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STATE OF VERMONT
PUBLIC SERVICE COMMISSION

#1809

Petition of State Board of Public Works
vs.
North Branch Cemetery Association, Inc. re land condemnation.

Hearing at Montpelier, Vermont
June 14, 1934

PRESENT: Commissioners Cushing and West and Kathryn M. Levarn, Clerk

APPEARANCES: Hon. Lawrence C. Jones, Attorney General
for the State Board of Public Works

Peter Giuliani, Esq., City Attorney
for the City of Montpelier

Harold J. Arthur, Esq.
for Ralph W. Putnam and
North Branch Cemetery Association, Inc.

REPORT

This is a petition of the State Board of Public Works in which it seeks authority to flood the land of the petitionee, located in the town of Middlesex, and used exclusively as a burial place. The Board is engaged in a cooperative project with the Federal Government which will result in the building of a flood detention dam on the North Branch, so called. While it is not the present intention that the dam will permanently hold back the waters of the North Branch, the outlet is so constructed that it will only permit the discharge of the normal flow of the river. As a result of this the water will, at different times of the year, fill the pond back of the dam and will cause a flooding of the cemetery.

A study of the flow of the stream and the history of highwater on the North Branch discloses that water of varying depth will cover the cemetery at different times of the year, varying from the slight regular floods of spring when the depth will vary from a few inches to a foot or more, to the century floods of great intensity when the depth may equal fifty or sixty feet. During the intervening cycles the depth will be somewhere between these two extremes. At some season in each year, however, the cemetery will be under water.

In the prosecution of the flood control project on the upper waters of the Winooski, it is necessary to construct the dam at Wrightsville, the dam which will hold back the waters of the North Branch. This entire project is vitally necessary in the protection of lives and property in the Winooski Valley, it has the approval of the State Board of Public Works and the required sanction of the Governor. No question is raised by petitionee that the project will not promote the general good, nor

that it is not necessary.

By the terms of the act creating the State Board of Public Works the legislature clothed that body with unlimited powers in the taking of land and property necessary in the prosecution of any Federal cooperative project. This taking extends, even, to property devoted to a prior public use, thereby having no limitations. That the Board, in the exercise of its powers under the act, may take the land of the petitionee is beyond question.

Prior to 1927 there existed no provision of statute for the taking of cemetery property by eminent domain. In this year the legislature passed an act in which this power was conferred on public service corporations, No. 87 of the Acts of 1927. This act provides that the procedure to be followed in the condemnation of a cemetery or burial ground shall be the same and have the same effect as that prescribed for other condemnation by public service corporations. The act further provides that after final award and before the exercise of any rights in a cemetery the remains of the dead therein shall be removed. The expense of the removal, the costs of whatever land may be necessary for reinterment and the removal and reerection of headstones or monuments and other incidental necessary expenses shall be borne by the public service corporation for whose benefit the cemetery is condemned.

By the provisions of No. 5 of the Acts of the Special Session of July, 1933, the act creating the State Board of Public Works, the procedure is outlined to be followed by the Board and the Public Service Commission, in the exercise of the right of eminent domain. This procedure follows very closely that prescribed by the legislature for the taking of land and property by public service corporations; notice and hearing in accordance with the provisions of statute is required, findings that the construction and maintenance of the proposed project will promote the public interest and the general good of the State must be made, and further that the public necessity and interest requires that the State should acquire the property must be found, and judgment must be entered thereon. Obviously, the legislature intended to protect the rights of private property from an unnecessary or unlawful taking, even by an agency of the State.

It must then follow, that when the State Board of Public Works condemns a cemetery or burial ground either to flood or acquire land used for that purpose, or to acquire an easement or limited right therein, it is limited by the legislature in such act in the same manner as a public service corporation would be. To hold otherwise would be to disregard every human consideration for the sanctity of the final resting place of the dead, for it is obvious that such consideration moved the legislature in enacting the provisions of Section 4 of No. 87 of the Acts of 1927.

It being determined, then, that, in the event the State requires the right to flood or otherwise damage a burial ground, it must proceed in the manner prescribed by the legislature, that is, by removing the bodies, the question then arises as to the manner and by whom this task shall be performed. In the statutes above cited, this task was delegated by the legislature to the selectmen or cemetery commissioners. As public officials they are responsible for the maintenance of public cemeteries and it may develop, under certain circumstances, that they assume a degree of direction and control over private cemeteries. In the matter of the condemnation of cemeteries, both public and private, it is their duty to see to the removal of the dead. Obviously, the legislative intent is that the duty of the removal of the remains of the dead should devolve upon a body of officials responsible to the people, rather than upon the corporation seeking to condemn the burial ground or upon the private interests in such burial ground.

The State Board of Public Works is a governmental body. Its members are appointed by the Governor and it is, in fact, one of the most important agencies of the State in the present crisis. It has competence and responsibility; its acts are regulated by law and it can proceed only in a legal manner. It is fitting that to it should be delegated the task of changing the location of the cemetery and the removal of the bodies in conformity with the statute.

By the provisions of Sections 7 and 8 of No. 5 of the Special Session of 1933, the act creating the Board of Public Works and defining its powers and duties, provision is made for the apportionment of the expense of any public works for flood control constructed under its provisions, between the State and the municipalities in accordance with the benefits received. Obviously, the State and the municipalities benefited are

vitally interested in the expenditures necessary to complete such flood control projects. On the Board of Public Works devolves the necessity of making the expenditures which must subsequently be apportioned. To hold that the Board of Public Works should not be responsible for the removal and interment of the bodies in a cemetery the taking of which was necessary, would remove all protection to the State and the municipalities in the matter of expense.

ORDER

From a consideration of the evidence, the Commission finds and adjudges that the construction and maintenance of the Winooski Flood Control Project will promote the public interest and the general good of the State and that public necessity and interest requires that the State should acquire the right to flow and otherwise damage the property of the North Branch Cemetery Association, Inc. situate in the Town of Middlesex, which is used as a cemetery or burial ground and is more particularly described as follows:

> The North Branch Cemetery bounded as follows: northerly by the bridge leading from the Montpelier-Worcester road to the farm of E. J. Hill: easterly by the North Branch River; southerly by the North Branch River and the highway; westerly by the highway, meaning to include all the cemetery land owned and controlled by the North Branch Cemetery Association, Inc.

The Commission further orders that the remains of the dead in said North Branch Cemetery shall be removed by the Board of Public Works after legal notice to kindred and interred in some suitable cemetery and the Commission further orders that the entire expense of whatever land may be necessary for the reinterment of such remains and the cost of removal and the reerection of headstones or monuments now in said North Branch Cemetery shall be paid by the Board of Public Works.

Dated at Montpelier, County of Washington, State of Vermont, this 16th day of July, A. D. 1934.

Stephen S. Cushing )
) Public Service Commission of Vermont
E. H. West )

OFFICE OF CLERK

Filed: July 16, 1934

Attest: Kathryn M. Levarn
Clerk