

FILE

Subject

*Cities - Property
Acquisition & Disposal*

Copy to



STATE OF KANSAS

Office of the Attorney General

State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

VERN MILLER
Attorney General

March 22, 1974

Opinion No. 74- 97

Firman G. Gladow
Lyons City Attorney
114 East Ave. South
Lyons, Kansas 67554

Dear Mr. Gladow:

You inquire concerning the legal effect of certain proceedings of the City of Lyons, begun in 1948 pursuant to G.S. 1935 12-635 et seq.

That section provided thus in pertinent part:

"That the governing body of any city of the state of Kansas in or near where there is . . . a natural watercourse, the overflow from which . . . is liable to cause injury to any . . . public or private property, may, in order to prevent said injury, acquire by condemnation and eminent domain, or purchase, within or without said city limits, within five (5) miles therefrom, the land and easements necessary to construct drains, canals and artificial watercourses, or to widen and straighten existing drains and watercourses, . . . and may cause any and all other necessary work, construction and improvements to be made to protect said city and public and private property therein located from floods and damage by overflow . . ."

On June 17, 1948, the city governing body adopted the appropriate resolution required by G.S. 1935, 12-636. In December, 1948, a further resolution was adopted for the adoption of plans and specifications which had been submitted by an engineering firm, "providing for the widening and straightening of the channel of Salt Creek." Thereafter, the governing body appointed three appraisers pursuant to G.S. 1935, 12-639:

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"That the governing body shall appoint three disinterested householders of the said city to assess all damage to any and all property that will be injured or damaged by reason of said improvement. In fixing the amount of injury or damage to any property, said appraisers shall take into consideration the benefit, if any, that said property will receive by virtue of said improvements and if the benefit received shall be equal to or greater than the damage or injury to said property, . . . no damage shall be allowed."

By an order entered June 6, 1949, the city governing body adjusted and confirmed the report of the appraisers. In that report, payments authorized by the appraisers are stated to be either for "damage" or for "easement."

In the course of the proceedings, you indicate the authorized work was done on Salt Creek, which was straightened, deepened, widened and otherwise improved. You indicate that after the work was completed, some property owners apparently believed the City of Lyons, Kansas, had thereby purchased the property where the bed of the creek is located, and that from that time, maintenance of the creek was the responsibility of the city.

Accordingly, you inquire whether the City of Lyons did acquire title to the real estate described in the Order Adjusting, Equalizing and Confirming Report of Appraisers, dated June 6, 1949.

The procedure prescribed by G.S. 1935, 12-635 et seq., is not itself a condemnation act. At that time, cities were authorized to condemn land pursuant to G.S. 1935, 26-201 et seq. As a part of that procedure, it was necessary that the "governing body shall make an order setting forth such condemnation and for what purpose the same is to be used," and

"The governing body, as soon as practicable after making the order declaring the appropriation of such land necessary and the fixing of the benefit district, if any is fixed, shall present a written application to the judge of the district court of the county in which said land is situated describing the land sought to be taken and setting forth the land necessary for the use of the city and setting out the benefit district in full and praying for the appointment of three commissioners to make an appraisal and assessment of the damages therefor."

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In Cow Creek Valley Flood Prevention Ass'n v. City of Hutchinson, 166 Kan. 78, 200 P.2d 279 (1948), the court considered an action to enjoin proceedings initiated by the city for flood control purposes. One objection raised to the authorizing ordinance and resolution was that it violated the cash-basis law. The court stated thus:

"The claim that it violates the cash-basis law is without merit. Until the land is taken, there is no obligation upon the city to pay therefor. Under the statutes relating to condemnation in cities, it is not necessary to provide for the funds with which to pay the cost of lands condemned until copy of the report of the commissioners is filed with the city treasurer. The city treasurer then pays the awards to such persons as shall be entitled thereto and files a copy of such report . . . with the register of deeds Right of possession does not vest with the city until the report has been filed." 166 Kan. at 82.

The court clearly did not regard the procedure prescribed by G.S. 1935, 12-635 et seq., as one providing for the acquisition of title to property, i.e., as a method of condemnation. Nothing in the resolutions which you have forwarded, or in the Order Adjusting, Equalizing and Confirming Report of Appraisers, suggests that the resolutions and Order were part of a condemnation proceeding. The appraisements were made not by commissioners appointed by the District Court, as in a condemnation proceeding under ch. 26, G.S. 1935, but rather by three disinterested householders, appointed by the city governing body under G.S. 1935, 12-639. In the latter statutory scheme, there is no provision for any transfer of title to property, but only provision for payment of damage to property owners.

On the basis of the statutory provisions invoked in the 1948-1949 proceeding, we find no basis for concluding that title to the property described in the Order Adjusting, Equalizing and Confirming Report of Appraisers was transferred to the City as a result of the council's approval thereof. Although we find no decision of the Kansas Supreme Court dealing specifically with the rights acquired by the city under a flood control program under this provision, there appears to be no basis for concluding other than that, as you suggest, the City has acquired no more than a temporary easement to construct the improvements described in the various resolutions. In our view, in its Order of June 6, 1949, the City did not acquire any title or possessory interest in the described property, but merely approved the payment of money for damages caused to the described property resulting from the flood control or improvement program.

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If you should have further questions, please do not hesitate
to contact us.

Yours very truly,



VERN MILLER
Attorney General

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