NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application of

WILMORITE, INC.

DEC 15-06

for a Declaratory Ruling Pursuant to the State Administrative Procedure Act Section 204 and 6 NYCRR Part 619

I. INTRODUCTION

On August 5, 1982, Wilmorite, Inc. of Rochester, New York, by its attorney, John A. Shields, requested a determination from the General Counsel as to applicability of Section 15-1501 of the Environmental Conservation Law ("ECL") to the proposed "Great Flats Critical Aquifer Area Project" of the City of Schenectady and Town of Niskayuna. Wilmorite's inquiry has been deemed a request for a Declaratory Ruling under Section 204 of the State Administrative Procedure Act and the Department's rules thereunder, 6 NYCRR Part 619.

Comments, information and authorities have been provided to this Department on the issue by counsel for Wilmorite, the Town of Niskayuna, the City of Schenectady, and the Town of Rotterdam.

Wilmorite contends that the City of Schenectady (hereafter "City"), and the Town of Niskayuna (hereafter "Town") are required to obtain a permit from the Department of Environmental Conservation ("DEC") pursuant to Sections 15-1501 et seq. of the ECL prior to furtherance of any proceedings pursuant to Article 2

of the Eminent Domain Procedure Law ("EDPL"). The City and Town have undertaken the Great Flats Critical Aquifer Area Project, pursuant to resolutions, for the stated purpose of "the protection, preservation and conservation of the water resources located within [the Great Flats Critical] Aquifer." A hearing was held August 10, 1982 pursuant to Section 203 of the EDPL to inform the public, take comment and form the basis of a City and Town determination concerning the project's public use, benefit, purpose, location, effect on the environment and residents and other factors cited in Section 204 of the EDPL. Counsel for the City and Town contend that the project does not come within those enumerated acts for which a permit is required under the ECL and that EDPL Section 207 provides the exclusive mechanism for judicial challenge by those persons who feel aggrieved by the City's and Town's administrative determination of the need, location or environmental impact of the proposed public project. This administrative determination is due ninety (90) days from the conclusion of the August 10, 1982 hearing.

II. THE PROJECTS

The proposed project of the City and Town is to acquire property and/or property rights. No construction is proposed. The stated intent and purpose of the City and Town is to protect, preserve and conserve the groundwater resources of the Great Flats section of the Schenectady Aquifer which is the sole source aquifer of the City of Schenectady and the major source for the

Town of Niskayuna. (Several neighboring communities likewise depend on this aquifer either through their own wells or by purchase of water from the City.)

According to the Report prepared by the City's Water Department for the August 10, 1982 hearing the project will accomplish the following:

1. Place the entire Great Flats Critical Area, Well Head Protection Area under public protection.
2. Provide protection of the Great Flats Wetlands, an integral part of the Aquifer.
3. Remove a major source of potential groundwater contamination.
4. Place 23% of the Aquifer Recharge within the Great Flats area under public control or ownership.

All the lands the City and Town are moving to condemn are in the Town of Rotterdam. A substantial portion of the land sought to be condemned consists of parcels subject to options of Wilmorite, Inc., or in other instances lands owned by Genesee Management, Inc., an affiliated corporation of Wilmorite, Inc. These lands are part of Wilmorite's proposed "Rotterdam Square Project", a retail shopping enterprise with a planned 650,000 square feet of gross leasable area, on about 83 acres of land. The Great Flats Critical Aquifer project, if undertaken, would leave the City and Town in control of approximately 200 acres. Approximately 31 acres of the Aquifer Project overlap with Wilmorite's 83 acres of planned shopping complex. The taking of this portion of land from Wilmorite would have the likely effect of preventing the construction of Rotterdam Square. (The

Aquifer Project also affects approximately 69 acres that the Town of Rotterdam was to receive from Wilmorite for parkland use.)

The Rotterdam Square Project was recently the subject of a State Environmental Quality Review hearing, hearing report and a Commissioner's Decision in connection with Wilmorite's application for several environmental permits (Project #447-07-01488, decision May 18, 1982). The Commissioner's Decision states:

> Foremost among the environmental issues and the one which ultimately led the Department to seek lead agency status was the concern for the Project's impact on the Schenectady/Rotterdam aquifer (the "Aquifer"). After a comprehensive, expert investigation and extensive testimony the conclusion reached in the Report is that the proposed Project, modified by certain conditions described below, will not have a significant effect on the Aquifer. Indeed, the proposed shopping center represents a far lesser risk than the existing land uses and transportation corridors in the area.

This decision approved issuance of permits contingent on several changes being made to Wilmorite's original project. DEC concluded that Wilmorite had met its burden of proof with respect to the requirements for various permits with the exception of the freshwater wetlands permit and an impoundment permit. Issuance of these permits depends on further submittals addressing what DEC considered to be the primary potential adverse environmental impacts of Wilmorite's project, namely the increased risk of flooding due to the filling of the wetland.

The City and Town have moved forward with the Great Flats project because they deem public control of the lands as necessary to protect the quality of the water supply notwithstanding the Commissioner's Decision to condition the development of Wilmorite's lands with measures to protect the aquifer.

Wilmorite has alleged that the City and/or Town are moving forward with the acquisition project more out of a motive to prevent commercial competition rather than the stated motive to protect the Great Flats Aquifer from contamination.

III. ISSUE

Despite the extensive hearings and public controversy surrounding the two projects, the question presented for Declaratory Ruling in this case is a narrow one: Do the City and Town need to apply for a permit from the Department in order to purchase or exercise eminent domain powers to acquire property for the protection of existing water supplies without contemplation of the construction of additional wells or increased quantities of withdrawals from the Great Flats aquifer source? This question can be stated as a generic issue of whether a person or public corporation must obtain a permit pursuant to Section 15-1501 et seq. of the ECL in order to acquire, take, or condemn lands for the purpose of protecting the aquifer that is the water supply for that person or public corporation.

I conclude that the ECL does require a permit in such a case and that the City of Schenectady and the Town of Niskayuna must apply to this Department prior to acquisition or exercise of eminent domain power to acquire lands and property rights to protect the Great Flats Aquifer.

IV. ANALYSIS

This ruling can be based entirely on the explicit provisions of the Environmental Conservation Law.

Section 15-1501 reads in pertinent part as follows:

> 1. Except as otherwise provided in this title, no person or public corporation who is authorized and engaged in, or proposing to engage in, the acquisition, conservation, development, use and distribution of water for potable purposes ... shall have any power to do the following until such person or public corporation has first obtained a permit from the department pursuant to this title:
>
> a. To acquire or take a water supply or an additional water supply from an existing approved source; or
>
> b. To take or condemn lands for any new or additional sources of water supply or for the utilization of such supplies; or ....
>
> 2. [Describes exemptions from permit requirements.]
>
> 3. [Refers to requirements that certain plans for facilities must be submitted to and approved by the Commissioner of Health.]

I have reviewed the judicial and Attorney General's opinions cited by counsel and find therein no conflict with the ruling made today. On the contrary, although no cases cited are specifically on point with the issue raised here, the

overwhelming weight of opinion supports the conclusion reached, namely that as in the words of the Legislative Findings for Article 15:*(1)

> Article 15 shall be construed and administered in light of the following findings of fact:
>
> 1. The sovereign power to regulate and control the water resources of the state ever since its establishment has been and now is vested exclusively with the State of New York except to the extent of any delegation of power to the United States; .... (Section 15-0103(1))

Hence, the State has the duty and authority to regulate water supply and the City's and Town's project to obtain additional control over the aquifer in question must be done pursuant to Departmental permit. Further explicit statutory policy is set out at Section 15-0105 as:

> In recognition of its sovereign duty to conserve and control its water resources for the benefit of all inhabitants of the state, it is hereby declared to be the public policy of the State of New York that:
>
> 1. The regulation and control of the water resources of the state of New York be exercised only pursuant to the laws of this state; ....

A close reading of Section 15-1501 in light of the foregoing provisions of Article 15 compels the result of this ruling.(2) The introductory paragraph of Section 15-1501 refers to the terms "acquisition", "conservation", "use" of water for potable purposes as objectives for which actions to control water supply must be authorized by permit. These same objectives are goals of the City and Town. Notwithstanding the City's and Town's intent

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* Case Notes follow this ruling.

to seek no greater quantities of water, the acts to take and/or acquire the lands forming the aquifer and water supply is the determinative fact which requires DEC oversight, according to Section 15-1501(1)(a).

Section 15-1501(1)(b) provides a complementary and independent basis for assertion of DEC's jurisdiction. The City and Town seek rights to land to conserve, and utilize water. The phrase "new or additional sources" is not defined in the statute.(3) However, the City's and Town's effort to obtain in fee or other property rights connotes the acquisition of additional rights to control a water supply not now so owned. Contrast this to the extent of ownership the City and Town possess with respect to their existing well fields.

The total and exclusive control of the land or the possession of certain development rights in the land which are related to water supply protection put the City and Town in a position of acquiring or taking lands for new or additional sources of water supply even if the City and Town choose not to seek permits to withdraw waters from the source below the lands.

Thus the fact that any waters within the Great Flats Aquifer may now already be transmitted to the water supply sources, i.e., the wells of the City and Town, does not alter the conclusion that when title is acquired to additional lands, it becomes part of the City's and Town's water supply and must be considered as a new or additional source of water supply, requiring a DEC permit.(4)

Additionally, Section 15-1501(2) does not include the acquisition of land for the purpose of protection of water supply as one of the exemptions from requirements to obtain a permit.

And lastly, there is the interpretation of the statutory requirements provided in Part 601 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR Part 601). The foregoing elements of this ruling are consistent with this interpretation. 6 NYCRR §601.1 sets out the jurisdiction and applicability of the Conservation Law from which Section 15-1501 of the ECL is derived. The approval requirements of Part 601 are applicable to identified entities proposing to:

> (b) acquire, take or develop any source of water supply in connection with such system;
>
> (c) acquire, take or develop any source of water supply in connection with an existing water supply system;
>
> (d) take or condemn any lands or other rights for water supply purposes; ...
>
> (m) perform any other acts covered by the statute, but not here specifically mentioned.

The predecessor statute to Section 15-1501 had been interpreted to require state approval prior to acquisition of any lands or other rights in connection with water supply purposes, except as specifically exempted in 6 NYCRR §601.3 of the regulations.(5) The noted exceptions do not pertain to the circumstances of this matter.

V. CONCLUSION

Section 15-1501 of the ECL applies to the project proposed to be undertaken. In order to proceed with the project the City and Town should make application through the Department's Regional Permit Administrator at the Region 4 Office, 2176 Guilderland Avenue, Schenectady, New York 12306.

DATED: Albany, New York
October 22, 1982

for Richard A. Persico
General Counsel/Deputy Commissioner

CASE NOTES

1. In Blomquist v. Orange County, 69 Misc.2d 1077, 332 N.Y.S.2d 546, the Supreme Court, Orange County held that the county was without any authority to purchase or condemn land for future reservoir purposes and the Court would enjoin any further acquisition of land for that purpose until the County complied with the Water Resources Law and obtained Water Resources Commission approval.

2. The Appellate Division, Third Department, in 1961, in the Petition of Suffolk County Water Authority, 12 A.D.2d 198, 209 N.Y.S.2d 978 upheld a decision of the Water Power and Control Commission involving allocation of water supply service area between local governmental entities as follows:

> The broad responsibilities to make determinations affecting the access to water resources of the State rests by law in the Commission (Conservation Law, Article V [Water Resources Law]). It must "control and conserve" the water resources "for the benefit of all the inhabitants of the state". City of Syracuse v. Gibbs, 283 N.Y. 275, 28 N.E.2d 835, 838.

3. Prior approval is required for a municipal corporation or other civil divisions to take or condemn lands for any "new or additional source of water supply". The term "source" does not indicate a whole territory from some part of which a municipality has taken a portion of its water supply, hence the taking of additional lands adjacent to New York City's existing "source" was deemed to be a taking of a new additional source of water supply in the 1909 case of Queens County Water Company v. O'Brien, 131 App. Div. 91, 115 N.Y.S.495.

4. The closest case paralleling the instant one is a 1945 Attorney General's opinion declaring that the Village of Liberty was required to obtain the consent of the Water Power and Control Commission prior to the purchase of 192 acres adjacent to its existing surface supply. Like the City's and Town's project, the acquisition was aimed solely at protecting the existing source and supply of the Village. The Attorney General stated:

> I am of the opinion that the acquisition of these lands as an addition to the present water system requires the approval of your Commission. The proper protection of the water supply and the water shed is a subject within the jurisdiction of the Commission (Conservation Law §523). The fact that Mud Pond now flows into Lilly Pond, the present source of water supply of the Village, does not alter the conclusion that when title to Mud Pond is acquired by the Village, it becomes part of the Village's water supply system and must be considered as a new or additional source of water supply, requiring your approval (Conservation Law §§521, 523).

5. Consistent with the regulation exemptions is the case of Mitchell v. Village of Croton-on-Hudson, 45 Misc.2d 910, 258 N.Y.S.2d 201 (1965). Prior approval of the State Water Resources Commission was not needed for condemnation of certain land by a village and for erection of a water storage tank where the reservoir was to draw water from the present village supply and would not result in an increase in the supply taken.