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ATTORNEY GENERAL OPINION NO. 81- 240

Mr. Darold Bolton
Marshall County Attorney
Marshall County Courthouse
P. O. Box 306
Marysville, Kansas 66508

Re: Drainage and Levees -- Watershed Districts -- General Powers; Sale of Land Acquired Through Power of Eminent Domain

Synopsis: A watershed district may, pursuant to the authority given it by K.S.A. 1980 Supp. 24-1209, Eighth, use eminent domain power to acquire land and interests in land for district purposes, including fee simple title. Upon a subsequent determination by the district that such acquisitions are no longer required for district purposes, they may be sold in the same manner as any other property owned by the district. Cited herein: K.S.A. 21-3110, 24-1202, K.S.A. 1980 Supp. 24-1209, K.S.A. 44-1015, 56-302, 77-201, 79-102, 79-3101.

* * *

Dear Mr. Bolton:

Together with David H. Anderson, the attorney for the Upper Black Vermillion Watershed District, you have requested our opinion on whether certain property acquired by the watershed district through its power of eminent domain may now be sold, and if so, what procedure should be followed to effect such a sale.

As we understand them, the facts surrounding this request are as follows. Approximately four years ago, the watershed district condemned a tract of land for the purpose of constructing a floodwater retarding structure that would provide for both temporary and permanent water storage. After several

discussions between the watershed district, the landowners and their respective attorneys, it was determined that, rather than follow an irregular boundary along the pond's edge based upon elevation above mean sea level, the condemned tract was to be "squared up" and given straight boundary lines. This decision resulted in approximately ten additional acres of pasture land being taken in the upper reaches of the dam structure. It now appears that while a portion of this land is covered by floodwater after heavy rain, it is still useful as pasture, as the water drains down in a relatively short period of time.

Since this land is only flooded on occasion and then only for a short period, the district wishes to know whether it may sell the property to an adjoining landowner who has offered to purchase it, or to anyone else who might be interested in purchasing the property. However, it should be noted that while the district wishes to sell the property, any purchaser of the land would be limited to uses consistent with the district's use of the adjoining property, i.e., there would continue to be occasional flooding of the 10 acres. The proposed sale raises questions as to the nature of the interest the district received in the condemnation proceeding and whether it may now freely alienate such interest.

K.S.A. 1980 Supp. 24-1209, Eighth, gives watershed districts the power to "acquire land and interests in land by . . . eminent domain." (Emphasis added.) To give meaning to both the terms "land" and "interests in land" requires a construction which gives the former term a meaning which includes something more than the latter. Some guidance is initially provided by K.S.A. 24-1202(c), which defines "land" as "[r]eal property as that term is defined by the laws of the State of Kansas, and shall include any road, highway, bridge, street or other right-of-way. . . ."

Looking in turn at the general statute which defines real property, K.S.A. 77-201, Eighth, we find:

> "The word 'land,' and the phrases 'real estate' and 'real property,' includes lands, tenements and hereditaments, and all rights thereto and interest therein equitable as well as legal."

Therefore, it is clear that K.S.A. 77-201, Eighth, defines the word land as anything from a fee simple absolute on down to the smallest interest, whether legal or equitable.

Other definitions of real property are also found throughout the Kansas statutes. For example, the statutes dealing with

taxation define real property on two different occasions in its broadest sense. K.S.A. 79-102 states:

> "The terms 'real property,' 'real estate', and 'land' when used in this act, except as otherwise specifically provided, shall include not only the land itself, but all buildings, fixtures, improvements, mines, minerals, quarries, mineral springs and wells, rights and privileges pertaining thereto."

K.S.A. 79-3101 states:

> "The words 'real property' and 'real estate' as used in this act . . . shall include all property a conveyance or mortgage of which is entitled to record as real property or interest therein under the laws of this state."

Other statutes which also give a broad definition to the term "real property" and therefore, by reference, "land" are K.S.A. 21-3110(20), 44-1015 and 56-302.

It would therefore appear that as the term "real property" is defined by the laws of the State of Kansas to include all interests in land, the term "land" as used in K.S.A. 1980 Supp. 24-1209, Eighth, may refer to the acquisition of a fee simple absolute as well as any other possible interest in land. Furthermore, the legislature has the ability to give districts this power, for as was stated in Sutton v. Fraizer, 183 Kan. 33, 41 (1958):

> "[T]he legislature has full power to determine the nature of the title to be acquired by the condemner, since the constitution of this state places no limitation or restriction on the nature of the title to lands which may be acquired by the process of eminent domain." State, ex rel., v. State Highway Comm., 163 Kan. 187 (1947).

It is therefore clear that the legislature has the power to give the watershed district the power to acquire title to land in fee simple absolute and, in fact, did so in K.S.A. 24-1209, Eighth. However, it is now necessary to look to the particular eminent domain proceeding itself in order to determine what interest was actually acquired by the Watershed District.

In its petition filed in the eminent domain proceeding, the district stated (at paragraph 3):

> "[T]hat on the twelfth day of December, 1977, the Board of Directors of the Upper Black Vermillion Watershed, Joint District No. 37, of Marshall, Nemaha, and Pottawatomie Counties, Kansas, in its regular monthly meeting, found and determined it necessary to acquire fee title to the following described tract of land . . . and found it necessary to acquire an easement upon the following described tracts . . . ." (Emphasis added.)

The notice of eminent domain proceedings which was published stated that the district had filed a petition for eminent domain proceedings in the District Court of Marshall County, Kansas,

> "for the purpose of taking fee title to a private tract of land for public use in connection with the construction and maintenance of a combination grade stabilization and flood retarding structure on the following realty . . . and for the purpose of taking an easement to private tracts of land for public use in connection with the construction and maintenance of a combination grade stabilization and flood retarding structure on the following described realty . . . ."

The notice further stated that a hearing was to be held on the 26th day of April, 1978 at 1:15 p.m. in the District Court of Marshall County, Kansas. It would appear settled that at all times pertinent thereto the district was requesting the condemnation of a fee title in certain property, including the property now in question, and that notice to the property owners was given.

It should also be noted that the district court raised no objection to the watershed district's acquisition of fee title in certain tracts through the power of eminent domain. The court's order of April 26, 1978 found that the district had the power of eminent domain, that the taking of the tracts as described was necessary to carry out the district's lawful corporate purposes, and that three disinterested appraisers should be appointed to view and appraise the tracts taken and to determine the damages to the interested parties resulting from the taking. The court further found that the district had the power to acquire land and interests in land by eminent domain pursuant to K.S.A. 24-1209, and that in order to complete the general plan of said watershed and complete the works contemplated, it was necessary that fee title and easements upon private property be taken for public benefit. In particular, the court found that:

> "[T]o carry out the purposes for which said Watershed District was organized that it is necessary for said Watershed to acquire fee title to a tract of land to construct and maintain a combination grade stabilization and flood retarding structure upon all of that tract described as follows . . . [and] [t]he Court further finds that to carry out the purposes of said Watershed District it is necessary for said District to acquire an easement to contruct and maintain said flood water retarding structure upon tracts described as follows . . . ."

It is also important to note that in their report, the appraisers based their appraisal of the value of the damages upon a taking of fee title in the tract of land in question. Thus, the amount of damages awarded to the owners was based upon a taking of a fee title to their land. Furthermore, the report of the appraisers is to be given great weight in determining the nature of the interest which was taken. As the Kansas Supreme Court stated in Sutton v. Fraizer, supra at 45:

> "The report of the appraisers must show what is taken, and what the landowners part with. Nothing is taken by implication or intendment. The Landowners may rely implicitly on the report filed. This report becomes the evidence and the only evidence of the commissioners' doings. (Mercantile Co. v. O.H.&G. Rld. Co., 56 Kan. 174, 42 Pac. 712; State v. Arnell, 8 Kan. 288; and C.K.&W. Rld. Co. v. Grovies, 41 Kan. 685, 21 Pac. 779.)" (Emphasis added.)

The next issue which presents itself is the effect of the district's determination that it no longer requires a fee title to all of the property condemned. It would appear from an examination of case law that such a determination does not affect the validity of the original condemnation nor change the nature of the interest the district received therein. It is clearly within the condemning authority's exercise of its discretion to determine what amount of land is reasonably necessary for the purposes designated in the statute, including future needs. State, ex rel., v. State Highway Commission, 163 Kan. 187 (1947). It is also well established that bad faith in the exercise of corporate power by the condemning authority will not be inferred, but must be made to appear by appropriate statement of facts. Skelly Oil Company v. Kelly, 134 Kan. 176 (1931). Thus, in the absence of a showing of bad faith on the part of a condemning

authority the fact of non-use or abandonment of use for the purpose condemned will not affect the validity of the original condemnation proceeding or the interest therein acquired. However, the fact of non-use or abandonment or change in use of the property so condemned could cause a reversion of the property to the original land owner or his successor if the court were to find that the condemning authority received a fee simple determinable as opposed to a fee simple absolute.

The question whether the district may have only received a fee simple determinable arises for two reasons. First, eminent domain statutes are to be construed narrowly in accordance with the general rule 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 fee title, unless the statute clearly so provides, either expressly or by necessary implication." Sutton v. Fraizer, 183 Kan. 33, 41 (1958).

Secondly, there is authority in State Highway Commission v. Puskarich, 148 Kan. 388 (1938), that land required in condemnation proceedings only passes title to a fee simple determinable. There the Kansas Supreme Court, in discussing the interest obtained by the State Highway Commission in a condemnation action, stated:

> "Where a right-of-way is acquired by condemnation or by a conveyance, the title acquired is not a fee simple absolute, but a fee simple determinable, and limited by the use for which the land is acquired." 148 Kan. at 392.

Therefore, it could be possible to find that the district only acquired title in fee simple determinable in the land in question. However, from a close examination of the present situation and the previously cited authority, it is our opinion that the district has acquired title in fee simple absolute to the land in question.

First of all, it must be noted that the general rule set forth in Sutton and cited above is qualified by the last phrase, "unless the statute clearly so provides, either expressly or by necessary implication." Sutton v. Fraizer, supra at 41. Therefore, where, as here, the statute expressly or impliedly gives the condemning authority the power to obtain property in fee simple absolute, the general rule of allowing only a narrow taking is not applicable.

Furthermore, the rule set forth in State Highway Commission v. Puskarich, supra, is also not specifically applicable here, insofar as the rule set forth therein dealt with the condemnation of a right-of-way as opposed to to fee ownership. In arriving at that rule the Court in Puskarich cited and relied upon the case of Abercrombie v. Simmons, 71 Kan. 538 (1905), which was a case dealing with a railroad company's right-of-way across land and the effect on this interest upon abandonment by the railroad company. Additionally, other cases which have found that the condemning authority has taken less than a fee, even though the language of the taking would on its face appear sufficient to do so, have also been right-of-way cases, primarily involving railroads.

Also, by applying standard principles of real property law, it would appear that the district did acquire a title in fee simple absolute to the land in question as opposed to a fee simple determinable. As stated in the Restatement of Property, Section 44 (1936):

> "When a limitation merely states the purpose for which the land is conveyed, such limitation usually does not indicate an intent to create an estate in fee simple which is to expire automatically upon the cessation of use for the purpose named."

Therefore, absent words expressing an intent upon the landowners to have the land automatically revert to them upon a change in use or abandonment, the title will not revert, and is to be considered a fee simple absolute. Furthermore, as noted above, the district will not be changing the use of the property, but will only be selling an interest which is consistent with continued use of the property in a manner consistent with the district's purpose.

As the final portion of your request, you inquire concerning whether specific procedures exist for the sale of the property in question. An examination of the statutes concerning watershed districts indicates that no restrictions exist on the manner in which such sales are to be conducted, although general requirements concerning any sale of municipally-owned property should be observed, i.e., it must be an arms-length transation and be made in a reasonable manner.

In conclusion, a watershed district may, pursuant to the authority given it by K.S.A. 1980 Supp. 24-1209, Eighth, use eminent domain power to acquire land and interests in land for district purposes, including fee simple title. Upon a subsequent determination by the district that such acquisitions are no longer required for district purposes, they

may be sold in the same manner as any other property owned by the district.

Very truly yours,

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