



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

May 25, 1977

ATTORNEY GENERAL OPINION NO. 77-170

Mr. Ivan D. Krug
Rush County Attorney
711 Main Street
LaCrosse, Kansas 67548

Re: Airports--Eminent Domain--Authority

Synopsis: K.S.A. 3-123 authorizes a city and county which jointly undertake the establishment of an airport under K.S.A. 3-119a et seq. to condemn property for the use of such jointly operated airport. K.S.A. 3-711 authorizes such city and county to condemn any use of land which constitutes an "airport hazard," as defined by K.S.A. 3-701(2) to the operation of such jointly operated airport.

* * *

Dear Mr. Krug:

You inquire whether K.S.A. 3-123 and -711 authorize the City of LaCrosse and Rush County to condemn property for airport purposes. K.S.A. 1976 Supp. 3-234 states thus:

"Municipalities operating airports jointly [pursuant to K.S.A. 3-119a et seq.] are hereby granted the same rights, privileges and immunities, and are charged with the same obligations, responsibilities and duties toward such airports located outside of the municipal limits of any municipality as now exist for any property now located within the limits of any municipality, including the right of eminent domain." [Emphasis supplied.]

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K.S.A. 3-120, a part of the 1941 act of which K.S.A. 3-123 is a part, commences thus:

"Whenever in the opinion of the governing bodies of two or more municipalities, the public safety, service and welfare can be advanced thereby, such governing bodies may own and hold, as tenants in common, and may acquire by gift, lease, purchase, or otherwise lands for use as airports or flying fields as herein provided, and may enter into contracts or agreements with each other, duly authorized by such governing bodies for their joint operation and development"

K.S.A. 3-120, thus, authorizes the city to acquire property for airport purposes by "gift, lease, purchase and otherwise" The right of eminent domain is not enumerated in this section as a permissible mode of acquiring property for the establishment of a jointly operated airport. It is, however, expressly enumerated in K.S.A. 3-123 as a power which may be exercised by municipalities "operating airports jointly" if that power may be exercised by any municipality respecting property located within the limits of the municipality. Under K.S.A. 26-201, a city has the right of eminent domain for "the use of the city for any purpose whatsoever." The establishment of a municipal airport is assuredly a public purpose, and thus a purpose for which a city may exercise the power of eminent domain. Because it is a power which a city could exercise for the establishment of an airport within the municipal territories, it is by reference in this section granted to both cities and counties, defined as "municipalities" in K.S.A. 3-119a, operating airports jointly under K.S.A. 3-119a et seq., respecting such jointly operated airport.

A somewhat technical ambiguity might be noted here. K.S.A. 3-123 states that "[m]unicipalities operating airports jointly" are granted the power of eminent domain "toward such airports" to the same extent that any municipality has that power respecting "any property now located within the limits of any municipality" It may be argued that to exercise that power, the municipalities must first in fact be "operating" an airport jointly; i.e., that municipalities have no power of eminent domain in the

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establishment of a jointly operated airport, but once it is operational and operating, and only then, do they have such power. The phrase "operating airports . . . jointly" also appears in the opening language of K.S.A. 3-121, which provides that the "governing bodies so operating airports . . . jointly may pay the expenses of purchasing or acquiring such airports" from the general fund or from the proceeds of bonds. The statute obviously does not contemplate that actual operation is a condition precedent to the exercise of the authority to use funds in the manner authorized, and in my judgment, actual operation is likewise not a condition precedent to the exercise of eminent domain powers under K.S.A. 1976 Supp. 3-123. Both sections were originally enacted in the same act, and the language in these two provisions should be construed together. K.S.A. 1976 Supp. 3-123 expressly grants the power of eminent domain to municipalities undertaking to operate jointly an airport under this act, and in my judgment, both Rush County, Kansas, and the City of LaCrosse, Kansas, have the joint authority of eminent domain respecting property to be used for the operation of such an airport.

You inquire also whether K.S.A. 3-711 authorizes the condemnation of property for airport purposes. That section is part of a 1947 enactment, K.S.A. 3-701 et seq., authorizing the adoption of airport zoning regulations to prevent the creation of establishment of "airport hazards," as defined by K.S.A. 3-701(2). K.S.A. 3-711 states thus:

"In any case in which: (1) It is desired to remove, lower, or otherwise terminate a nonconforming structure or use; or
(2) the approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations under this act; or
(3) it appears advisable that the necessary approach protection be provided by acquisition of property rights rather than by airport zoning regulations, the political subdivision or subdivisions owning, controlling or operating the airport may acquire, by purchase, grant, or condemnation in the manner provided by the law under which political subdivisions are authorized to acquire real property for public purposes, such air right, navigation, easement, or other estate or interest in the property or nonconforming structure or use in question as may be necessary to effectuate the purposes of this act."

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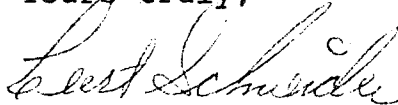
The purposes of the act are set out in K.S.A. 3-702, which commences thus:

"It is hereby found that an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity"

An "airport hazard" includes any "use of land which obstructs the airspace required for the flight of aircraft in landing or taking-off at any airport or is otherwise hazardous to such landing or taking-off of aircraft." The use of the former private airport which constitutes an "airport hazard" for operation of the new city-county airport is an interest which in my judgment is subject to condemnation by the city and county which jointly operate the airport to which the hazard applies.

If further questions remain in this matter, please feel free to contact us.

Yours truly,



CURT T. SCHNEIDER
Attorney General

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