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ATTORNEY GENERAL OPINION NO. 82-50

The Honorable LeRoy F. Fry
Kansas State Representative
State Capitol, Room 272-W
Topeka, Kansas

Re: Public Health--Solid and Hazardous Waste--
Condemnation of Property For Storing Radioactive
Waste

Synopsis: The provisions of K.S.A. 1981 Supp. 65-3449(b) cannot be construed as an implied delegation of the power of eminent domain to any state board or agency.

If the Kansas Legislature were to enact legislation authorizing condemnation proceedings to acquire real property for use as a radioactive waste storage facility, and declaring condemnation of property for such use to be a "public use," the condemnation of property under such an enactment would probably be upheld by the courts of this state. However, any specific "taking" of property, thereunder, would be open to judicial review for the purpose of considering public use, fraud, bad faith, or abuse of discretion. Cited herein: K.S.A. 1981 Supp. 65-3445 and 65-3449.

* * *

Dear Representative Fry:

You request our opinion as to whether the state of Kansas has the authority, under the general power of eminent domain, to

take property for use as a high-level or low-level radioactive waste storage facility. Although our research has failed to reveal any Kansas case, or cases from other jurisdictions, where this specific question has been addressed, we will respond to your inquiry by providing a general review of the law of eminent domain.

In Weast v. Budd, 186 Kan. 249 (1960), the Kansas Supreme Court defined the power of eminent domain as follows:

> "[E]minent domain is the right to take private property for public use without the owner's consent upon payment of just compensation. The right is an inherent power of the sovereignty and comes into being with the establishment of government and continues as long as the government endures, but its exercise may be limited by the constitution. Except as so limited, it may be exercised for any public purpose designated by the legislature and in the manner it prescribes." (Citations omitted.) 186 Kan. at 252.

In Soden v. State Highway Commission, 192 Kan. 241 (1963), the Court enunciated the following principles regarding the exercise of the power of eminent domain:

> "It rests with the legislature to determine the power of eminent domain, when the power may be exercised and the character, method and extent of such exercise. The power of eminent domain can only be exercised by virtue of a legislative enactment. However, once the legislature has delegated to a public authority the power to determine the necessity of exercising the power, the decision of the grantee as to the necessity can only be reviewed by the courts for the purpose of considering public use, fraud, bad faith, or abuse of discretion. A court cannot sit in judgment on the motives actuating a public authority in pursuing a course authorized by the legislature." [Citations omitted.] (Emphasis added.) 192 Kan. at 244.

As is apparent from the underscored portion of the above quotation, one of the questions which would arise if the Kansas Legislature were to authorize the condemnation of property for use as a

high-level or low-level radioactive waste facility is whether such a condemnation would be for a "public use." In this regard, the Kansas Supreme Court has stated that, although such a question is a "judicial question for the determination of the court . . . , a legislative declaration with respect to that question is entitled to a prima facie acceptance of its correctness." State, ex rel., v. City of Topeka, 176 Kan. 240 (1954), Syllabus No. 6. Therefore, if the Kansas Legislature declared that the condemnation of property for use as a radioactive waste facility would be for a public use, such a declaration would be entitled to a "prima facie acceptance of its correctness."

Also in regard to the public use requirement, it should be noted the state of Oregon has authorized its "Environmental Quality Commission" to institute condemnation proceedings to acquire real property for the disposal of hazardous wastes (see Oregon Rev. Stat. §459.595), and that the state of Maryland has authorized its "Department of Health and Mental Hygiene" to condemn any land or facility used for disposal of hazardous substances, provided the condemnation "is necessary to provide for proper perpetual care and monitoring of the facility" [see Md. Natural Res. Code Ann. §8-1413.2(n) (Michie Supp. 1981)]. Our research has failed to reveal any reported case wherein a "taking" under either of these two statutes has been challenged on the basis of the public use requirement.

"Public land siting" of hazardous waste sites, and the exercise of the power of eminent domain in acquiring sites, was discussed in a recent law review article.[1] Although the author's position represents only one person's opinion, which may or may not be supported by other authorities, the following excerpt from the article is relevant to the question which has been posed:

> "Closely related to state identification of hazardous waste sites is the idea of siting on state-owned land. Public land siting can also entail state operation of the facility, operation by a private licensee, or the availability of both options. Eminent domain has also been recommended for the quick and assured capture of sites for private facilities and is usually presupposed an integral part of the public land siting option. The justifications

[1] Wolfe, Public Opposition to Hazardous Waste Sites: The Self-Defeating Approach to National Hazardous Waste Control Under Subtitle C of The Resource Conservation and Recovery Act of 1976, 8 Boston College Environmental Affairs Law Review 463 (1980).

for public siting seem to be that it allows the prompt acquisition and development of sites when needed, provides a stronger state role in site care during and after operations, and, through the intermediary of state government, moves citizens closer to decisions about the proper management of hazardous waste sites.

"The rationales for public siting dissolve when public siting is scrutinized either as it has actually been practiced or alongside other regulatory measures which attain the same ends. The ultimate in public land siting is the government owned and operated waste facility, yet this facility is just as prone to hazardous waste pollution catastrophe as any private facility sited on private or public land. A case in point is the hazardous waste disaster at the federally owned Rocky Mountain Arsenal near Denver. Discharges of industrial and military wastes at the arsenal have contaminated thirty square miles of underground water and EPA believes that merely to study the problem could cost up to $78 million; the actual clean-up costs would be several times larger. From the perspective of Subtitle C control, public land siting provides neither greater nor lesser citizen power in the management of hazardous waste sites than does private land siting. No distinction between hazardous wastes facilities on public land and those on private land is made by Subtitle C or its draft regulations either in the type of control or in the extent of public involvement in the regulation of the facilities. The only advantage possibly gained by public siting or eminent domain for hazardous waste facilities is a greater ease in securing sites. Public ownership of hazardous waste sites, in itself, gives no assurance of greater security against harm nor of diminished public opposition.

"EPA has not adopted a formal policy supporting or promoting the use of public land (federal, state or local) for the siting of hazardous waste facilities in any manner. Conspicuous in its absence is any provision in Subtitle C which even faintly refers to state or federal ownership of hazardous waste sites or facilities. The Subtitle C which Congress fashioned is firmly

> anchored to the long-held assumption that the private sector is competent to manage waste sites and the proper role of government is as a regulator not an owner or operator of waste sites. Whether private waste facility operators are in fact competent is another matter, but there is no reason to believe state government can do a better job of running hazardous waste sites." (Emphasis added.) [Footnotes omitted.]

Although there appears to be some doubt as to the wisdom of public siting of hazardous waste facilities, such questions must be resolved by the legislature, not the courts. As we previously noted above, our research has failed to reveal any Kansas case, or cases from other jurisdictions, which have considered whether the taking of property for a hazardous waste disposal site is for a "public purpose." Additionally, the Kansas Supreme Court has stated that "it has been impossible for courts to define comprehensively the concept of a public use and to formulate a universal test, due, no doubt, to the diversity of local conditions and circumstances in an inevitably changing world." Ottawa Hunting Ass'n v. State, 178 Kan. 460, 464 (1955). Although the question has apparently not been addressed in any reported case, it is our opinion that if the Kansas Legislature were to enact legislation authorizing condemnation proceedings to acquire real property for use as a radioactive waste storage facility, and declaring condemnation of property for such use to be a "public use," the condemnation of property under such an enactment would probably be upheld by the courts of this state. Of course, any specific "taking" of property, thereunder, would be open to judicial review for the purpose of considering public use, fraud, bad faith, or abuse of discretion. See Soden v. State Highway Commission, supra.

Finally, it should be recognized that there is no statutory enactment which, at the present time, authorizes condemnation of real property for use in storing radioactive wastes. Although state law (K.S.A. 1981 Supp. 65-3449 and 65-3445) requires that the state of Kansas acquire the physical site of any commercial radioactive waste disposal or storage facility, or that such lands be owned by the federal government, such a requirement is not a delegation of the power of eminent domain to the Hazardous Waste Facility Board or the Kansas Department of Health and Environment. The power of eminent domain is not lightly inferred, but must be articulated in any statutory grant by clear and unmistakable language. See Kansas Attorney General Opinion No. 76-348 (copy enclosed) and authorities cited therein. In our judgment, the

provisions of K.S.A. 1981 Supp. 65-3449(b) cannot be construed as an implied delegation of the power of eminent domain to any state board or agency.

Very truly yours,

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RTS:BJS:TRH:jm