may regulate the height and size of buildings and other structures, the percentage of the lot to be occupied, the size of yards, courts, and open spaces, the density of population and the location and use of buildings, structures, and land for trade, industry, residences and other purposes.¹⁵⁰ With reference to the purposes for which zoning regulations may be enacted, the statutes provide that regulations may be imposed to protect and preserve the public health, safety, and general welfare, as

S. 651 (1934); *Chicago v. Clark*, 359 Ill. 374, 194 N.E. 537 (1935); *Pritz v. Messer*, 112 Ohio St. 628, 149 N.E. 30 (1925); *Kroner v. Portland*, 116 Ore. 141, 240 P. 536 (1925).

¹⁴⁷ *Kass v. Hedgpeth*, 226 N.C. 405, 38 S.E. (2d) 164 (1946); *Clements v. McCabe*, 210 Mich. 207, 177 N.W. 722 (1920); 8 McQUILLIN, *MUNICIPAL CORPORATIONS*, 3d ed., §25.35 (1957). Legislative delegation of zoning powers to a municipality is constitutional. *Brady v. Keene*, 90 N.H. 99, 4 A. (2d) 658 (1939).

¹⁴⁸ Section II-E *supra*. See RHYNE, *MUNICIPAL LAW* 321-322 (1957), regarding the few examples of extraterritorial zoning powers.

¹⁴⁹ *Marshall v. Salt Lake City*, 105 Utah 111, 141 P. (2d) 704 (1943); *Brown v. Board of Appeals*, 327 Ill. 644, 159 N.E. 225 (1927); *122 Main Street Corp. v. Brockton*, 323 Mass. 646, 84 N.E. (2d) 13 (1949); *Kass v. Hedgpeth*, 226 N.C. 405, 38 S.E. (2d) 164 (1946); *Holzbauer v. Ritter*, 184 Wis. 35, 198 N.W. 852 (1924).

¹⁵⁰ Ill. Rev. Stat. (1957) c. 24, §73-1; Md. Code Ann. (1957) art. 66B, §21; N.H. Rev. Stat. Ann. (1955) §31:60; N.J. Stat. Ann. (Supp. 1957) §40:55-30; Pa. Stat. Ann. (Purdon, 1957) tit. 53, §14752.

well as to lessen traffic congestion, secure safety from fires, provide adequate light and air, prevent overcrowding and facilitate adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.¹⁵¹

Zoning power, as delegated to the municipalities, is limited to the regulation of specified objects and activities for certain stipulated purposes.¹⁵² If the preservation of water development sites cannot be accomplished in a practical manner by means of the specific regulations and restrictions provided in the statutes, or if the safeguarding of water sites is not a lawful purpose for which zoning may be utilized, the zoning power will furnish no solution to the problem of disappearing water source areas.¹⁵³

The statutory listing of objects and activities which may be regulated is broad, and appears adequate to permit the regulation and restriction of undesirable development in the area proposed for water conservation or storage. Regulation of the size of yards and courts, coupled with regulation of the density of population, if necessary, provides a useful way of facilitating drainage in the area and preserving the watershed. From the viewpoint of safeguarding water development areas, the most appropriate type of regulation permitted under the delegation of zoning powers is the regulation of the use of land and structures for trade, industry, residences, and other purposes. Through this type of regulation, the municipality is able to exclude from the water conservation area businesses which would tend to destroy the water supply by pollution as well as activities on the land which might be detrimental to the area as a good watershed.

In listing the promotion of health, safety, and general welfare as one of the purposes for which zoning may be exercised, the legislatures have delegated to municipalities power to zone to the fullest extent and for the widest purpose consistent with constitutional principles. Preservation of existing potable water supplies clearly is in the interest of the public health, safety, and general welfare. There is no doubt that conservation of our natural resources for man's future use is within the statutory

¹⁵¹ Ill. Rev. Stat. (1957) c. 24, §73-1; Md. Code Ann. (1957) art. 66B, §21; N.H. Rev. Stat. Ann. (1955) §31:62; N.J. Stat. Ann. (Supp. 1957) §40:55-32; Pa. Stat. Ann. (Purdon, 1957) tit. 53, §14754.

¹⁵² Notes 150, 151 *supra*.

¹⁵³ The ability of the municipality to zone legally must be construed according to the terms of the legislative grant of power. Note 149 *supra*.

provision permitting zoning to be utilized for the purpose of public health, safety, and general welfare.¹⁵⁴ Nevertheless, it must be pointed out that, although justified as protecting the public health, safety, and general welfare, the conservation of natural resources generally has not been considered the purpose of zoning regulations. As evidenced by the particular purposes set forth in the statutes delegating power, zoning traditionally has been used for the purpose of avoiding slums and maintaining healthful and attractive residential areas. Whether, under traditional statutes granting zoning powers, a court will allow zoning for conservation purposes is a matter for speculation.¹⁵⁵ However, if a court is apprised of the necessity for conserving natural resources, the provision in the statutes delegating power to zone in the interest of the public health, safety, and general welfare is sufficient to allow the municipality to zone to preserve sources of potable water for future use.

In a few states, the legislatures, in delegating zoning powers to local governmental units, have recognized the possible use of zoning to conserve natural resources.¹⁵⁶ These states provide expressly that zoning regulations may be enacted for conservation

¹⁵⁴ *Hudson Water Co. v. McCarter*, 209 U.S. 349 (1908), the right of New Jersey to prohibit transportation of water from New Jersey streams to New York was upheld as a valid use of the police power to protect the waters of New Jersey. Cf. *In re Willow Creek*, 74 Ore. 592, 144 P. 505 (1914). See *Walls v. Midland Carbon Co.*, 254 U.S. 300 (1920), concerning preservation of natural gas; *Ohio Oil Co. v. Indiana*, 177 U.S. 190 (1900); *Henderson Co. v. Thompson*, 300 U.S. 258 (1937), restricting the use of sweet gas; *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8 (1931), affg. 110 Cal. App. 123, 293 P. 899 (1930), upholding as a valid police regulation the California conservation statute. This statute is now found at Cal. Pub. Res. Code Ann. (Deering, 1954; Supp. 1957) §§3000 et seq.; *Richfield Oil Corp. v. Crawford*, 39 Cal. (2d) 729, 249 P. (2d) 600 (1952), permitting the legislature to provide for the prevention of the waste of oil and gas; *Julian Oil & Royalties Co. v. Capshaw*, 145 Okla. 237, 292 P. 841 (1930); comment, 19 CALIF. L. REV. 416 (1931).

¹⁵⁵ Although the statutes delegating zoning power to municipalities set forth the protection of the public health, safety, and general welfare as a legitimate purpose for which the zoning power may be exercised, this general purpose is listed with other more specific purposes which are all directed toward the preservation or establishment of healthful conditions in the specific area which is zoned. Under the rule of statutory construction, *ejusdem generis*, the general purpose would be interpreted in the light of, or limited by, the specific purposes enumerated.

¹⁵⁶ Ind. Stat. Ann. (Burns, 1951 repl.) §53-756(5) provides that a municipality may "classify and designate the rural lands amongst agricultural, industrial, commercial, residential and other uses and purposes." Va. Code Ann. (1956 repl.) §15-844 allows counties to zone "for the purpose of promoting health, safety, order, prosperity, the conservation of natural resources and the general welfare." Minn. Stat. Ann. (1947) §§396.01, 396.03(5), permit certain counties to zone "to conserve and develop natural resources." See also Pa. Stat. Ann. (Purdon, 1956) tit. 16, §§2026, 5226 (counties); Wis. Stat. Ann. (1957) §§60.74(1), 60.74(3) (towns); Mich. Stat. Ann. (1958) §§5.2961(1), 5.2963(1) (county and township).

purposes. The Georgia statute, for example, states that municipalities may adopt zoning regulations for the purpose, among others, of "conserving and developing the natural resources."¹⁵⁷ Provisions of this type extend the traditional concept of zoning purposes and clearly may serve as a basis for conserving areas for a water supply and for water development sites for future use. Statutes similar to the Georgia enactment are not very common, however, and, of the few state statutes existing, most are limited to zoning by authorities in the counties where most undeveloped land is located.¹⁵⁸

2. *Extraterritorial zoning power.* Since municipalities generally have not been granted power to zone beyond their corporate limits, the most direct method available for a municipality to accomplish extraterritorial zoning is to cooperate with governmental units controlling the outside territory.¹⁵⁹ Often this cooperation will be informal, without statutory basis. On the other hand, statutory authorization may exist, as in Illinois, for the cooperation of local units of government in matters pertaining to the zoning of land in the general area of the municipality.¹⁶⁰ This authorization, however, in no way grants to a municipal unit power to enforce the zoning of areas beyond its corporate limits.

The most detailed method provided by statute for the cooperation of a municipality with outside governmental units is a provision, as in Kentucky, for the establishment of a city-county planning and zoning commission.¹⁶¹ This commission has the power to prepare for the area within and without the municipal boundaries a comprehensive development plan including a master plan, a zoning plan and regulations and restrictions relating thereto, and a subdivision control plan.¹⁶² Before the comprehensive plan with its zoning regulations and restrictions becomes effective, it must be approved by both the county and the city governing bodies.¹⁶³

¹⁵⁷ Ga. Code Ann. (1957) §69.802.

¹⁵⁸ Note 156 supra. For a consideration of rural zoning, see Warp, "The Legal Status of Rural Zoning," 36 ILL. L. REV. 153 (1941).

¹⁵⁹ For a discussion of extraterritorial zoning by a municipality, see Bouwsma, "The Validity of Extraterritorial Municipal Zoning," 8 VAND. L. REV. 806 (1954); Bartelt, "Extraterritorial Zoning: Reflections on Its Validity," 32 NOTRE DAME LAWYER 367 (1957).

¹⁶⁰ Ill. Rev. Stat. (1957) c. 34, §152n. See a similar provision at Ga. Code Ann. (1957) §69-807.

¹⁶¹ Ky. Rev. Stat. (1956) §§100.031-100.098 (county with first class city), 100.320-100.490 (county with second class city).

¹⁶² Id. at §§100.044, 100.350.

¹⁶³ Id. at §§100.048, 100.400-100.410.

A city-county planning and zoning commission is the most effective and efficient method now available whereby a municipality may effect extraterritorial zoning. From the viewpoint of the municipality, the lack of extraterritorial zoning powers restricts municipal activities and interferes with planning. On the other hand, in the interest of the orderly and balanced development of an entire area of which the municipality is only a part, it is desirable to "restrain" the municipality by preventing it from controlling the lands beyond its borders. The city-county commission allows the municipality to place before the county governing body, through the municipal representatives, plans and suggestions for regulation of lands outside the corporate limits. On the other hand, a joint commission, subject to the county officials as well as municipal authorities, provides representation and protection for the persons and lands beyond municipal borders.

The zoning power whether exercised by an inter-governmental organization or by a governmental unit outside the municipality, must be delegated by the state to the local unit. This delegation of power must be examined to determine whether it may be used by the local unit for the purpose of conserving the disappearing water development sites. Legal issues as to the scope of the delegated power are the same whether the power is exercised by a municipality within its limits or by a county or inter-governmental body outside the municipal limits.

3. *Reasonableness of zoning regulations.* If, in the interest of the public health, safety, and general welfare, action to conserve sources of potable water for the future requirements of a populace is permitted as a proper purpose of zoning, the sole issue remaining is what particular restrictions or regulations will be permitted. Because of the great divergence of factual settings, it is impossible to suggest in detail what specific regulations will be required to preserve effectively the natural water source area. The law as to the validity of a zoning regulation is the same as that of any police measure, namely, the regulation must be reasonable under the circumstances.¹⁶⁴ Determinations of the reasonableness of zoning regulations are controlled by the facts in each instance.¹⁶⁵ Probably a regulation aimed at keeping industry, which

¹⁶⁴ 58 AM. JUR., Zoning §14 (1948), and cases cited therein.

¹⁶⁵ *Bacon v. Walker*, 204 U.S. 311 (1907); *Wulfsohn v. Burden*, 241 N.Y. 288, 150

would pollute the future water source, out of the area of the water supply would be held reasonable. On the other hand, restrictions freezing completely the development of the area probably would be held unconstitutional as constituting a taking of property without compensation.¹⁶⁶ Between these extremes, the validity or invalidity of particular zoning restrictions will depend on the facts in the individual case.

E. *Summary.* A municipality desiring to preserve and protect waters and water development sites for future use must be concerned (1) with the protection of particular parcels of land for future condemnation, and (2) with the conservation of lands located in the general area of the chosen sites. With reference to property destined for acquisition, the municipality is interested not only in maintaining it in a condition fit for future public use but also in preventing development which would add to the cost of acquisition. The prime interest in lands surrounding the future public site is to regulate and restrict activities on those lands which may have a detrimental effect on the water supply or water development site.

Statutory delegations of power to municipalities which permit control and protection of lands marked for future condemnation exist as part of the planning and charting powers of the municipal corporation. The most common power is that allowing the municipality to deny building permits for construction in areas marked for future public use. On the other hand, the most effective power to reserve lands, presenting fewer constitutional difficulties, is that afforded by a statutory system providing for compensation to the owner for the reservation of his land. Both powers are now limited to regulation of land designated for street construction. With expansion, these systems may provide valuable assistance to the municipality trying to protect, for future condemnation, water supply and development areas.

The most feasible method available for regulating lands in the

N.E. 120 (1925); *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381 (1925); *Senefsky v. Huntington Woods*, 307 Mich. 728, 12 N.W. (2d) 387 (1943).

¹⁶⁶ See *Henle v. Euclid*, 97 Ohio App. 258 at 264, 125 N.E. (2d) 355 (1954), where the court stated: "The claim that the city has the right to 'freeze' plaintiff's property, preventing her from its beneficial use until the city gets around to appropriating it for public purposes as a part of the Lakeland Freeway, is without foundation. If the city needs the property in that development, then an immediate proceeding in eminent domain would end this lawsuit."

general area of the future public water supply or development is zoning. Through the zoning power, reasonable regulations may be imposed to avoid development in the area of the future public improvement which will prove detrimental to the site for the public use intended to be made of it. In most states, however, it is not settled whether the conservation of natural resources is a purpose, within the legislative grant of power, for which a municipality may exercise its zoning powers.

VI. CONCLUSION

The foregoing discussion, both of case and statute law, reveals that municipalities generally are well equipped to secure and protect a water supply for their inhabitants. Where, in some states, adequate powers for the municipality are lacking, they can be supplied with ease by legislative grant. Even in the field of future water needs, the municipalities may be able, and, with legislative delegation of authority, will be able, to protect and reserve water source areas and water development sites for future use without condemnation.

An increase in power enabling the municipality to reach out and take or reserve potable water supplies is a logical method of answering the growing demands for water within municipal boundaries. Yet as the demands for more and more water increase and the great water source areas dwindle before the encroaching urban population, it is time to question the feasibility and wisdom of continuing to arm small local segments of the government with extensive uncontrolled powers in the field of water supply. When the supply of water far outdistanced the demand, it made little difference where or how a particular group of people acquired their water. When the quantity of demand begins to approach the availability of supply, however, the uncontrolled grabbing of available water resources by municipalities will preclude equitable apportionment of the waters, interfere with the normal development of the state, and create serious conflicts between municipalities competing for water. The water resource is intimately connected with the expansion, development, and well-being of a state. As the excess of water supply in a state dwindles, it is questionable whether the people as a whole will be benefited by allowing municipal authorities representing their own particular interests to exercise great powers without state supervision in the acquisition and control of the state's water resources.