STATE OF KANSAS

# Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

*Curt T. Schneider*
*Attorney General*

January 12, 1977

ATTORNEY GENERAL OPINION NO. 77- 17

Mr. Dale L. Pohl
City Attorney
417 North Main
Eureka, Kansas 67045

Re: Cities--Eminent Domain--Airports

Synopsis: The City of Eureka did not acquire fee simple absolute title to property acquired by eminent domain proceedings in 1958 for a municipal airport which would enable the city to convey fee simple absolute title to portions thereof to purchasers for industrial sites.

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Dear Mr. Pohl:

You inquire concerning the status of title to certain property which the City of Eureka acquired by eminent domain and upon an order of the Greenwood County District Court entered November 4, 1958, which property was located outside the city, for the purpose of establishing a municipal airport. Since entry of the order, the city has been in sole and exclusive use and possession of all of the property condemned, although all of the property has not been used directly as a runway or for the location of related buildings. A large portion of the runway has, in fact, been leased annually for hay purposes, the city receiving the landlord's share. In addition, several years ago, the city leased a portion of the property to the Eureka Gun Club for the operation of a skeet shoot.

The city now has plans underway to develop an industrial park on the airport grounds, and has requested Farmers Home Administration funds for that purpose. As a part of the application, it is necessary to certify that the city is the sole and exclusive owner of the property.

Particularly in view of *Isley v. Bogart*, 338 F.2d 33 (10th Cir. 1964), you inquire whether the city is indeed the owner of the property holding fee absolute title, and thus able to convey tracts of the property for industrial sites.

In *Isley, supra*, plaintiff claimed dominion over property which had been condemned by the City of Wichita in 1929, and used as a public produce market. In 1960, the city repealed the ordinance providing for operation of the property as a public market, and leased a portion of the property to a public utility. Plaintiffs claimed that after the condemnation, they held fee title absolute to the property, but that it was subjected to a burden of servitude in favor of the city, and that when use of the property for the purpose for which it was condemned was abandoned, full and complete dominion and control over the property was again vested in the owners. The court agreed:

> "We see no escape from the conclusion that the disputed property was acquired for use as a 'market place.' By the condemnation Wichita acquired only an easement sufficient for the public use intended and not a fee title. The Kansas rule is that 'when the purposes which authorized the condemnation [have] been terminated the burden of servitude is lifted from the land and the owner of the basic fee returns to full dominion.'" 338 F.2d at 34.

For the "Kansas rule" quoted above, the court cited *Federal Farm Mortgage Corp. v. Smith*, 149 Kan. 789, 89 P.2d 838 (1939). The court also cited *Sutton v. Frazier*, 183 Kan. 33, 325 P.2d 338 (1958). In the latter case, the court recited the general rule thus:

> "The general rule is that eminent domain statutes will be construed to authorize only the taking of an easement on or title to land sufficient for the public use intended rather than a fee title, unless the statute clearly so provides, either expressly or by necessary implication. And the legislature has full power to determine the nature of the title to be acquired by the condemner . . . ." 183 Kan. at 41.

In that case, the court held that the condemner, an improvement district, did not obtain title to underlying minerals. In *Federal Farm Mortgage Corp. v. Smith, supra*, the court likewise held that the condemner, a railway, acquired only an easement, and not fee title absolute, to property acquired by eminent domain for right of way.

Neither of these cases, however, involved title acquired by a city in eminent domain proceedings under K.S.A. 26-201 *et seq.* *Skelly Oil Co. v. Kelly*, 134 Kan. 176, 5 P.2d 823 (1931), was such a case, however, and it is summarized in *Sutton* as follows:

> "In Skelly . . . , the City of Atchison condemned land for a park by virtue of regular condemnation proceedings under Article 2, Chapter 26, Revised Statutes of 1923 (now G.S. 1949, 26-201 to 26-210). The city took possession, but did not use the land for a park, and afterwards sold the land for a sum greatly in excess of the award given the previous landowner to a purchaser who erected a filling station. In a quit title action by the purchaser against the former owner it was held that the city had fee simple title. There the condemnation proceedings were conducted under the special statutes applicable to cities where the provisions empowered the city to condemn and likewise provided a special procedure. The pertinent portion of R. S. 1923, 26-204, specifically provided: '. . . The title to lands condemned by any city for parks, parkways, or boulevards shall vest in such city upon the publication of the resolution of the governing body condemning the same. . .' Under the circumstances, the legislature having deemed it important to insert a special provision as related, the court there construed the word 'title' to indicate ". . . ownership, and unquestionably the usual and ordinary signification of the word when used above in the sense of ownership is ownership in fee.' (p. 179) The vesting of title under the statute was unqualified." 183 Kan. at 42.

*Skelly Oil* was decided in 1931, and was governed by R.S. 1923 26-201 *et seq.*, including the especial language in 26-204 quoted above, providing expressly for the vesting of title in the city for lands acquired for parks, parkways and boulevards. The land involved in that case being property acquired for park purposes, the court concluded, accordingly, that the city did not have merely an easement, but acquired fee title absolute.

The property in question here was condemned in 1958. Three years later, the legislature amended G.S. 1949 26-204 in pertinent part thus:

> "The fee simple title to lands condemned by any city for parks, parkways located within a park, *airports* or municipal buildings shall vest in such city at the time herein provided." [Emphasis supplied.] Ch. 209, L. 1961.

However, the interest acquired by the city in 1958 must be governed by the law in force at that time, G.S. 1949 26-204, which remained unchanged since 1923, and thus provided expressly for the vesting of title in cities only in lands acquired for parks, parkways and boulevards. In all lands acquired by eminent domain under that act for any other purposes, presumptively, the city did not acquire title, for even under *Skelly Oil*, the express vesting of title mandated by statute applied only to lands acquired for parks, parkways and boulevards. Thus, in lands acquired by eminent domain under G.S. 1949 26-201 *et seq.* for airport purposes, the fee absolute title remained in the condemnee, and the city acquired only that interest permitted under the general rule, *i.e.*, an "easement on or title to land sufficient for the public use intended," rather than a fee title absolute.

I note that the petition and order in the 1958 condemnation action refers to a fee title interest in certain described land, and a "clear zone easement" in other described tracts. However, as the court observed in *Isley, supra*, "The city may not extend its statutory powers by general language in ordinances or in pleadings in condemnation actions." 338 F.2d at 34.

Thus, I must conclude that in 1958, the city did not acquire fee simple absolute interest in the property in question, but acquired only a burden of servitude for the purpose for which the property was intended acquired. Thus, the city does not in my judgment

hold fee simple absolute title to all the property which would permit it to convey fee simple absolute title to persons acquiring portions thereof for industrial sites.

Yours very truly,

Curt Schneider

CURT T. SCHNEIDER
Attorney General

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