

STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

November 17, 1976

ATTORNEY GENERAL OPINION NO. 76-348

Mr. Donald E. Martin
City Attorney
Legal Department of Kansas
City, Kansas
Ninth Floor - Municipal Office Building
One Civic Center Plaza
Kansas City, Kansas 66101

Re: Cities--Industrial Revenue Bonds--Eminent Domain

Synopsis: The Kansas industrial revenue bond act does not authorize cities which issue bonds thereunder to exercise the power of eminent domain to acquire sites for facilities which are financed by the proceeds of industrial revenue bonds.

* * *

Dear Mr. Martin:

You request that we reconsider Opinion No. 63-30, issued by Attorney General William Ferguson under date of April 16, 1963, concluding that a city does have the right to acquire a site by eminent domain for the purposes set out in the Kansas industrial revenue bond act, K.S.A. 12-1740 *et seq.*

K.S.A. 12-1740 of that act contains a lengthy declaration of legislative purpose to be served by the act by

"authorizing all cities of the state to issue revenue bonds, the proceeds of which shall be used only to purchase or construct, maintain and equip buildings and acquire

Mr. Donald E. Martin

Page Two

November 17, 1976

sites therefor and to enlarge or remodel buildings and equip the same, for agricultural, commercial, hospital, industrial and manufacturing facilities and to enter into leases or lease-purchase agreements with any person, firm or corporation for said facilities."

The substantive bond authority is set out at K.S.A. 12-1741 thus in pertinent part:

"Any city shall have power to issue revenue bonds, the proceeds of which shall be used only to purchase, construct, reconstruct, equip, maintain or repair buildings and to acquire sites therefor"

In concluding that cities were empowered to exercise the power of eminent domain, Attorney General Ferguson relied almost entirely on *City of Enterprise v. Smith*, 62 Kan. 815, 62 Pac. 324 (1900), a case which we believe requires a contrary conclusion. There, the city sought to acquire by eminent domain the land on which was situated the well from which the city water supply was drawn. The city began a condemnation action under an 1897 act a section of which expressly provided for condemnation by cities of waterworks property belonging to private corporations. It was objected that the section was unconstitutional because it was not expressed in the title of the bill. Omitting that part of the title not pertinent here, it stated thus:

"An act authorizing and empowering cities . . . to obtain . . . water . . . by purchasing or constructing, owning and operating water-works."

The city urged that the term "purchase" in the title was used in its technical legal sense, to mean any acquisition of land by any lawful act of the party, thus including condemnation. The court, however, ascribed to the word its popular meaning, acquisition by voluntary act or agreement for valuable consideration.

In choosing between the so-called technical and the popular significations of the word, the court referred to a helpful rule of construction from Sutherland, *Statutory Construction*, § 255, quoting thus in pertinent part:

Mr. Donald E. Martin
Page Three
November 17, 1976

"Words in common use, and also having a technical sense, will, in acts intended for general operation and not dealing specially with the subject to which such words in their technical sense apply, be understood primarily in their popular sense, unless they are defined in the act or a contrary intention is otherwise manifest. Such words, however, will be understood in a technical sense when the act treats of the subject in relation to which such words are technically employed. Thus, they are deemed technically used in legislation relating to courts and legal process. . . . But by the cardinal rule that the intention of the law-makers is the essence of the law, when a technical word is obviously intended to have a broader than its strict technical sense, it will receive that interpretation. . . .'"
62 Kan. at 818-819.

The court applied this guidance thus:

"It is evident, therefore, that the word 'purchasing,' in the title to the act in question, was not used in its technical legal sense, because such title is not inclusive of or cognate with the technical subject of titles to real estate by purchase, but is inclusive of and cognate with the general subject of acquisition of title to real estate for water-works purposes." 62 Kan. at 819.

Nothing in the industrial revenue bond enactment even remotely suggests that the word "purchase," as used either in its title, in the declaration of legislative purpose, in the grant of substantive bond authority, or elsewhere in the text, is used in its refined legal and technical sense. In every instance in which it appears, the context relates to the general purposes of the act and the general powers granted thereunder, without the slightest implication that the term is used in its technical sense relating to the conveyance of real property.

In *City of Enterprise, supra*, the court ascribed the popular and nontechnical meaning to the word "purchase" as it appeared in the title of the bill there in question, notwithstanding one section of the bill dealt expressly with eminent domain, stating thus:

Mr. Donald E. Martin
Page Four
November 17, 1976

"It must be borne in mind that section 12 of the statute under consideration attempts to exert the sovereign power of dispossessing the citizen of his property. All the authorities hold that such statutes are to be strictly construed. No effect by implication or intendment other than that which is reasonable and necessary is allowed to them. For like reasons the same must be said of the titles to such enactments. Nothing should be regarded as comprehended within their titles except that which can with reasonably clear distinctness of view be seen. We are therefore constrained to hold that the title to the act in question does not embrace the subject of condemnation of property for waterworks purposes." 62 Kan. at 820.

There is even less reason here to give the term its legal and technical meaning, where there is nothing in the text of the act, unlike the act in question in *Enterprise*, to suggest that the legislature intended expressly or by any reasonable implication to grant the power of eminent domain property as an additional tool to implement the purposes of the act.

In addition, General Ferguson cited what is now K.S.A. 12-1748, a part of the industrial revenue bond enactment, which recites thus:

"The enumeration of any object, purpose, power, manner, method or thing in this act shall not be deemed to exclude like or similar objects, purposes, powers, manners, methods or things."

General Ferguson did not indicate, however, the bearing of this provision upon his conclusion. In *City of Enterprise, supra*, the court made clear that statutes exercising and granting the sovereign power of dispossessing citizens of their property are to be strictly construed. Certainly, this rule alone forbids any inference from the very broad and general language of K.S.A. 12-1748 that the power of eminent domain is granted by that act to cities as a means of acquiring sites for industrial projects financed with the proceeds of bonds issued thereunder. By the same strict construction rule, there is no basis, in my view, for inferring

Mr. Donald E. Martin
Page Five
November 17, 1976

that condemnation is a mode of acquisition of real property "like or similar to" acquisition by voluntary act or agreement, and that therefore, condemnation is permitted to cities under the act by virtue of such an inference drawn solely on the slender basis of this general provision.

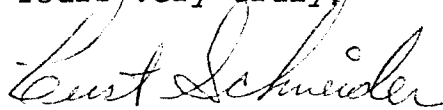
In addition, in *State ex rel. Ferguson*, 188 Kan. 612, 364 P.2d 71 (1961), the court upheld the industrial revenue bond act against a variety of arguments, one of which is pertinent here. It was objected that the act violates the due process provisions of the Kansas and United States Constitutions by "taking property without due process of law." The court dismissed the argument:

"It is conceded that under the act there is no 'taking of property' in the ordinary sense of the word, such as by eminent domain" 188 Kan. at 621.

The argument that eminent domain powers are granted by the act rests entirely upon a construction of the term "purchase," to include the acquisition of property in its technical and legal sense, *i.e.*, by any lawful act of the party. The rules of construction followed in *City of Enterprise*, applied here, do not support the attribution of a technical legal meaning to the term which is used in its apparent general and popular sense in an act dealing generally in a descriptive fashion with the purposes and powers granted to cities in the issuance of industrial revenue bonds. By other rules which were followed in the same case, the power of eminent domain is not lightly inferred, but must be articulated in any statutory grant by clear and unmistakable language. There is no such language in the industrial revenue bond act, and the very general rule of construction provided by K.S.A. 12-1748 is no substitute for a clearly defined grant of the power of eminent domain.

Accordingly, I can but conclude that the Kansas industrial revenue bond act, K.S.A. 12-1740 *et seq.*, does not in and of itself authorize cities which issue bonds thereunder to exercise the power of eminent domain to acquire sites for facilities which are construed with the proceeds of such bonds. In addition, I note, as you point out, that in an opinion dated June 3, 1969, by Attorney General Kent Frizzell concluded that a city has no right under any other provision to condemn private property for industrial sites.

Yours very truly,


CURT T. SCHNEIDER
Attorney General

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